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Comptroller General
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Washington, D.C. 20548

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B-195437.2

September [illegible], 1986

The Honorable Glenn English
Chairman, Subcommittee on Government
Information, Justice and Agriculture
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

This is in response to your letter of June 18, 1985, requesting our Office to determine whether certain policies and practices that have been established by the Rural Electrification Administration (REA) in administering the rural electric and telephone loan programs are within REA's legal authority.

You asked us to determine whether REA's reliance on its general funds policy in recent years caused REA to fail to achieve congressionally imposed minimum loan levels for those years. In addition, an attachment to your letter contains numerous other questions relating to the legal authority of the Administrator of REA to take a variety of actions in administering the rural electric and telephone loan program.[1/]

Recently, your staff has advised us of your immediate need for our response to two questions--one involving REA's failure to meet statutorily established minimum loan levels in the 1984 and 1985 fiscal years as a result of its adherence to its general funds criteria and the other concerning the extent to which REA has complied with the requirements of the

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1/ Your letter also asks our Office to evaluate certain other aspects of the electric and telephone loan program, including "REA's effort to eliminate or shift to the private sector the engineering standards function," that are not primarily focused on the extent of REA's legal authority. These issues have been addressed in a recent report issued by our Resources, Community and Economic Development Division. GAO, Rural Cooperatives: Information on Two Rural Electrification Administration Proposals, RCED-86-101, B-222848, May 30, 1986.

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Administrative Procedures Act, 5 U.S.C. §§ 551-557, in issuing agency bulletins. Accordingly, we have addressed these two issues.

As explained hereafter, it is our view that REA's reliance on its general funds criteria in the 1984 and 1985 fiscal years caused REA to fail to achieve and thus to violate congressionally imposed minimum loan levels for those years. Moreover, we think that REA's failure to publish its substantive bulletins in the Federal Register, as required by the Administrative Procedures Act, is not consistent with the requirements of that statute.

BACKGROUND

REA is a credit agency of the United States Department of Agriculture which provides financial assistance to rural electric and telephone organizations for the purpose of providing electric and telephone service in rural areas. REA was created by Executive Order No. 7037 on May 11, 1935. Approximately one year later the Rural Electrification Act of 1936 (REA Act) was enacted, granting REA statutory authorization. 49 Stat 1363, codified at 7 U.S.C. § 901. Initially, REA was only authorized to provide direct loans to eligible borrowers for the purpose of furnishing electricity to persons in rural areas that were not receiving central station service. REA's authority to make such rural electrification loans is set forth in section 4 of the REA Act as amended, 7 U.S.C. § 904, as follows:

> "The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, * * * peoples' utility districts and cooperative, nonprofit, or limited dividend associations * * * for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, * * *. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income * * *."

REA's loan-making authority was expanded significantly in 1949 with the enactment of legislation giving it the authority to make direct loans to eligible borrowers for the purpose of providing and improving telephone service to persons in rural areas. Pub. L. No. 81-423, 63 Stat 948, codified at 7 U.S.C. §§ 921-924. REA is "authorized and empowered" by 7 U.S.C. § 922 to make telephone loans under the same general term and conditions as are provided in 7 U.S.C. § 904, unless otherwise specified. In 1973, a major amendment to the REA Act was enacted, establishing the Rural Electrification and Telephone Revolving Fund and authorizing REA to use the Fund to make insured and guaranteed loans to eligible electric and telephone borrowers. Public Law 93-32, 87 Stat 65, codified at 7 U.S.C. §§ 931-940. Under 7 U.S.C. § 935, the Administrator of REA is authorized:

> "* * * to make insured loans * * * to the full extent of the assets available in the fund, subject only to limitations as to amounts authorized for loans and advances as may be from time to time imposed by the Congress of the United States for loans to be made in any one year, which amounts shall remain available until expended * * *."

An insured loan is defined in that section as a loan "which is made, held, and serviced by the Administrator, and sold and insured by the Administrator hereunder * * *." The purposes for which insured loans can be made are set forth in 7 U.S.C. § 739 as follows:

> "Loans made from or insured through the fund shall be for the same purposes and on the same terms and conditions as are provided for loans in subchapters I and II of this chapter * * *."

Thus, the purposes, terms and conditions for which insured electrification and telephone loans can be made are the same as those set forth in 7 U.S.C. § 904 and 7 U.S.C. § 922, respectively.

In addition to its authority to make insured loans under 7 U.S.C. § 935, REA is authorized by 7 U.S.C. § 936 to "provide financial assistance to borrowers for purposes provided in this chapter" by guaranteeing 100 percent of loans made by legally organized lending agencies. Again, the purposes for which such guaranteed loans can be made are those enumerated in 7 U.S.C §§ 904 and 922. See B-195437, February 15, 1980.

Although REA's basic authorities under 7 U.S.C. §§ 904 and 922 to make direct loans to electric and telephone borrowers remain in force, REA no longer makes direct loans. For some time, all of REA's electrification and telephone loans, have been made in the form of insured and guaranteed loans under 7 U.S.C. §§ 935 and 936. The fundamental issue you have asked us to address is whether REA's establishment and use of its "general funds" policy in administering the insured and guaranteed loan programs authorized under 7 U.S.C. §§ 935 and 936 improperly "restrict[s] the availability of loan funds to otherwise qualified borrowers", resulting in REA's failure to achieve congressionally imposed minimum loan levels.

REA GENERAL FUNDS POLICY

REA's general funds policy, as it currently exists, is set forth in two REA Bulletins. REA Bulletin 300-5, dated August 19, 1969, applies to telephone loans and REA Bulletin 1-7, dated December 6, 1977, governs electrification loans. These two bulletins are essentially the same[2/] and use substantially the same definition of "general funds" as follows:

> "'General Funds' includes all the cash and investments which are not held in trust in similar accounts specified by contractual agreements * * *." REA Bulletin 1-7, December 6, 1977.

In a letter we received from REA, dated January 6, 1986, concerning this matter (copy enclosed), REA summarized the manner in which the general funds policy set forth in the REA Bulletins is applied as follows:

> "(1) REA recommends that borrowers maintain sufficient working capital to meet operating costs, taxes, debt service payments, routine construction and replacement costs and for contingencies.
>
> "(2) Usually general funds available for these purposes should not exceed 8 percent of total utility plant or $100,000, whichever is greater.

2/ However, REA Bulletin 300-5 has not been updated since 1969, prior to enactment of the 1973 legislation authorizing REA to make insured and guaranteed loans. Therefore, this Bulletin, unlike Bulletin 1-7, does not specifically refer to those types of loans.

"(3) REA recommends that general funds over the appropriate level be used for Plant Additions, Retirement of Patronage Capital, and Advance Payments.

"(4) It is the policy of REA, when reviewing a loan application and determining the amount of the loan, or when reviewing requisitions for loan fund advances, to take into consideration the amount of general funds. Amounts in excess of the appropriate level will be applied to uses which conserve loan funds and provide maximum consumer benefits."

As further explained by REA in its letter to us, REA implements its general funds policies at two different points in the loan-making process. Initially, REA requires everyone applying for an insured or guaranteed loan to submit current information indicating the level of adjusted general funds. If that data shows that the applicant's level of general funds exceeds the appropriate 8 percent level:

"REA will either refuse to process the application until the applicant's general funds are within the appropriate level or REA will require the applicant to deposit in a REA construction fund account, prior to the release of loan funds, the amount by which the applicant's general fund exceeds the appropriate level."

In addition, REA will review the level of each borrower's general funds when the borrower submits a requisition for an advance of funds on a previously approved loan. If REA determines at that time that the amount of a borrower's general fund exceeds the appropriate 8 percent level:

"REA will normally either defer action on the requisition until the borrower's general funds level has been appropriately reduced or REA will reduce the amount of loan funds to be advanced by an amount equal to the excess general funds."

These policies are intended to "assure that, throughout the term of the loan, loan funds are not made available to a borrower when the borrower has general funds above the approved level." However, the borrower is allowed to reduce its level of general funds by applying the excess to a recommended purpose and "may thereafter receive advances in the full amount of the loan."

REA adopted its general funds policy in February 1962, when it first issued REA Bulletin 1-7:300-5 entitled "General Funds". This was done in response to a recommendation made by the House Appropriations Committee. See H.R. Rep. No. 448, 87th Cong., 1st Sess. 27 (1961). REA's general funds Bulletins 300-5 and 1-7, have not substantially changed since 1969, although REA did update Bulletin 1-7 in 1977 to specifically make it applicable to insured and guaranteed loans.

In this opinion, we do not endorse the specific general funds criteria that REA has adopted or consider whether the general funds policy is the best way for REA to accomplish its statutory mandate. Moreover, we note the provision in REA's fiscal year 1986 appropriation, which states:

> "That no funds appropriated in this Act may be used to deny or reduce loans or loan advances based upon a borrower's level of general funds." See Agricultural Rural, Development, and Related Agencies Appropriations Act, 1986, as enacted by Pub. L. No. 99-190, § 101(a), 99 Stat. 1185, December 19, 1985.

There is no doubt that once this language became effective it prohibited REA from applying its general funds criteria during fiscal year 1986, both with respect to the approval of new loans and the disbursement of loan funds for previously approved loans. REA does not dispute this, as indicated by an internal memorandum from the REA Administrator to agency officials, dated December 31, 1985, which states the following:

> "Each reviewing official should be made aware of this provision and all necessary steps should be taken to ensure that the level of general funds is not a consideration in recommending approval of loans or in making advances."
>
> "This supersedes any provision to the contrary in the Code of Federal Regulations, REA Bulletin, Staff Instructions and Loan Manuals."

However, by its very terms, the statutory prohibition only applies to funds appropriated for fiscal year 1986.

As your staff has recently indicated to us, your primary interest at this time in REA's general funds policy is whether, in the absence of an express statutory prohibition such as is contained in REA's fiscal year 1986 appropriation,

REA's adherence to its general funds criteria is permissible if, as a result, REA fails to meet congressionally imposed minimum loan levels, as it did in the 1984 and 1985 fiscal years. As stated earlier, REA's insured and guaranteed loan programs are funded out of the Rural Electrification and Telephone Revolving Fund established under 7 U.S.C. § 931. Accordingly, REA's annual appropriation does not appropriate funds directly for such loans, but rather authorizes a level of loan activity using the moneys contained in the Revolving Fund.3/ However, rather than authorize an exact amount for each type of loan that REA makes, REA's annual appropriation sets maximum and minimum levels for the different types of loans involved. For example, REA's appropriation for the 1984 fiscal year, authorized the following level of loan activity for that year:

> "Insured loans pursuant to the authority of section 305 of the Rural Electrification Act of 1936, as amended (7 U.S.C. § 935), shall be made as follows: rural electrification loans, not less than $850,000,000 nor more than, $1,100,000,000, and rural telephone loans, not less than $250,000,000 nor more than $325,000,000; to remain available until expended: Provided, That loans made pursuant to section 306 of that Act are in addition to these amounts but during 1984 total commitments to guarantee loans pursuant to section 306 shall be not less than $3,360,000,000 nor more than $4,145,000,000 of contingent liability for total loan principal * * *." See Agriculture, Rural Development and Related Agencies Appropriation Act, 1984, as enacted by Pub. L. No. 98-151 § 101(d), 97 Stat. 964, 972 (1983).

In the 1985 fiscal year, the maximum and minimum levels for electrification and telephone insured loans were unchanged, but the minimum and maximum levels for guaranteed loans were

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3/ REA's annual appropriation, however, typically does appropriate an amount to be deposited in the Revolving Fund to reimburse it for interest subsidies and losses sustained in prior years. For example, in the current fiscal year, the amount appropriated by Pub. L. No. 99-190 to reimburse the fund is $100,000,000. See H. Rep. No. 439, 99th Cong., 1st Sess. 18 (1985).

set at not less than $1,325,000,000 nor more than $2,345,000,000[4/].

In the 1984 fiscal year, REA failed, for the first time, to meet some of the minimum lending levels set by Congress. In the 1985 fiscal year, REA failed to meet any of the minimum lending levels set by Congress.[5/] Based on the information furnished to us, it appears that during the 1984 and 1985 fiscal years, REA refused to approve loans or disburse loan advances to a significant number of applicants because their level of general funds exceeded the 8 percent maximum. REA's reliance on its general funds policy thus was a significant factor in its failure to achieve the minimum loan levels imposed by Congress for the 1984 and 1985 fiscal years. It is our view, for the reasons set forth hereafter, that REA's reliance on its administratively imposed requirement that otherwise qualified borrowers whose level of general funds exceeded 8 percent of total utility plant were not eligible for an REA loan was improper if, as a result, REA failed to achieve minimum lending levels established by law.

[4/] We note that the authorized maximum and minimum lending levels set forth in the appropriations legislation for the 1984 and 1985 fiscal years for REA's guaranteed loan program does not list separate amounts for telephone and electrification loans. While the committee reports on REA's appropriations for the 1984 and 1985 fiscal years list separate minimum amounts for telephone and electrification guaranteed loans, these amounts would not be legally binding on REA since the legislation itself only sets a combined minimum authorization for both types of guaranteed loans. See 55 Comp. Gen. 303, 319 (1975); and 64 Comp. Gen. 282 (1985).

[5/] In the 1984 fiscal year, REA did not meet the $250,000,000 minimum for insured telephone loans, making only $228,559,000 in such loans, and did not meet the $3,360,000,000 minimum for guaranteed loans, making only $1,185,099,000 in both types of guaranteed loans. In the 1985 fiscal year, REA did not meet the $850,000,000 minimum for insured electrification loans, making $562,029,000 in such loans, did not meet the $250,000,000 minimum for insured telephone loans, making $224,589,000 in such loans, and did not meet the $1,325,000,000 minimum for both types of guaranteed loans, making only $4,987,000 in such loans, all of which were electrification loans.

It is a fundamental precept of administrative law, long recognized by our Office and the courts, that "Federal agencies and officials must act within the authority granted to them by statute in issuing regulations." 64 Comp. Gen. 319, 321 (1985). By the same token, a regulation which may be valid when issued must be brought into conformity with any new legislation or statutory amendments that are subsequently enacted. In other words, when a conflict exists between an otherwise valid regulation and a statute, the statute should ordinarily be given priority. This is certainly true in this case, in which the statutory provisions involved were included in annual appropriations legislation, and thus represent the most recent expression of congressional intent concerning the REA loan program. While REA has the administrative discretion to adopt a policy regarding loan approval, its discretion in this respect is not unlimited. By enacting statutory language which provided that REA should make not less nor more than a specified amount of a certain type of loan in a particular fiscal year, Congress set the parameters within which REA was free to exercise its discretion. REA did not have the authority, in our view, to adhere to its administratively imposed general funds criteria where doing so resulted in a level of loan activity that fell short of the minimum authorized by law.

Certainly, REA could not be faulted for its failure to adhere to the minimum level of loans authorized for a particular fiscal year if there was a shortage of eligible applicants. See S. Rep. No. 566, 98th Cong., 2d Sess. 87 (1984). See also Pub. L. No. 98-151, § 114, 97 Stat. 964, 976 (1983); and Pub. L. No. 98-473, § 113, 98 Stat. 1837 (1984). However, we do not think that REA can use its administratively imposed general funds criteria to disqualify otherwise eligible applicants in order to reduce program levels below the minimums established by Congress. The legislative history of the general funds prohibition that was incorporated by Congress into REA's appropriation for the 1986 fiscal year demonstrates that Congress believed REA was doing just that in recent years.

According to the House Committee on Appropriations, REA had been using its general funds policy to "defeat congressional authority to establish loan levels for REA programs" in the 1984 and 1985 fiscal years. H. Rep. No. 211, 99th Cong., 1st Sess. 78 (1985). The comments of the Senate Committee on

Appropriations explaining the need for the general funds prohibition are particularly elucidating:

> "The Committee has been informed by REA that the minimum level of insured and guaranteed loan commitments contained in the fiscal year 1985 bill will not be achieved. REA implies that a reduction of applications over the years is the cause for not meeting minimum funding levels. However, REA has not provided any evidence of an actual shortage of loan applications and, to the contrary, information from borrowers indicates that ample need exists for REA to meet minimum loan levels.
>
> "Furthermore, it has been brought to the Committee's attention that REA is maintaining a policy which, in effect, circumvents congressional authority to set minimum loan levels. This policy takes into account the level of a borrower's general funds and serves to: (1) deny or reduce loans to eligible borrowers; (2) deny loan fund advances to borrowers already approved for the loan; (3) require borrowers to supplement loan funds with their own funds; and (4) refuse to reimburse borrowers for funds expended for approved loan purposes.
>
> "Therefore, the Committee feels that the REA's general funds policy is responsible for not meeting minimum loan levels, rather than any lack of applications. * * *
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> "The Committee, therefore, has included language in the bill which precludes the reduction or denial of insured, guaranteed, or Rural Telephone Bank loans or loan advances based upon a borrower's level of general funds." S. Rep. No. 137, 99th Cong, 1st Sess. 81-82 (1985). (Emphasis added.)

Thus, it can be seen that Congress adopted the provision prohibiting REA from applying its general funds policy in the 1986 fiscal year because Congress believed that REA was using the policy as a "device for reducing program levels" below the minimums set by Congress.

Accordingly, we think that during the 1984 and 1985 fiscal years, REA was legally obligated, if necessary, to suspend or

amend its general funds criteria, in order to meet the minimum loan levels imposed by Congress. To the extent that REA's reliance on its general funds criteria resulted in lending levels for any REA loan programs in the 1984 or 1985 fiscal years that were below the prescribed minimum amounts, REA exceeded its authority, in our view.

Moreover, it is our opinion that because the funds were withheld pursuant to REA policy, REA's failure to achieve the lending levels established by statute for its insured loan program in the 1984 and 1985 fiscal years constituted an impoundment of budget authority that should have been but was not reported to the Congress in accordance with the Impoundment Control Act, 2 U.S.C. § 681, et seq. However, REA's failure to achieve the loan levels established by statute for its guaranteed loan program did not constitute an impoundment since the definition of "budget authority" contained in 2 U.S.C. § 622(2) specifically excludes loan guarantee authority.6/

According to one REA official, REA expects to meet the minimum fiscal year 1986 lending levels for electrification loans, but may not meet the minimum level for telephone loans. REA has not applied its general funds criteria to loan applications this fiscal year in accordance with the prohibition against its doing so contained in its appropriation for the 1986 fiscal year. According to the REA official, any failure to meet the minimum lending levels this year would result from the amount of time required to process loan applications. We are monitoring REA's actions to ensure compliance with the Impoundment Control Act.

The other question you asked us to address in this opinion is whether REA has adequately complied "with the requirements of the Administrative Procedures Act and the Department of Agriculture's own regulations and directives in the formulation and adoption of policy guidelines and agency bulletins relating to the administration of the REA loan program."

6/ While the definition of "budget authority" in 2 U.S.C. § 622 also excludes the authority to insure loans incurred by another person or Government, that exclusion does not apply to REA's insured loan program. As explained previously, under 7 U.S.C. § 935, REA insured loans are loans that are "made" in the first instance by REA (using funds in the Revolving Fund) which REA then sells and insures.

Our Office cannot definitively determine whether or not REA's practice of issuing bulletins to implement the rural electrification and telephone loan program violates the Administrative Procedures Act (APA), 5 U.S.C. §§ 551-557, for several reasons. First, this issue can only be resolved on a rule-by-rule basis. Second, the determination of whether a particular rule issued by an agency is required to be published in the Federal Register, and the effect of its failure to do so, can best be made by a court of competent jurisdiction after full consideration of the specific circumstances involved. See B-213805, September 28, 1984. However, we do have our own views on the matter which are set forth hereafter.

There are two provisions of the APA that must be considered in responding to this question--5 U.S.C. § 553 and 5 U.S.C. § 552(a). The effect of each of these provisions will be considered in turn.

Under 5 U.S.C. § 553, Federal agencies are required, with certain exceptions, to publish a notice of "proposed rulemaking" in the Federal Register at least 30 days prior to the effective date of any substantive rule in order to provide all interested parties with the opportunity to comment on the proposed rule before it takes effect. While 5 U.S.C. § 553(a)(2) specifically exempts any "matter relating to * * * loans, grants, benefits, or contracts" from the public notice and comment requirements imposed by that section, the Secretary of Agriculture waived the statutory exemption in 1971 and agreed to comply with the public participation procedures imposed by 5 U.S.C. § 553. See 36 Fed. Reg. 13804 (1971). It has been held that this waiver of the statutory exemption establishes a legally binding requirement that is applicable to the Department of Agriculture (or any subdivision thereof). See Rodway v. Department of Agriculture, 514 F.2d 809 (D.C. Cir. 1975). However, it has also been held that waivers of this type do not apply to any rules adopted prior to the date on which the waiver was published in the Federal Register. See Good Samaritan Hospital v. Mathews, 609 F.2d 949, 954 (9th Cir. 1979).

Thus, since 1971, REA, as a subdivision of Agriculture, has been required to comply with the notice and comment procedures set forth in 5 U.S.C. § 553 before issuing any

substantive rule[7]/ applicable to its electrification and telephone loan program. In its letter of January 6, 1986, REA agrees with our position and maintains that "REA has complied with the procedures for rules adopted thereafter [after 1971]."

To support its contention that since 1971 it has fully complied with the formal rule-making requirements in 5 U.S.C. § 553, REA furnished us with a copy of an internal REA memorandum, dated November 7, 1971, to the Administrator (copy enclosed) entitled "REA Compliance with the Secretary's Memorandum on Proposed Rule-Making." Paragraph 2 of the memorandum reads as follows:

> "The text of all new or revised REA bulletins incorporating program policy or requirements, or summaries thereof, would be published as Proposed Rules in the Federal Register. A standard introductory statement published with each proposed bulletin would advise those interested of the opportunity to submit their views to REA for consideration in development of the final bulletin not later than 30 days from the date of publication of the proposed rule in the Register. REA would issue the final bulletin any time after the 30 day waiting period, with incorporation of any appropriate suggestion received from the public as a result of the proposed rule making procedure."

We understand that REA commonly revises and updates the many bulletins that it has issued. In accordance with the Secretary's 1971 waiver of the exemption contained in 5 U.S.C. § 553, as well as the internal REA memorandum of November 7, 1971, it is clear that REA was and is obligated to comply with the formal notice and comment procedures set forth in 5 U.S.C. § 553 with respect to any substantive bulletin dealing with loan program requirements revised after the

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[7]/ Under 5 U.S.C. § 553(b) the notice and comment procedures otherwise required by the section do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" or when the agency determines that such procedures "are impracticable, unnecessary, or contrary to the public interest." We have not considered whether or not the bulletins REA issues might be exempt from the notice and comment procedures on this basis since REA did not make this argument in its letter to us of January 6, 1986.

waiver became effective in 1971. In light of the large number of bulletins REA has issued relating to its loan programs, we have not attempted to determine whether REA has complied with this procedural requirement for all new or revised bulletins issued after 1971.

However, considering your particular interest in REA's general funds policy, we have reviewed whether REA's general funds bulletins were issued in accordance with the formal notice and comment procedures set forth in 5 U.S.C. § 553. REA Bulletin 300-5, which sets forth REA general funds policy with respect to telephone loans, was last revised on August 16, 1969, prior to the 1971 waiver of the exemption in 5 U.S.C. § 553. Therefore, the formal rule-making procedures contained in the statute would not apply to Bulletin 300-5, unless REA revises it. This is consistent with REA's actions in 1983, when it published a notice of proposed rule-making in the Federal Register in connection with the proposed addition of a new part to the C.F.R. that would have in effect revised the general funds requirements for telephone loans as set forth in Bulletin 300-5. 48 Fed. Reg. 29000 (1983). However, REA never issued a final rule in that instance and Bulletin 300-5, as issued in 1969, has remained in effect without revision.

On the other hand, Bulletin 1-7, governing REA's electrification loan program was revised and reissued on December 6, 1977. Therefore, the formal notice and comment procedures set forth in 5 U.S.C. § 553 were applicable. In accordance with those procedures, REA published a notice of the proposed revision of Bulletin 1-7 in the Federal Register on September 27, 1977, and invited public comment thereon. 42 Fed. Reg. 49459 (1977). Subsequently, on May 16, 1978, REA published a list in the Federal Register indicating that the revised Bulletin 1-7, together with numerous other new and revised bulletins had been adopted as final. 43 Fed. Reg. 20955, 20956. However, as has been REA's custom in "publishing" its bulletins in the Federal Register, only the title of the bulletin and a brief summary description were actually published in the Federal Register. Thus, the text of the revisions to the bulletins were never published in the Federal Register, either at the time they were proposed or when they were adopted. The validity of this practice is discussed below.

The other relevant provision of the APA for purposes of your inquiry is set forth at 5 U.S.C. § 552(a). Under 5 U.S.C. § 552(a)(1)(D), agencies are required to publish in the Federal Register "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 * * *." This subsection further provides as follows:

> "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 to 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."

In its letter to us, REA maintains that it has complied with 5 U.S.C. § 552(a) "by publishing in the Federal Register a list and summary description of REA Bulletins." (40 Fed. Reg. 16075 (1975), as amended at 40 Fed. Reg. 31956, July 30, 1975.) REA also maintains that it "provides actual and timely notice of its existing rules by providing all borrowers with copies of bulletins as well as any proposed changes in the bulletins." Finally, REA asserts that, at the direction of the Office of the Federal Register, "REA has now undertaken to codify its bulletins."

We find that REA's statements in these respects are only partially accurate. Under 5 U.S.C. § 552, the Federal Register publication requirements can be satisfied through incorporation by reference--the method REA claims it has used to publish its bulletin--only with the approval of the Director of the Federal Register (Director). Information your office furnished to us indicates that the Director's approval of REA's efforts to incorporate its bulletins in the Federal Register by reference has been limited in scope. For example, in a letter dated December 31, 1980, the Director advised REA as follows:

> "The Director of the Federal Register approves for incorporation by reference into 7 CFR 1701, all REA Bulletins on the list enclosed with this letter. This approval is effective for one year beginning January 1, 1981, and is limited to the material listed.

* * * * *

> "The material for which the Rural Electrification Administration (REA) seeks approval appears to be the agency's substantive regulations respecting its telephone and electric programs. At present, REA has three and one-half pages of regulations published, and several hundred pages incorporated by reference. The Federal Register Act (44 U.S.C. Chapter 15), and Title 5 of the United States Code, sections 501 et seq, contemplate the Federal Register and the Code of Federal Regulations as the publication vehicles for regulations generated by federal agencies. Incorporation by reference is not a device for giving regulatory status to agency-produced regulations that should meet these full text publication requirements.
>
> "The approval to incorporate these REA Bulletins will expire December 31, 1981. During this year, we urge you to codify these Bulletins by publishing them in full text in the Federal Register and CFR."

Thereafter, the Director agreed to extend until June 30, 1983, his approval of the incorporation by reference of REA's substantive regulations. However, by letter dated June 29, 1983, the Director advised REA as follows:

> "As this Office has advised your agency since December, 1980, these bulletins are not appropriate for incorporation by reference. I have given this material extensions of approval based on your agency's promises that the material would be codified. Since this has not occurred, and because of my statutory responsibility for the integrity of the incorporation by reference system, I can no longer continue to grant approval for this material."

Thus, contrary to REA's assertion in its letter to us, since July 1, 1983, REA's efforts to incorporate its bulletins in the Federal Register by reference have, for the most part, been unsuccessful. Accordingly, it is our view that since that date, REA has not been in compliance with the requirements of 5 U.S.C. § 552. Also, while REA apparently has been in "the process" of codifying its bulletins in the Federal Register since at least 1982, such codification has not been completed to date.

The legal effect of an agency's noncompliance with the publication requirement of 5 U.S.C. § 552 is set forth in the

statute which provides that unless a person "has actual and timely notice" of material that is required to be published in the Federal Register and is not so published, the person is not bound by the unpublished regulations. See 55 Comp. Gen. 911, 918 (1970). However, REA asserts that all REA borrowers are provided with copies of REA bulletins and any proposed changes in them. As explained above, REA borrowers receiving actual notice of REA's rules and regulations would be bound by them, even though they were not published in the Federal Register. See Saint Francis Memorial Hospital v. United States, 648 F.2d 1305, 1312 (Ct. Cl. 1981). However, REA runs the risk of being unable to apply its unpublished bulletins to any REA borrower who did not receive actual notice of the material contained therein. See Saint Elizabeths Hospital v. United States, 558 F.2d 8, 14 (Ct. Cl. 1978).

We trust that the information contained in this opinion has been responsive to your request and will be helpful to you. In accordance with the agreement reached with a member of your staff, we will make this opinion generally available in 10 days.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

Enclosures