regulation which only indirectly required that information eventually be made available to an agency was within the scope of the PRA and subject to OMB approval.

The Supreme Court has had the opportunity to address the PRA in Dole v. United Steelworkers of America, 494 U.S. 26, 110 S.Ct. 929 (1990). When the regulations for the PRA were first adopted in March, 1983, those rules required federal agencies to submit to OMB not only those "information collection requests" which were to be submitted directly to the agencies, but also those requests concerning the provision of information to parties other than the federal agencies. These latter types of "disclosure" regulations were at issue in Dole, and of course the Court held that OMB did not have authority over such disclosure rules. 21 But, in making this decision, the Court was required to define precisely what types of "information collection requests" were within the authority of OMB:

"The common-sense view of 'obtaining or soliciting facts by an agency' is that the phrase refers to an agency's efforts to gather facts for its own use and that Congress used the word 'solicit' in addition to the word 'obtain' in order to cover information requests that rely on the voluntary cooperation of information suppliers as well as rules which make compliance mandatory," 110 S.Ct., at 934.

"If 'reporting and recordkeeping requirement' is understood to be analogous to the examples surrounding it, the phrase would comprise only rules requiring information to be sent or made available to a federal agency....," Id., at 935.

"When OMB approves an information collection request, it issues a control number which is placed on all forms. If a request does not receive OMB approval, it is not issued a control number and the agency is prohibited from collecting the information... In addition, if the agency nevertheless promulgates the paperwork requirement, members of the public may ignore it without risk of penalty... However, this protection of the public is applicable only to information gathering rules," Id., at 937.

"[T]he public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information for an agency or provide information to an agency," Id., at 937.

The principle of law which manifests itself within these four cases may be succinctly stated. As the Supreme Court concluded in Dole, a regulation subject to the PRA is one which commands that information be provided directly to a federal agency. The decision in Action Alliance expands the definition of those regulations within the scope of the PRA to those which mandate availability of information to an agency. And both Smith and Hatch demonstrate the consequence of the failure of a regulation subject to the PRA to display a control number: no civil or criminal penalty for a violation of the regulation may be imposed.

There have been some decisions regarding the application of the PRA to

various tax forms and instruction booklets. For example, in United States v. Bentson, 947 F.2d 1353 (9th Cir. 1991), and United States v. Hicks, 947 F.2d 1356 (9th Cir. 1991), those defendants sought to apply the Dole-Smith-Hatch rule to the instruction booklet for tax form 1040. But here, the very same Circuit which created the Smith-Hatch rule rejected such challenges ("The PRA was not meant to provide criminals with an all-purpose escape hatch... If, in enacting the PRA, Congress had intended to repeal 26 U.S.C., §7203, it could have done so explicitly;" see Hicks, 947 F.2d, at 1359).

In United States v. Dawes, 951 F.2d 1189, 1192 (10th Cir. 1991), that court was confronted with the PRA issue being raised by these convicted tax crime defendants. Here, the Tenth Circuit declared that income tax regulations "simply assist taxpayers to complete tax forms" and "are subsidiary to and mere administrative appendages of the tax form. They function only to aid the taxpayer in providing the information required by the 1040 form." For this reason, the Dawes court concluded that tax regulations don't need OMB control numbers. See also United States v. Neff, 954 F.2d 698 (11th Cir. 1991). These cases dealing with federal income tax legislation, which is a far different legislative scheme than that involving FCC statutes and regulations, are readily distinguishable for this reason.

D. Compliance by the FCC with the PRA.

The FCC regulations which are relevant for this case are codified at 47 C.F.R., part 73. Pursuant to the PRA regulations, the FCC has adopted a tabular list of its collections of information which have been assigned OMB control numbers; see 47 C.F.R., §0.408. This list identifies all of the part 73 FCC regulations which have been assigned control numbers, and those regulations are 47 C.F.R., §§ 73.30, 73.37, 73.45, 73.51, 73.61, 73.68, 73.69, 73.99, 73.158, 73.661, 73.687, 73.932, 73.961, 73.1125, 73.1207, 73.1212, 73.1250, 73.1350, 73.1510, 73.1560, 73.1590, 73.1610, 73.1615, 73.1620, 73.1635, 73.1680, 73.1690, 73.1740, 73.1820, 73.1870, 73.1920, 73.1930, 73.1942, 73.1943, 73.2080, 73.3523, 73.3525B, 73.3526, 73.3527, 73.3538, 73.3544C, 73.3550, 73.3588, 73.3589, 73.3594, and 73.3613. Noticeably absent from this list are the assignments of OMB control numbers for the regulations at issue here, §§ 73.3511, 73.3512, 73.3513 and 73.3514. The FCC is acutely aware of the requirement for its regulations to have control numbers, because it admits as much at 47 C.F.R., §0.408:

"Notwithstanding any other provisions of law, no person shall be subject to any penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number."

Does the FCC understand precisely which of its regulations must be approved by OMB? An examination of certain regulations which do have these control numbers more than adequately demonstrates that it does. For example, §73.51 contains the following collection of information:

"(c) Applications for authority to operate with antenna input power which is less than nominal power and/or to employ a dissipative network in the antenna system shall be made on Form 302."

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Section 73.68 contains several collections of information:

"(b) A station having an antenna sampling system constructed according to the specifications given in paragraph (a) of this section, may obtain approval of that system by submitting an informal request to the FCC in Washington, DC."

"(d)(4) Request for modification of license shall be submitted to the FCC in Washington, DC, within 30 days of the date of sampling system modification or replacement. Such request shall specify the transmitter plate voltage and plate current, common point current, base currents and their ratios, antenna monitor phase and current indications, and all other data obtained pursuant to this paragraph."

Section 73.69 contains the following collection of information:

"(d)(5) An informal request for modification of license shall be submitted to the Commission in Washington, DC, within 30 days of the date of monitor replacement. Such request shall specify the make, type, and serial number of the replacement monitor, phase and sample current indications, and other data obtained pursuant to this paragraph (d) of this section."

In section 73.158, there are at least two collections of information, one of which provides:

"(b) When the descriptive routing to reach any of the monitoring points as shown on the station license is no longer correct due to road or building construction or other changes, the licensee must prepare and file with the FCC, in Washington, DC, a request for a corrected station license showing the new routing description."

Section 73.1510 entitled "Experimental authorizations," contains the following collection of information:

"(b) Experimental authorizations may be requested by filing an informal application with the FCC in Washington, DC, describing the nature and purpose of the experimentation to be conducted, the nature of the experimental signal to be transmitted, and the proposed schedule of hours and duration of the experimentation. Experimental authorizations shall be posted with the station license."

Section 73.1680 (relating to emergency antennas) requires the submission of certain information:

"(b) ... However, an informal request to continue operation with the emergency antenna must be made to the FCC in Washington, DC, within 24 hours after commencement of its use."

Section 73.1690 concerning modifications of transmission systems provides that, in order for modifications to be made, certain defined information must be provided:

"(b) The following changes may be made only upon specific

authority of the FCC. Applications requesting authorization must be filed on FCC Form 301 for commercial stations and on FCC Form 340 for noncommercial educational stations."

Section 73.3538, entitled "Application to make changes in an existing station," provides for information to be submitted regarding the making of changes at radio stations:

"Where prior authority from the FCC is required to make changes in an existing station the following procedures shall be used to request that authority:

"(a) An application for a construction permit using the forms specified in §73.3533 must be filed for authority to make the following changes:" . . . . . .

"(b) An informal application filed in accordance with §73.3511 is to be used to obtain authority to make the following changes in the station authorization:"

All of these regulations do have OMB control numbers assigned to them and the reason why is related to their obvious requirements that information and even forms be submitted to the FCC. It is also interesting to note that §73.3538(b) quoted above acknowledges that §73.3511 is a collection of information.

The regulations applicable here are no different from those quoted above. For example, §73-3512 requires information to be submitted to the FCC:

"All applications for authorizations required by §73-3511 shall be filed at the FCC in Washington, DC... The number of copies required for each application is set forth in the FCC Form which is to be used in filing such application."

Section §73-3514 provides:

"(a) Each application shall include all information called for by the particular form on which the application is required to be filed, unless the information called for is inapplicable, in which case this fact shall be indicated."

There can be no dispute that these extremely important regulations do in fact constitute collections of information under the PRA; but the problem arises from the fact that they lack assigned OMB control numbers. The law expressly allows members of the public to "regulate the regulators" and this is done by "ignoring with impunity" those collections of information which fail to display an OMB control number.

CONCLUSION

For the reason that the FCC has failed to obtain OMB approval for the collections of information codified at 47 C.F.R. , §73.3511, et seq., the public protection provisions of 44 U.S.C., §3512 operate here so as to foreclose any prosecution based upon 47 U.S.C. §§ 301, 308, or 501.

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END NOTES:

*1. S. Rep. No. 479, 77th Cong., 1st Sess., (1941). The Central Statistical Board later became a part of the Bureau of the Budget, whose name was eventually changed to the Office of Management and Budget ("OMB").

*2. P.L. 77-831, 56 Stat. 1078 (1942), codified at 44 U.S.C., § 3501, et seq. (1981).

*3. 44 U.S.C., § 3509 (1976).

*4. 44 U.S.C., §§ 3506, 3509(2) (1976).

*5. 44 U.S.C., § 510 (1976).

*6. Circular No. A-40, having application solely to federal agencies, was never published within the Federal Register. These regulations and subsequent amendments were effective until March 31, 1983, when regulations for the PRA were adopted.

*7. See P.L. 93-153, 87 Stat. 576, § 409 (1973).

*8. See P.L. 93-556, 88 Stat. 1789 (1974), codified at 44 U.S.C., § 3501 (1982).

*9. A Report of the Commission on Federal Paperwork, Final Summary Report (Oct. 3, 1977).

*10. Id., at 606.

*11. Report of the Comptroller General, "Status of GAO's Responsibilities Under the Federal Reports Act," May 28, 1976, at 20.

*12. Final Report, at 613.

*13. The Reports Clearance Process, A Report of the Commission on Federal Paperwork 43 (1977).

*14. Paperwork and Redtape Reduction Act of 1979: Hearing before the Subcomm. on Governmental Affairs, at 12, 96th Cong., 1st Sess. (1979).

*15. Id., at 131, 132.

*16. Id., at 165.

*17. Senate Report No. 96-930, 1980 U.S. Code Cong. and Admin. News 6241, at 6292.

*18. Presidential Documents, Administration of Jimmy Carter, December 11, 1980, at 2795.

*19. See preliminary remarks to such regulations, 48 Fed. Reg. 13666 (March 31, 1983).

*20. See P.L. 104-13, 109 Stat. 163, currently codified at 44 U.S.C., §3501, et seq.

*21. Resolution of this particular problem was an objective of the 1995 PRA.

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3. APA Violations Brief.

A. Nature of the Indictment and Facts.

The FCC has sought various indictments and forfeiture actions in the past alleging that certain radio transmissions "from a place in a State to another place in the same State" were made "without a license."

The legal theory of the actions and the proof offered consists of assertions that certain individuals engaged in the proscribed radio broadcasts "without a license." Under federal law, total control of the airwaves has been asserted by the United States; see 47 U.S.C., §301. This section prohibits anyone from broadcasting a radio signal in either interstate or intrastate commerce without first obtaining a license to do so. To obtain a license for engaging in the activity of radio broadcasting, one must submit an application to the FCC pursuant to §308(a):

"The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it..."

The content of this license application is the subject of the FCC's rule making authority as is apparent from a review of §308(b):

"All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe..."

Thus the law does not command that any specific information be provided to the FCC and the information to be included on the application form is the subject of regulations which the FCC promulgates.

The applicable regulation relating to the content of such an application form is found at 47 C.F.R., §73-3514, which provides that:

"(a) Each application shall include all information called for by the particular form on which the application is required to be filed..."

Under this particular regulatory scheme, it becomes clear that the application form itself implements the law. An applicant is required to supply the information mandated by the form, and no form but the "official" form may be submitted, at least pursuant to this regulation. This is the only method by which one may comply with the law and obtain a license.

However, as argued below, this type of regulatory scheme is further subject to the commands of other federal laws such as the Administrative Procedures Act ("APA"), which compels federal agencies such as the FCC to promulgate and publish all rules of general applicability. Here, the application form undoubtedly implements the statutory application and licensing process, which makes this form a "rule" for APA purposes. But since this particular form has never been promulgated and published in the Federal Register, it is void and cannot form the foundation for any civil or criminal prosecution.

B. Statutory Foundation for Federal Register Publication.

Prior to 1935, much of the internal documentation of federal agencies as well as regulations promulgated by these agencies to administer and enforce a variety of federal statutes was not published and generally made available to the American public, notwithstanding the fact that such documentation and regulations purported to impose mandatory obligations. The first act which commanded the publication of agency requirements which affected the public was the Act of July 26, 1935, 49 Stat. 500, ch. 417; this act created the Federal Register and compelled federal agencies to publish therein agency orders and regulations (see §§ 4 and 5 of the act). To insure agency compliance with the act's requirements, §7 provided as follows:

"No document required under section 5(a) to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof."

An expansion of items required to be published in the Federal Register occurred as a result of the enactment of the Administrative Procedures Act; see Act of June 11, 1946, 60 Stat. 237, ch. 324. An important definition in this act was the following contained in §2:

"(c) Rule and rule making. -- 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency...."

Section 3 of the act commanded that the following types of agency "rules" be published within the Federal Register:

"(a) Rules. Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance

with law. No person shall in any manner be required to resort to organization or procedure not so published."

Further, the act established a certain method whereby agencies were to publish in the Federal Register proposed and final agency rules and were to accord public hearings in reference thereto. The well known requirements that federal agencies provide adjudication of certain contested matters, subject to judicial review, was established for the first time in this act. Section 9 of the act further provided:

"No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

The benefits to the American public derived from the adoption of this act are many. For example, without the requirement to publish statements of the agency's organization, a party would not know as a matter of law what part of an agency was the proper unit or division responsible for the resolution of a particular problem, what part of an agency had enforcement authority, or what part of an agency was designated to receive "submittals" required of the public. While it is obvious that social security benefits applications are not submitted to the Securities and Exchange Commission, it might be entirely improper to submit such an application to the office secretary for Social Security's data processing unit. Without the requirement to publish agency "delegation orders," the American public and its members are deprived, and possibly detrimentally so, of the knowledge of which officers and agents within a vast federal agency are authorized to act on the agency's behalf. The submission of a tort claim to either the proper officer designated to receive the same or to the office janitor is of critical importance if the claim is one year and 363 days old. Finally, without notice to the American public via publication of the substantive requirements of a federal agency having delegated authority to administer and enforce federal laws, nobody, excluding possibly agency personnel, judges and lawyers, would have any knowledge of what was required to avoid the imposition of civil or criminal sanctions.

As amended, the above noted statutes continue their existence today, codified within 5 U.S.C, §§ 551 through 558. These sections within Title 5 require that federal agencies must publish in the Federal Register a variety of information which affects the rights, duties and obligations of members of the public. In 5 U.S.C., §551, a "rule" is defined:

"(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency ...."

Section 552 describes in particular detail various items which must be published by federal agencies in the Federal Register:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and content of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision or repeal of the foregoing.

"Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

Further, §552a directs that all federal agencies which maintain "systems of records" containing data and other information regarding individual citizens or residents must publish descriptions of those systems in the Federal Register; see §552a(e)(4). When any federal agency engages in the collection of information from an individual, §552a(e)(3) commands that the individual concerned be informed of the authority for the collection of the information, the purpose for which the information is intended to be used, the routine uses made of the information, and the effect of not providing such information. Finally, §558(b) prohibits an agency from issuing any substantive rule or order, or imposing any sanctions, outside the jurisdiction delegated to the agency.

As seen from above, §552 permits "incorporation by reference", a process governed by 1 C.F.R., part 51. However, matters which should be published in the Federal Register but which are deemed included therein "by reference" must be approved by the Director of the Federal Register and "proper language" so noting the "incorporation by reference" must appear within agency rules which are published in the Federal Register. Items which cannot be published either in the Federal Register or by incorporation by reference are described at 1 C.F.R., §5.4. (*1)

Thus, current statutes impose stringent requirements upon federal agencies to publish in the Federal Register descriptions of the agency's organizational structure as well as those substantive rules of general applicability duly promulgated by the agency. Any matter

required by law to be published, but which is not, cannot be the basis for the imposition of any sanction or penalty against anyone. As shown below, the FCC application form, which is a rule, is void because of its non-promulgation and non-publication as a rule.

C. Legal Mandates to Supply Information.

It is an established rule of law that one may not be prosecuted or proceeded against by the government for failure to supply information unless the applicable statute requires that the information be supplied. For example, in Viereck v. United States, 318 U.S. 236, 242, 63 S.Ct. 561, 563-64 (1943), a foreign agent who omitted certain information from his foreign agent's registration statement was prosecuted because the government believed he should have disclosed some information which he did not. In reversing that conviction, the U.S. Supreme Court held:

"Unless the statute, fairly read, demands the disclosure of the information which petitioner failed to give, he cannot be subjected to the statutory penalties."

See also United States v. Irwin, 654 F.2d 671, 679 (10th Cir. 1981)("And, of course, there can be no criminal conviction for the failure to disclose when no duty to disclose is demonstrated"); United States v. Anzalone, 766 F.2d 676, 683 (1st Cir. 1985); United States v. Larson, 796 F.2d 244, 246 (8th Cir. 1986); and United States v. Dorey, 711 F.2d 125, 128 (9th Cir. 1983). Therefor, for the government to proceed against one either civilly or criminally for a failure to supply information which a statute does not mandate to be supplied violates due process.

This rule operates in a wide variety of fields of law, particularly in those which require parties subject to the law to file some return or disclosure statement. For example, when the first Federal Corrupt Practices Act was adopted in the 1930s for the purpose of regulating election campaign finances, challenges were made regarding its application; see Burroughs v. United States, 290 U.S. 534, 54 S.Ct. 287 (1934). Challenges have been made to the federal laws requiring the registration of lobbyists and the filing of disclosure statements by them; see United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808 (1954). The current Federal Elections Campaign Act requires the submission of very specific information by means of forms which are required to be filed with the Federal Elections Commission; see 2 U.S.C., §§431 through 455. But, some of those statutory demands for information have been found unconstitutional; see Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976). If it had been impossible to know what information was required by law to be supplied pursuant to these various federal laws, the constitutionality of those requests for information could never have been legally challenged.

This rule also manifests itself via decisions of the state courts. For example, California was one of the first states to adopt an Ethics in Government law which required elected public officials to disclose their financial condition. Shortly after the first California law was enacted, its very specific demands for very broad information was

tested and the whole act was found unconstitutional; see City of Carmel-By-The-Sea v. Young, 2 Cal.3d 259, 466 P.2d 225 (1970). After a second and more refined law was adopted, it too was challenged but this time the act survived; see County of Nevada v. MacMillan, 11 Cal.3d 662, 522 P.2d 1345, 1352-53 (1974). Some of the contentions made in MacMillan concerned what specific information was required to be supplied, that information being described as "sources of income," and the Court explained what that information precisely was:

"That amendment defined the term 'source of income' as 'the business entity or activity of the official which earned or produced the income.' Thus as we read it, the act, as amended, would not require disclosure of the names of the official's customers, clients or patients. Instead, the official must only disclose the specified information regarding his own business entity or activity which produced the income. For example, a landlord would disclose the address and receipts from his apartment building, not the names of his tenants and the rents paid by each."

Other challenges have been made to these disclosure laws of California and whether those laws constitute a legal mandate to supply certain specific information. In Hays v. Wood, 25 Cal. 3d 772, 603 P.2d 19 (1979), an "equal protection" objection was made to the different disclosure requirements which ostensibly applied to different types of officials and other, private activities they pursued. Finding no rational basis for the distinct classes established by the law, certain provisions of the act were found unconstitutional. In Community Cause v. Boatwright, 124 Cal.App. 3d 888, 177 Cal.Rptr. 657, 666 (1981), an action was brought against a public official for his failure to provide greater details regarding certain of his assets than were required by law. In finding that this action should be dismissed, that court stated that "[t]here is no requirement for more specificity, and the facts alleged do not constitute a violation" of the act.

Other state courts have upheld these disclosure laws despite various constitutional challenges which were made; see Stein v. Howlett, 52 Ill.2d 570, 289 N.E.2d 409 (1972); Ill. State Employees Assoc. v. Walker, 57 Ill.2d 512, 315 N.E.2d 9 (1974); Fritz v. Gorton, 83 Wash.2d 275, 517 P.2d 911 (1974); and Chamberlin v. Missouri Elections Comm., 540 S.W.2d 876 (Mo. 1976). While not finding the whole law unconstitutional in Falcon v. Alaska Public Offices Comm., 570 P.2d 469 (Alaska 1977), that court declared that a particular statutory disclosure requirement constituted an invasion of privacy and required the agency to formulate better disclosure regulations.

Disclosure of financial information is required by federal "blue sky" laws and federal courts do not require that more information be supplied when complying with those laws than is required either by law or regulations; see Azurite Corp. Ltd. v. Amster & Co., 844 F.Supp. 929, 934 (S.D.N.Y. 1994); and Teltronics Services, Inc. v. Anaconda-Ericsson, Inc., 587 F.Supp. 724, 732 (E.D.N.Y. 1984). All of the courts which rendered the above decisions implicitly recognized the general principle that a governmental demand that an individual supply to it certain specific information must have its foundation in the law, either a statute or its counterpart, a regulation. Needless to say, if

review of other fields of law were undertaken here, this same rule would manifest itself.

Since a demand imposed upon an individual requiring that personal information to be supplied to a government agency must have a legal foundation, the natural question arises regarding the consequence of a demand for information which lacks such a basis. Again, this problem has been addressed by the federal courts and they have determined that due process is violated in such circumstances. For example, in United States v. Anzalone, 766 F.2d 676, 681, 682 (1st Cir. 1985), a defendant was prosecuted for violating the federal currency transactions reporting laws by structuring his cash transactions, and this case naturally drew into question the issue of what was the source for the defendant's duty to disclose the transaction itself by filing a report. In reversing Anzalone's conviction, the court held:

"We can find nothing on the face of either the Reporting Act, or its regulations, or in their legislative history, to support the proposition that a 'structured' transaction by a customer constitutes an illegal evasion of any reporting duty of that customer.

"According to the report, although the July 1980 revisions of the regulations resolved some of the deficiencies, 'the propriety of multiple transactions has not been addressed in the regulations'.

"We are required to conclude that the Reporting Act and its regulations, as they presently read, imposed no duty on appellant to inform the Bank of the 'structured' nature of the transactions here in question. The application of criminal sanctions to appellant for engaging in the activities heretofore described violates the fair warning requirements of the due process clause of the fifth amendment. The charges under Count V should have been dismissed." [Emphasis added]

A similar rationale was given to reverse a defendant's conviction in United States v. Denemark, 779 F.2d 1559 (11th Cir. 1986).

In United States v. Varbel, 780 F.2d 758, 762 (9th Cir. 1986), the same issue arose. Here, some defendants had broken up a large sum of cash and had converted it into cashier's checks by a series of transactions under $10,000. When prosecuted, they contended that there were no regulations (*2) implemented which required the disclosure of the information. In reversing those convictions, that court stated:

"The present ambiguity regarding coverage of the Reporting Act and its regulations has indeed been created by the government itself. 31 U.S.C. § 5313(a) extends its coverage to financial institutions and any other participant in the transaction. The Secretary could have required participants other than financial institutions to file a report; however, 31 C.F.R. §103.22 limits the reporting to financial institutions only.

"We conclude that the Reporting Act and its regulations did not impose a duty on appellants to inform the banks involved of the

nature of their currency transaction. We believe that the application of criminal sanctions against appellants here would violate due process." [Emphasis added]

See also United States v. Dela Espriella, 781 F.2d 1432 (9th Cir. 1986), and United States v. Larson, 796 F.2d 244 (8th Cir. 1986).

In summary, there is a clear principle of law that whenever government seeks the provision of specific information by members of the public, that command must manifest itself via either a statute or regulation which identifies the precise information that must be provided. Here in this case, §308 is the statute which arguably requires one desiring to engage in radio broadcasting to obtain a license through an application process; it must therefore be tested against the legal principle discussed above.

D. Statutes Implemented by Regulations.

It is common for various Congressional acts to broadly vest rule making authority in some designated federal official, and a problem in this respect may be that the grant of such authority can be so broad that it is unconstitutional as an unlawful delegation of legislative power. Some of the most notorious Congressional acts delegating broad rule making authority were enacted during the Great Depression via the National Industrial Recovery Act, and the resulting litigation brought the same into issue. In Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241 (1935), at issue were "hot oil" regulations promulgated via §10(a) of the National Industrial Recovery Act which authorized the President "to prescribe such rules and regulations as may be necessary to carry out the purposes" of the Act; 293 U.S., at 407. Finding that the President's rule making authority under this act amounted to an unconstitutional delegation of legislative power to the President, the regulations at issue were found to be "without constitutional authority;" 293 U.S., at 433. The National Industrial Recovery Act not only authorized the President to promulgate rules and regulations, it also authorized him to adopt entire "codes of fair competition;" in both Schecter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837 (1935), and Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855 (1936), such "codes" were found unconstitutional. A reading of the National Industrial Recovery Act reveals that it was primarily enforceable only through such "rules, regulations and codes."

In Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660 (1944), and M. Kraus & Bros. v. United States, 327 U.S. 614, 66 S.Ct. 705 (1946), the price control laws at issue in these cases were dependent upon the promulgation of regulations. In Douglas v. Commissioner of Internal Revenue, 322 U.S. 275, 64 S.Ct. 988 (1944), a statute dealing with income tax deductions contained the words "such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary." Douglas was decided solely by interpretation and construction of the regulation at issue. In Commissioner of Internal Revenue v. South Texas Lumber Co., 333 U.S. 496, 503, 68 S.Ct. 695 (1948), at issue before the Court was the construction of a statute and regulation. Here, the Court found it

essential to construe both the statute and regulation to decide the case:

"That the Commissioner was particularly intended by Congress to have broad rule-making power under the regulation was manifested by the first words in the new ... section which only permitted taxpayers to take advantage of it 'under regulations prescribed by the Commissioner with the approval of the Secretary.'"

See also Fratt v. Robinson, 203 F.2d 627 (9th Cir., 1953), a case involving a statute containing the language, "such rules and regulations as the Commissioner may prescribe."

In United States v. Mersky, 361 U.S. 431, 437-38, 80 S.Ct. 459 (1960), the Court had before it a statute which contained the words, "The Secretary of the Treasury may by regulations ..." Concerning this language, the Court stated:

"Here the statute is not complete by itself since it merely declares the range of its operation and leaves to its progeny the means to be utilized in the effectuation of its command .... Once promulgated, these regulations, called for by the statute itself, have the force of law, and violations thereof incur criminal prosecutions, just as if all the details had been incorporated into the congressional language. The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other."

See also United States v. Wayte, 549 F.Supp. 1376, 1385 (C.D.Cal. 1982) ("the defendant's argument that the court should view the applicable statute, regulations and proclamation as one statutory scheme is well founded").

These decisions demonstrate the manner by which rules "implement" a statute. Whenever a legislative scheme delegates rule making authority to an executive officer, there is usually a legislative purpose in having him adopt regulations to implement the law. If the full commands of the law are not known from just simple examination of the statute itself and if the requirements of the law can only be enforced by construing together both the applicable statute and corresponding rule, then it is clear that the rule implements the statute.

Simple review of §308 discloses that, as the Secretary of the Treasury may propose regulations regarding the federal CTR laws, the FCC is authorized to prescribe rules regarding the contents of an application for a radio station license. Further, it must be noted the Commission cannot have unbridled discretion regarding the type of information it may demand;(*3) for this reason, the remainder of §308(b) limits this rule making authority of the Commission to "the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station;... and such other information as it may require." Clearly, the statute itself requires rules for its implementation and to implement this regulatory scheme, 47 C.F.R., §73.3514 has been promulgated, and like the statute, it as well requires further rules.

That further rule is the actual application form itself, and thus the form implements the complete legislative scheme; see Ranger v. F.C.C., 294 F.2d 240, 242 (D.C.Cir. 1961). For this reason and as explained below, the form must be promulgated as a rule as required by the APA.

1. Rules within instructions.

Within an agency, "instructions" may be promulgated and distributed to agency officers and employees informing them as to the manner and method of implementing and enforcing any particular law. If by chance these "instructions" likewise meet the definition of a "rule" as defined by '551, and if the same be "substantive" as prescribed by '552, they must be published in the Federal Register.(*4) Further, instructions given to members of the public by an agency likewise qualify as rules. Several cases have found these "instructions" given by an agency void for non-publication.

It appears that one of the first cases to deal with this issue was United States v. Morelock, 124 F.Supp. 932 (D.Md. 1954). This case concerned an act to regulate the production of wheat which of necessity required agriculture officials to measure the amount of acreage devoted to wheat production. To accomplish this purpose, agency "instructions" given to agency employees outlined measurement procedures and the same required some affirmative acts on the part of farmers. When suit was instituted to force some dissenting farmers to permit measurement of their wheat crops, the farmers replied that their supposed duties under the act as set forth within the unpublished "instructions" were void. The court agreed with this argument, holding:

"But there is no provision in the Act or the Regulations imposing any duty on farm operators in connection with the visits of the reporters or other representatives of the county committee. The only obligation on farm operators in that connection is set out in Paragraph II D of Instruction No. 1006.... This instruction was not published in the Federal Register or otherwise brought to the attention of defendants before suit. It was, therefore, not binding on them," Id., at 944.

"As we have seen, those Instructions were not published in the Federal Register, and therefore cannot impose any affirmative duty on defendants," Id., at 945.

During the height of the Viet Nam war, certain draft regulations outlined a procedure whereby conscientious objectors would be inducted for civilian service. But, the operation of this procedure concerning conscientious objectors was substantially altered by the issuance of a "Letter to All State Directors" and a temporary "instruction," both of which were not published in the Federal Register notwithstanding the fact that they had an adverse impact upon the objectors. In Gardiner v. Tarr, 341 F.Supp. 422, 434 (D.D.C. 1972), upon challenge, these documents were found void as unpublished substantive rules:

"While the pre-publication and publication sections of the Act and the implementing Executive Order do not further define what are considered to be 'Rules' and 'Regulations', it is inconceivable that

policies intended to have the force and effect of the policies purporting to effect the Plaintiffs in this proceeding, may be considered anything other than 'Rules and Regulations', notwithstanding the label attached by Defendant, and may be applied to Plaintiffs or any affected registrant without having been published in a manner in accordance with the Act. Whatever Defendant has entitled these unpublished but written policies, they 'purport[s] to be an authoritative declaration of policy issued for the guidance of the [Selective Service] System's line officers....' Therefore, the letters and Temporary Instruction in question are as much 'regulations' as any administrative agency's standardized, enforced, and broad policy directives."

The same issue was raised in Piercy v. Tarr, 343 F.Supp. 1120 (N.D.Cal. 1972), which resulted in a similar holding. See also Washington Fed. Sav. & Loan Assoc. v. Federal Home Loan Bank Board, 526 F.Supp. 343, 383-84 (N.D.Ohio 1981), concerning instructions as to the manner and method of closing down a bank.

The validity of an unpublished instruction affecting the food stamp program was at issue in Aiken v. Obledo, 442 F.Supp. 628 (E.D.Cal. 1977).
While the food stamp program is federally funded and state administered, federal regulations establish the standards for eligibility. But in this case, an indigent and eligible family was denied assistance because of an unpublished "FNS (FS) Instruction 732-1, section 2313," which limited eligibility by a "collateral contact requirement and a 6 month rule." These limitations upon food stamp entitlement contained in an "instruction" to employees administering the program were held void for lack of publication:

"Interpretative rules '... consist of administrative construction of a statutory provision on a question of law reviewable in the courts'.... They do not have the force of law....

"The 'collateral contact' and 'six month' rules set forth in the instruction in question have the force of law....

"Procedural rules are those that relate to the method of operation of the agency, while substantive rules are those which establish standards of conduct or entitlement..." Id., at 649.

"Since it is undisputed that the 'collateral contact' rule was not so published, it was adopted in violation of notice and comment provisions of the APA and must be declared void and set aside," Id., at 650.

See also Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2nd Cir. 1972).

A similar problem regarding the food stamp program was raised in Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977), which considered a different aspect of the unpublished "Food and Nutrition Service (FNS), Food Stamp (FS) Instruction 732-1," before the court in Aiken, supra. Here the unpublished instructions commanded that HUD rent subsidies

should be considered as "income"(*5) for food stamp purposes. Finding a substantial impact upon recipients of food stamps as a consequence of the "rule" contained in the unpublished instructions, the Court declared this rule void and unenforceable. See also Air Line Pilots Assoc. Intern. v. Dep't. of Transportation, 446 F.2d 236 (5th Cir. 1971); Phillips Petroleum Co. v. Federal Power Commission, 475 F.2d 842 (10th Cir. 1973); Alaniz v. Office of Personnel Management, 728 F.2d 1460 (Fed.Cir. 1984); Fraga v. Smith, 607 F.Supp. 517, 523 (D.Or. 1985); United States v. Article of Drug, 634 F.Supp. 435, 457 (N.D.Ill. 1985)("matching letters" which established a policy of the agency were void); United States v. Shearson Lehman Bros., Inc., 650 F. Supp. 490, 496 (E.D.Pa. 1986); United States v. Riky, 669 F. Supp. 196, 201 (N.D.Ill. 1987); NI Industries, Inc. v. United States, 841 F.2d 1104 (Fed.Cir. 1988); and National Treasury Employees Union v. Reagan, 685 F.Supp. 1346 (E.D.La. 1988).

Thus, the above decisional authority clearly shows that "instructions" given by an agency which command the performance of an act by a member of the public are subject to the publication requirement. Any instruction pamphlet or booklet which accompanies the FCC application form may very likely be a rule within the scope of the APA.

2. Forms that are rules.

As seen from the above cases, agency "rules," especially those which are not published, can appear in a variety of documents such as manuals, letters, instructions and other things. Additionally, forms used by agencies can fall within the scope of a "substantive rule," especially those designed to implement a law, thus necessitating publication. Several cases have considered the issue of the consequence of non-publication of such an agency form.

In United States v. Two Hundred Thousand Dollars ($200,000) in United States Currency, 590 F.Supp. 866 (S.D.Fla. 1984), at issue was the validity of Customs Form 4790 (Currency Transaction Report), used in the enforcement of the Currency and Foreign Transactions Reporting Act. In this case, a man named Palzer had suffered the seizure of $200,000 by Customs agents when he entered the country and failed to submit Form 4790. In the resulting forfeiture proceedings, Palzer intervened and asserted the invalidity of the form because it constituted an agency "rule" which had not been published in the Federal Register. In considering Palzer's claim, the court found that regulations required the filing of a form, although the substance and contents of the information required to be supplied was not addressed in the regulations:

"However, the regulations are incomplete in this case without the forms, because the regulations do not set forth the information a traveler will be required to furnish on the forms, specifically Form 4790," Id., at 869.

The Court found that the form itself constituted an agency "rule":

"Interpretative rules are 'statements as to what the

administrative officer thinks the statute or regulation means', ... whereas substantive rules, such as Form 4790, are issued by an agency pursuant to statutory authority which have the force and effect of law.... It is also apparent that Form 4790 is not a 'general statement of policy' as would be exempted from the publication requirement under 5 U.S.C. section 553(b). That Form 4790 is a 'legislative' rule rather than an interpretive one or a general statement of policy is apparent from the fact that the form was clearly intended to implement the pertinent statute ... and the regulation...; section 551(4) of the APA distinguishes agency statements designed to implement a law from those designed to interpret it," Id., at 870-71.

Finding that the form in question was a "rule" that had not been published in the Federal Register, the Court declared:

"Given the scope of the information which Customs Form 4790 requires a traveler to furnish, as well as the Form's role as an implementing mechanism for the reporting regulations, Form 4790 is a substantive and implementing rule which falls within none of the acceptable exemptions under the APA and should have been published in the Federal Register," Id., at 871-72.

Another case addressing the issue of whether an agency form is likewise a "rule" requiring publication is United States v. Reinis, 794 F.2d 506 (9th Cir. 1986). Here, Reinis was charged with money laundering and consequent failure to file the C.T.R. Form 4789. In a short opinion and based upon the authority of the opinion noted immediately above, it was held that this form was a substantive rule which was invalid for failure of the agency to publish it in the Federal Register. See also United States v. Cogswell, 637 F. Supp. 295, 298 (N.D.Cal. 1985); United States v. Gimbel, 830 F.2d 621, 626 (7th Cir. 1987); United States v. Risk, 672 F. Supp. 346, 358 (S.D.Ind. 1987), affirmed at 843 F.2d 1059 (7th Cir. 1988); and United States v. Hayes, 827 F.2d 469, 471, 472 (9th Cir. 1987).

At issue in Appalachian Power Company v. Train, 566 F.2d 451, 455 (4th Cir. 1977), was the failure of the EPA to publish a very lengthy document named "Development Document" in the Federal Register. This document (described in Virginia Electric and Power Company v. Costle, 566 F.2d 446, 448 (4th Cir. 1977)) was 263 pages long and purported to establish standards for effluent emissions. Because the document itself constituted a substantive agency regulation which was not published, it was held invalid:

"[T]he Development Document is not a validly issued part of the regulations, because it has not been published in the Federal Register, nor have the procedural requisites for incorporation by reference been complied with. With this position we agree, and hold that 40 C.F.R., section 402.12 is not enforceable for want of proper publication.

"Any agency regulation that so directly affects pre-existing legal rights or obligations ..., indeed that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence,'

is within the publication requirement.... As the substance of a regulation imposing specific obligations upon outside interests in mandatory terms..., the information in the Development Document is required to be published in the Federal Register in its entirety, or, in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register."

See also PPG Industries, Inc. v. Costle, 659 F.2d 1239 (D.C.Cir. 1981). But compare United States v. Bowers, 920 F.2d 220 (4th Cir. 1990).

The lesson of the above cases is directly applicable here. Section 308 requires parties to submit to the FCC an application for a license to operate a radio station, a legal requirement which does not stand alone by itself and which must be construed in conjunction with 47 C.F.R., §73.3514. But like the statute, this regulation also fails to describe the information which must be submitted in order to obtain this license and obviously the contents of a license application can only be known through the official application form itself. Since this form is clearly one which implements a statutory scheme, it is plainly a rule for APA purposes. But because this rule has never been published in the Federal Register, it cannot be the basis for any civil or criminal prosecution; see Hotch v. United States, 212 F.2d 280, 283 (9th Cir. 1954).

E. Decisional authority in other states.

The above legal proposition is not some minor technicality apparent in federal law. Many states also have administrative procedures acts which similarly require state agencies to publish within some administrative publication all rules of general applicability. These statutory requirements have been litigated and a variety of courts have concluded that instructions to both agency personnel in some instances and instructions to the public promulgated by the agency must be published. Further, several cases have held that agency forms which have not been published were void rules.

Several state cases have dealt with this problem arising from agency instructions. For example, in Burke v. Children's Services Division, 26 Or. App. 145, 552 P.2d 592 (1976), an instruction regarding the termination of welfare benefits was held void as an unpublished rule. In Florida State University v. Dann, 400 So.2d 1304, 1305 (Fla.App. 1981), a salary document setting forth the manner for granting merit salaries to university employees was held to be a void rule. Regarding the revocation of a state issued certificate based on an unpublished letter, the court in McCarthy v. Dep't. of Ins. & Treasurer, 479 So.2d 135, 137 (Fla.App. 1985), held that "[t]his letter was more than incipient agency policy. Since it had the effect of requiring compliance and was not adopted by the proper rulemaking process, it was invalid."

In Ohio Dental Hygienists Assoc. v. Ohio State Dental Board, 21 Ohio St.3d 21, 487 N.E.2d 301 (1986), an unpublished advisory opinion letter was declared to be a void rule, as was a "program bulletin" in Detroit Base Coalition for Human Rights of Handicapped v. Director, Dep't. of Social Services, 431 Mich. 172, 428 N.W.2d 335, 342-43 (1988). An

administrative order was held void in Woodland Private Study Group v. State Dep't. of Environmental Protection, 209 N.J.Super. 261, 507 A.2d 300, 302 (1986), as were a personnel memo regarding employee sick leave in Petition of Daly, 523 A.2d 52 (N.H. 1986); an agency directive in Johnson v. N.D. Workers Comp. Bureau, 428 N.W.2d 514 (N.D. 1988); and a fee schedule in West Virginia Chiropractic Soc., Inc. v. Merritt, 358 S.E.2d 432 (W.Va. 1987).

A benefits policy was determined unenforceable in K-Mart Corp. v. State Industrial Ins. System, 101 Nev. 12, 693 P.2d 562 (1985), and an aquifer policy suffered the same fate in Heimbach v. Williams, 517 N.Y.S. 2d 393 (Sup. 1987). A prison rule was declared void in Watson v. Oregon State Penitentiary, 90 Or.App. 85, 750 P.2d 1188 (1988), as were workmen compensation rules and a position paper in Hardiman v. Dep't. of Public Welfare, 550 A.2d 590, 596 (Pa.Cmwlth. 1988), and Ohio Nurses Assoc., Inc. v. State Board of Nursing, 44 Ohio St.3d 73, 540 N.E.2d 1354 (1989). See also Brunson Const. & Environ. Services, Inc. v. City of Prichard, 664 So.2d 885, 893 (Ala. 1995); and Ex Parte Traylor Nursing Home, Inc., 543 So.2d 1179 (Ala. 1988).

In Northwest Airlines, Inc. v. State Tax Appeal Board, 720 P.2d 676, 678 (Mont. 1986), this airline challenged a tax apportionment formula devised by state tax authorities to compute the amount of taxes owed; finding this formula to be an unpublished rule, it was held void. In Grier v. Kizer, 268 Cal.Rptr. 244 (Cal.App. 2 Dist. 1990), the court found that a statistical auditing technique affected the rights of the challenging party; because this technique was not published as a rule, it was held void. The court interestingly described this unpublished rule as "an underground regulation."

Several state cases have also dealt with the issue of whether a given form meets the requirements of an APA rule. In Dep't. of Business Regulation v. Martin County Liquors, Inc., 574 So.2d 170 (Fla.App. 1991), a liquor license form was held to be a void rule due to the lack of promulgation and publication within the administrative code. In Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878, 888 (Fla.App. 1988), the court found that an "application form constitutes an unpublished rule and is therefore invalid." Certain forms relating to home schooling compliance were found void in Clonlara, Inc. v. State Board of Education, 188 Mich.App. 332, 469 N.W.2d 66 (1991). Another manner of viewing such unpublished forms was demonstrated in Matter of Estate of Horman, 152 Ariz. 358, 732 P.2d 588 (1986); an unpublished form does not comply with the APA, and it is therefore not a rule. Obviously, this principle of law which manifests itself in a line of federal decisional authority is one recognized by many state courts.

CONCLUSION

The FCC has a checkered history of compliance and occasional non-compliance with the requirements of the APA, and this often creates serious problems; see Salzer v. F.C.C., 778 F.2d 869, 874 (D.C.Cir. 1985). This lack of compliance with the dictates of the APA is clearly posing problems for those in the "micro-broadcasting" industry. If the FCC wants to enforce the full weight of the law upon whom the allege

engage in "unlicensed" broadcasting, perhaps it should first comply with the law itself, especially the APA. For the reasons noted above, the FCC application form to obtain a radio broadcasting license is clearly a "rule" under the APA, and it is void because it has never been promulgated and published.

END NOTES:

(*1) This latter prohibition first appeared in the August 27, 1941, edition of the Federal Register, at page 4398, et seq.

(*2) The federal currency transactions reporting laws have been found to be entirely dependent upon the promulgation of regulations for their enforcement; see California Bankers Assn. v. Shultz, 416 U.S. 21, 26, 94 S.Ct. 1494 (1974); United States v. Reinis, 794 F.2d 506, 508 (9th Cir. 1986)(a person cannot be prosecuted for violating the currency reporting law unless he violates an implementing regulation); and United States v. Murphy, 809 F.2d 1427, 1430 (9th Cir. 1987)(the reporting act is not self-executing and can impose no reporting duties until implementing regulations have been promulgated).

(*3) Such broad discretion cannot be vested in the hands of an administrative agency; see Gutknecht v. United States, 396 U.S. 295, 306, 90 S.Ct. 506 (1970)("The power under the regulations to declare a registrant 'delinquent' has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a type of administrative absolutism not congenial to our law-making traditions").

(*4) See Herron v. Heckler, 576 F.Supp. 218, 230 (N.D.Cal. 1983)("The claims manual provisions clearly fall within the definition of 'rule' quoted above: they are an agency statement; they are applicable prospectively to a class of SSI beneficiaries generally and to the named plaintiff particularly; and by defendants' own admission in their memoranda, they are designed to implement, interpret and/or prescribe law. Moreover, the claims manual provisions are 'rules' as the term generally has been construed by the courts: they declare policies generally binding on the affected public; they provide specific standards to regulate future actions of the affected public; and they make a substantive impact on the rights and duties of persons subject to their limitations").

(*5) See Dean v. Butz, 428 F.Supp. 477, 480 (D.Hawaii 1977), where an unpublished policy statement regarding what was income was held void because not promulgated as a rule.

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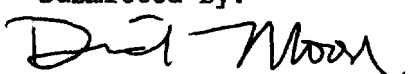
Submitted by:



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