(i) *.5 percent* when the median household income of the service area is below the poverty line.

(ii) *1.0 percent* when the median household income of the service area is above the poverty line but not more than 85 percent of the State's nonmetropolitan median household income.

* * * * *

(7 U.S.C. 1989; 7 CFR 2.23; 7 CFR 2.70)

Dated: February 28, 1985.

Dwight O. Calhoun,

Acting Associate Administrator, Farmers Home Administration.

[FR Doc. 85-7861 Filed 4-1-85; 8:45 am]

BILLING CODE 3410-07-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Exceptions to Notice and Comment Rulemaking Procedures

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The final rule amends the Commission's rules of practice by revising Commission rulemaking procedures contained in 10 CFR 2.804 and 2.805 to clarify the Commission's use of the exceptions to notice and comment rulemaking contained in section 4 of the Administrative Procedure Act, 5 U.S.C. 553(b). This clarification is necessary in light of the U.S. Court of Appeals for the District of Columbia decision in *Union of Concerned Scientists* v. *Nuclear Regulatory Commission*, 711 F. 2d 370 (D.C. Cir. 1983).

EFFECTIVE DATE: May 3, 1985.

FOR FURTHER INFORMATION CONTACT: Francis X. Cameron, Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-8689.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Court of Appeals for the District of Columbia, in its decision in *Union of Concerned Scientists* v. *Nuclear Regulatory Commission*, 711 F. 2d 370 (D.C. Cir. 1983) ("*UCS* v. *NRC*"), vacated the Commission's rule of June 30, 1982, which amended operating licenses by removing the deadline for the environmental qualification of electric equipment (47 FR 28363, June 30, 1982). The D.C. Circuit held that by making the rule immediately effective instead of providing for notice and comment, the NRC had among other things, violated Commission regulations. This holding was based on language in 10 CFR 2.804 which the Court read, contrary to the Commission's interpretation, as a requirement for prior notice and opportunity for comment in all Commission rulemakings. The Court concluded that the NRC had divested itself of whatever discretion applicable statutes might allow for dispensing with notice and comment.

In response, the Commission issued a proposed rule to clarify its regulations so as to leave no doubt that the Commission does assert, to the extent allowable, its discretion under Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b), to make exceptions to the general requirements for notice and opportunity for comment in informal rulemaking (49 FR 13043, April 2, 1984). In making this clarification, however, the Commission also noted that the D.C. Circuit in *UCS* v. *NRC* had called into question the extent to which the Commission can lawfully claim discretion to invoke the APA exceptions to notice and comment rulemaking. As an alternative reason for vacating the rule under review, the D.C. Circuit held that the notice and hearing requirements in Section 189a of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239a, prevented the Commission from relying on the APA "good cause" exception in the June 30, 1982, rulemaking. In the Commission's view, however, the Court's explanation of this holding left unclear whether the Court saw Section 189a as a general bar to use of the APA "good cause" exception in any NRC rulemaking affecting the activities of licensees, or as a less sweeping restriction that would only apply to rulemakings which specifically amend reactor licenses. Consequently, the Commission moved the D.C. Circuit to vacate this part of its opinion. The Commission noted to the Court that the discussion of the relation between Section 189a and the APA "good cause" exception was unnecessary to the result of the case, raised issues which had not been briefed, was ambiguous in its scope, and could, if read broadly, interfere severely with the Commission's ability to act promptly in the interest of public health and safety. The Court then called for simultaneous briefing by the parties on the availability of the APA "good cause" exception in Commission rulemaking. The Commission filed a brief which maintained that Section 189a does not restrict use of the "good cause" exception. The Union of Concerned Scientists argued that there was a virtually total bar to use of the exception. After receiving this additional briefing, the Court on December 5, 1983 denied without opinion the Commission's motion to amend the decision, offering no further explanation or clarification of its holding, and ordered that its mandate should issue.

In the Supplementary Information to the proposed rule, the Commission noted its view that any reading of Section 189a which interferes with the Commission's ability to take immediate action affecting the activities of NRC licensees, whether by individual order or by rulemaking, when safety requires it, is contrary to the intent of Congress and is an erroneous interpretation of the Atomic Energy Act. A limitation on use of the APA "good cause" exception clearly has the potential for such interference and therefore should be interpreted narrowly.

Under these circumstances, it is reasonable to interpret the court's opinion no broader than the language and the context require. Accordingly, the Commission interprets the language in *UCS* v. *NRC* relevant to the availability of the "good cause" exception to apply only to the rulemaking under review in that case, *i.e.*, amendments of specific reactor licenses requiring prior notice by statute, while leaving unaffected the Commission's authority under the APA to make other kinds of rules effective without prior notice and comment when there is good cause. In response to the D.C. Circuit's opinion in *USC* v. *NRC*, the Commission proposed to include in 10 CFR 2.804 language providing that the APA exceptions to notice and comment rulemaking will apply only where notice and comment are not required by statute.

The proposed rule left intact for the most part the Commission's longstanding and consistent interpretation of its statutory authority and of rulemaking procedures contained in 10 CFR Part 2, Subpart H, that the Commission could avail itself of the exceptions to notice and comment rulemaking contained in the APA for—

- Interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. 5 U.S.C. 553(b)(A); or
- When the agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B).

To ensure that the regulation unambiguously reflected the Commission's intentions, the proposed rule amended 10 CFR 2.804 and 2.805 to provide explicitly for Commission discretion to invoke in appropriate situations the APA exceptions to notice and comment rulemaking cited above, as permitted by law. Under the proposed rule, notice and comment would not be mandatory in Commission rulemaking within the scope of section 553 of the U.S. Code, when they involve interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice, or where the Commission for good cause finds that notice and comment are impracticable, unnecessary or contrary to the public interest.

II. Comments

The Commission received five comments on the proposed rulemaking. Two of these were from the nuclear industry (Yankee Atomic Electric Company, Comment 2; Middle South Services, Comment 4), one from a private citizen (M.L. Lewis, Comment 1), one from a public interest group (Union of Concerned Scientists, Comment 5), and one from a Federal agency (Administrative Conference of the United States, Comment 3).

One of these commenters (M.L. Lewis) expressed the opinion that the proposed rule was an attempt to remove the public's right to comment on a rule before it becomes effective. The proposed rule simply incorporates into the Commission's regulations, the exceptions to notice and comment provided in the APA. These statutory exceptions, generally available to all agencies, are a congressional recognition that in some situations the normal public participation procedures should not be required in advance of taking the action. Public comment, however, will be sought post-promulgation pursuant to new Section 2.804(e) where it is necessary because of public interest in the rule. The Commission's normal practice, in keeping with Section 4 of the APA, is to provide for public participation in Commission rulemakings.

Another commenter, the Administrative Conference of the United States (ACUS), recommended that the final rule provide an opportunity for "post-promulgation" comment whenever the good cause exception of Section 4 of the APA was invoked because prior notice and comment was "impracticable" or "contrary to the public interest." However, such post-promulgation comment need not be provided when the good cause exception was invoked because prior notice and comment are "unnecessary." This corresponds to Administrative Conference Recommendation 83-2, 1 CFR 305, 83-2 (1984). Recommendation 83-2 stated that experience has confirmed the need for a "good cause" exception from the APA's notice and comment requirements. However, a post-promulgation comment opportunity "will give interested persons a chance to expose any errors or oversights that occurred in the formulation of the rule and to present policy arguments for changing the rule." *Id.* at 158. The post-promulgation comment opportunity should not extend to rules for which the agency determines public notice and comment to be "unnecessary" because such rules have been found by the courts to be minor or merely technical amendments in which the public has little interest.

The Commission agrees in principle with the recommendation of the ACUS. Accordingly, the final rule incorporates a new provision, 10 CFR 2.804(e), to provide for post-promulgation comment on rules when the "good cause" exception is invoked when prior notice and comment is "impracticable" or "contrary to the public interest." After receipt of comments, the Commission will publish a statement in the **Federal Register** which provides an evaluation of any significant issues raised by the public comments, as well as any revisions to the rule that have resulted from the staff evaluation of the public comments.

In addition, the ACUS recommended that the Commission should normally use notice and comment when adopting interpretative rules or general policy statements that are likely to have a substantial impact on the public, or at least to provide a post-promulgation comment opportunity if there has been no notice and comment prior to the adoption of such rules or statements. This corresponds to ACUS Recommendation 76-5, 1 CFR 305.76-5 (1984). The Commission normally provides for notice and opportunity for comment on policy statements and interpretative rules, and will continue to do so in the future. In order to retain the flexibility provided by the exception in Section 4 of the APA, the Commission has not adopted the ACUS recommendation completely. The Commission, in 10 CFR 2.804(e), provides for a post-promulgation comment opportunity for interpretative rules or general statements of policy issued without prior notice and comment, except when the Commission finds that post-promulgation comment would "serve no public interest or would be so burdensome as to outweigh any forseeable gain." This latter provision reflects ACUS Recommendation 76-5. *Id.*

A third commenter, the Union of Concerned Scientists (UCS), asserted that Section 189a of the Atomic Energy Act requires the Commission to provide notice and opportunity for comment with respect to *any* rulemaking proceeding dealing with the activities of licensees and consequently prohibits the Commission from restricting the limitation on the use of the APA exceptions to notice and comment rulemaking to rulemakings which amend reactor licenses. Section 189a(1) of the Atomic Energy Act provides, among other things, that:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, *and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees*, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, *the Commission shall grant a hearing* upon the request of any person whose interest may be affected by the proceeding. (Emphasis added)

UCS argues that this provision constitutes a statutory bar to the use of the APA exceptions from notice and comment rulemaking. These exceptions are normally available, "except when notice or hearing is required by statute." 5 U.S.C. 553(b). According to the commenter, this proposition was affirmed in *UCS* v. *NRC* where the D.C. Circuit held that "[w]hether characterized as a license amendment or a rulemaking, the Commission's action runs afoul of the express terms of Section 189(a) which unequivocally requires notice and opportunity to comment for both types of proceedings." *Supra* at 380. Therefore, the commenter argues, the Commission cannot limit the decision in *UCS* v. *NRC* to the specific type of rule at issue in that case, i.e. rules which specifically amend reactor licenses. Furthermore, the commenter does not believe that the Commission needs the APA "good cause" exception to take immediate action when safety requires it: In support, the commenter cited the Commission's ability to issue an "immediately effective license amendment" when no significant hazards are involved or to issue an "immediately effective order."

In response, the Commission first reiterates its earlier statement that it is reasonable to give the Court's opinion in *UCS* v. *NRC* an interpretation no more restrictive than the language and context appear to require. As noted earlier, the Court's explanation of its holding left unclear whether the Court saw section 189a of the Atomic Energy

Act as a general bar to the use of the APA "good cause" exception in any NRC rulemaking affecting the activities of licensee, or as a less sweeping restriction, which would only apply to rulemakings which specifically amend reactor licenses. The Commission would note that Section 181 of the Atomic Energy Act states that "[t]he provisions of the Administrative Procedure Act . . . shall apply to all agency action taken under this Act," 42 U.S.C. 2231. It is well-established that Commission rulemaking is governed by the APA requirements for informal rulemaking, set out in 5 U.S.C. 533, in which the exceptions to notice and comment appear.[1] Unless the APA exceptions are withdrawn by language elsewhere in the Atomic Energy Act, it should be presumed the Congress intended the exceptions to be available. The Commission does not believe that the language of Section 189a, or any other language in the Atomic Energy Act, compels a finding that Congress intended to deprive the Commission of the rulemaking flexibility permitted by the APA. Nothing in the language of Section 189a or the legislative history specifies that in rulemaking the Commission is to be limited by the constraints of the APA, but denied the opportunity to use the flexibility provided by the APA. The Commission's interpretation of the Atomic Energy Act as not prohibiting the promulgation of a rule without notice and opportunity to comment when APA "good cause" requirements have been met has been consistent and longstanding, and is reflected in Commission practice.[2]

The interpretation on which UCS insists cannot be reconciled with the Nuclear Regulatory Commission's clear responsibility to act swiftly to protect public health and safety when it perceives that a regulated activity presents an undue risk. Under the regulatory framework established by the Atomic Energy Act, the Commission's primary means of responding to hazards is by suspending, revoking, or amending licenses. The notice and hearing requirements for such actions are set out in Section 189a(1) of the Act in the same language that applies to rulemaking dealing with the activities of licensees. Accordingly, if Congress intended the language of Section 189a(1) to be read, as the commentor would read it, as an absolute bar on the Commission's ability to promulgate regulations without delay even when there is good cause for doing so, the same bar apparently would apply to immediate action by the Commission to suspend or revoke licenses in circumstances where delay could have grave consequences. This cannot have been Congress' intention. Even the commentor recognizes that such a restriction would be fundamentally at odds with the Commission's responsibilities.[3] The Commission therefore rejects their interpretation of Section 189(a) as overriding the APA good cause exception and requiring prior notice and comment in all Commission licensing and rulemaking activities, regardless of circumstances.

The language the commenter cites from *UCS* v. *NRC that* "[w]hether characterized as a license amendment or a rulemaking, the Commission's action runs afoul of the express terms of section 189a which unequivocally requires notice and comment for both types of proceedings," *supra* at 380, must be read in the context of the Court's reference to Section 187 of the Atomic Energy Act, 42 U.S.C. 2237. Section 187 explicitly provides that "the terms and conditions of all licenses shall be subject to amendment, revision, or modification, . . . by reason of rules and regulations issued in accordance with the terms of this Act." As the Court noted:

> We express no opinion on the arguments of the parties on the question whether these amendments must be made by adjudication or whether they fall within that category of license amendments that may be made by rule under section 187 of the Atomic Energy Act, 42 U.S.C. § 2237 (1976). That is a matter for the NRC to determine in the first instance on remand. We merely hold here that notice and an opportunity to comment must be provided whatever administrative route is taken. Section 187 provides that "[t]he terms and conditions of all licenses shall be subject to amendment . . . by reason of rules and regulations *issued in accordance with the terms of this chapter* [sic]." 42 U.S.C. § 2237 (emphasis added). Since section 189(a) requires a hearing "in any proceeding for the issuance . . . of rules and regulations dealing with the activities of licensees," id. § 2239(a), a license amendment effected pursuant to section 187 but without notice and comment would not be "issued in accordance with the terms of this chapter." *Id.*

In order to comply with the Court's decision, 10 CFR 2.804 of the final rule provides for prior notice and comment whenever a rulemaking would specifically amend reactor licenses. However, as noted earlier, the Commission believes it is reasonable to give the Court's opinion an interpretation no more restrictive than the language and context requires.

Any reading of Section 189a, which interferes with the Commission's ability to take immediate action affecting the activities of NRC licensees, whether by order or by rulemaking, when safety requires it, is contrary to the intent of Congress. A limitation on use of APA "good cause" exception clearly has the potential to interfere with the Commissions safety responsibilities and therefore should be interpreted narrowly. The existence of the other mechanisms cited by the commenter that would enable the Commission to act quickly in the event of a safety emergency is not a sufficient rationale to deny the Commission the availability of all mechanisms provided by law, such as the use of the APA exceptions to notice and comment rulemaking.

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[1] *See, e.g. Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

[2] For example, see the following instances where the Commission has invoked the APA exceptions to notice and comment rulemaking: Amendment to Definition of Production Facility, 26 FR 4989 (June 6, 1961); Siting of Reprocessing Plants and Related Waste Management Facilities, 36 FR 5411 (March 23, 1971); Prohibition of Site Preparation and Related Activities, 37 FR 5745 (March 21, 1972); Exemption for Facilities Processing Irradiated Materials Containing Limited Quantities of Special Nuclear Materials, 39 FR 4871 (February 8, 1974); Application of Certain Cost—Benefit Analysis Requirements of Appendix I to Certain Nuclear Power Plants, 40 FR 40816 (September 4, 1975); Codes and Standards for Nuclear Power Plants, 41 FR 23831 (June 14, 1976); Revocation of Certain Reporting Requirements, 43 FR 49175 (October 25, 1978); Amendment to Definition of Basic Components, 43 FR 48621 (October 10, 1978); Domestic Licensing Proceedings; Modified Adjudicatory Procedures, 44 FR 65050 (November 9, 1979); Packaging of Radioactive Materials for Transport and Transportation of Radioactive Materials Under Certain Conditions, 44 FR 63083 (November 2, 1979); Physical Protection of Irradiated Reactor Fuel in Transit, 44 FR 34466 (June 15, 1979); Emergency Planning and Preparedness for Production and Utilization Facilities, 46 FR 63031 (December 30, 1981); Commission Review Procedures for Power Reactor Construction Permits and Operating Licenses 47 FR 40535 (September 15, 1982); Filing of Copies of Changes to Emergency Plans and Procedures, 47 FR 57670 (December 29, 1982).

[3] The Union of Concerned Scientists states in its comments that the Commission retains authority to take immediate safety action, but apparently believes that language in Section 189a authorizing immediately effective license amendments that involve "no significant hazards consideration" gives the Commission its sole power to act immediately to protect safety. This language was not included in the 1954 statute and did not appear until the 1962 amendments. Thus, UCS's approach implies that prior to 1962 the Commission had no power at all to take immediate safety action affecting licensees and that after 1962, Congress allowed such action only through the device of amending licenses, even if a temporary license suspension would be more appropriate. This approach is contradictory to the emphasis on safety and flexibility apparent throughout the Act, its legislative history, and longstanding Commission practice prior to 1962. A more reasonable approach which the Commission adopts, is that Congress intended from the beginning that the APA exceptions for immediately effective action should be available to the Commission and were not to be overridden by Section 189.

On a separate matter, UCS also objected to a provision currently in 10 CFR 2.804 which allows the Commission to use means of providing notice of proposed rulemaking other than publication in the **Federal Register**. Section 2.804(a) provides that:

> when the Commission proposes to adopt, amend, or repeal a regulation it will cause to be published in the **Federal Register** a notice of proposed rulemaking unless all persons subject to the notice are named and either personally served or otherwise have actual notice in accordance with law.

According to the commenter, Section 189a of the Atomic Energy Act requires the Commission to provide a notice and comment hearing to any person whose interest may be affected by the proceeding. Because this could include all members of the public affected by the proceeding, the commenter argues that it is misleading to suggest that the Commission could avoid **Federal Register** publication by attempting personal service of all affected members of the public. In addition, the commenter asserts that the provision would be illegal if the Commission intends to implement the rule by giving notice only to the licensees governed by particular rules.

This provision is within the permissible scope of 5 U.S.C. 552(a), is not an issue that was addressed in *USC* v. *NRC*, and does not fall within the ambit of this rulemaking. Therefore, this provision is unaffected by this rulemaking and is retained as part of Commission regulations.

Another commenter, (Yankee Atomic) writing in support of the rule, stated that the notice and comment requirements of Section 4 of the Administrative Procedure Act must be followed whenever a Commission rulemaking ". . . changes existing rights and obligations . . ." for licensees. The basis for this statement, and the source of the quoted material, is the decision in *Lewis—Mota* v. *Secretary of Labor*, 469 F.2d 478, 482 (2d. Cir. 1972). In response, the Commission reiterates that any limitations on the use of the APA exceptions from notice and comment inferred from *UCS* v. *NRC* only apply to the kind of rulemaking under review in that case, i.e. rules that specifically amend reactor licenses. Under the final rule, the Commission can avail itself of the APA exemptions, if the requisite criteria are met, for any other rulemakings even if they do affect the "rights and obligation" of licensees. The case cited by the commenter, *Lewis-Mota* v. *Secretary of Labor*, focused on an application of the APA exception from notice and comment rulemaking for *interpretative* rules. The issue in the case was whether the particular rule was a "substantive" rule or an "interpretative" rule. The phrase cited by the commenter was made in the context of determining whether the rule was a "substantive" rule, i.e., whether it "changes existing rights and obligations." In applying the exemptions contained in Section 4 of the APA, the Commission will follow all applicable law, including judicial decisions, in determining whether a rule is an interpretative rule or a substantive rule as a part of its determination concerning what rulemaking procedures are applicable.

Finally, one commenter (Middle South Services), although supporting the rule, recommended that 10 CFR 2.805 be amended to ensure that public participation in Commission rulemaking is of a "timely" fashion. The Commission does not believe that it is necessary to amend Section 2.805 to include the word "timely." Each Commission rulemaking establishes appropriate requirements for timely participation.

III. Final Rule

Section 2.804(d). This section provides for Commission discretion to invoke, in appropriate situations, the APA exceptions to notice and comment rulemaking as permitted by law. Under the final rule, notice and comment would not be mandatory in Commission rulemaking within the scope of section 553 of the U.S. Code, when they involve interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice, or where the Commission for good cause finds that notice and comment are impracticable, unnecessary or contrary to the public interest. However, the use of such exceptions is not available when notice and comment are required by statute. The Commission interprets the *UCS* v. *NRC* case as establishing such a limitation on the use of the APA exceptions only for rules which specifically amend reactor licenses. The exceptions to notice and comment will be available for use, in appropriate situations for all other rules, including those that deal with the activities of licensees.

Section 2.804(e). This section provides for post-promulgation comment for all rules issued on the basis of the good cause exception when prior notice and comment was "impracticable" or "contrary to the public interest." Section 2.804(e) will also provide a post-promulgation comment opportunity for policy statements and interpretative rules that are issued without prior notice and comment. However, this opportunity for post-promulgation comment on interpretive rules and policy statement is not required if the Commission finds that such procedures would serve no public interest or would be so burdensome as to outweigh any forseeable gain.

Section 2.804(f). This section provides for a Commission evaluation of all significant issues raised by the comments received under the post-promulgation procedures of § 2.804(e).

Section 2.805(a). This section has been revised to reflect the revisions made to § 2.804.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq*.).

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule will not have a significant economic impact upon a substantial number of small entities. It merely clarifies and affirms existing Commission practice on utilizing the statutory exceptions to notice and comment rulemaking contained in Section 4 of the Administrative Procedure Act, 5 U.S.C. 553.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Part 2.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

Subpart H—Rulemaking

1. The authority citation for Part 2 continues to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Section 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955 as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 2.200–2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.300–2.309 also issued under Pub. L. 97–415, 96 Stat. 2071 (42 U.S.C. 2133). Sections 2.600–2.606 also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Sections 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85–256, 71 Stat. 579, as amended (42 U.S.C. 2039). Appendix A also issued under sec. 6, Pub. L. 91–580, 84 Stat. 1437 (42 U.S.C. 2135).

2. In § 2.804, paragraph (a) is revised and new paragraphs (d), (e), and (f) are added to read as follows:

§ 2.804 Notice of proposed rulemaking.

(a) Except as provided by paragraph (d) of this section, when the Commission proposes to adopt, amend, or repeal a regulation, it will cause to be published in the **Federal Register** a notice of proposed rulemaking, unless all persons subject to the notice are named and either are personally served or otherwise have actual notice in accordance with law.

* * * * *

(d) The notice and comment provisions contained in paragraphs (a), (b), and (c) of this section will not be required to be applied—

(1) To interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(2) When the Commission for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest, and are not required by statute. This finding, and the reasons therefor, will be incorporated into any rule issued without notice and comment for good cause.

(e) The Commission shall provide for a 30-day post-promulgation comment period for—

(1) Any rule adopted without notice and comment under the good cause exception on paragraph (d)(2) of this section where the basis is that notice and comment is "impracticable" or "contrary to the public interest."

(2) Any interpretative rule, or general statement of policy adopted without notice and comment under paragraph (d)(1) of this section, except for those cases for which the Commission finds that such procedures would serve no public interest, or would be so burdensome as to outweigh any foreseeable gain.

(f) For any post-promulgation comments received under paragraph (e) of this section, the Commission shall publish a statement in the **Federal Register** containing an evaluation of the significant comments and any revisions of the rule or policy statement made as a result of the comments and their evaluation.

3. In § 2.805, paragraph (a) is revised to read as follows:

§ 2.805 Participating by interested persons.

(a) In all rulemaking proceedings conducted under the provisions of § 2.804(a), the Commission will afford interested persons an opportunity to participate through the submission of statements, information, opinions, and arguments in the manner stated in the notice. The Commission may grant additional reasonable opportunity for the submission of comments.

* * * * *

Dated at Washington, D.C., this 28th day of March 1985.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Acting Secretary of the Commission.

[FR Doc. 85–7848 Filed 4–1–85; 8:45 am]

BILLING CODE 7590-01-M

FEDERAL RESERVE SYSTEM

12 CFR Parts 204, 208, and 217

[Docket No. R-0542]

Regulations D, H, and Q; Repurchase Agreement Involving Shares of a Money Market Mutual Fund Whose Portfolio Consists Wholly of United States Treasury and Federal Agency Securities; State Member Bank Purchase of Shares of a Money Market Mutual Fund Whose Portfolio Consists Wholly of Securities That the Bank May Purchase Directly

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final interpretation.

SUMMARY: The Board of Governors has issued an interpretation of the definition of deposit in Regulation D—Reserve Requirements of Depository Institutions (12 CFR Part 204) and Regulation Q—Interest on Deposits (12 CFR Part 217) to exclude from the definition of the term "deposit" repurchase agreements involving shares of a money market mutual fund whose portfolio consists wholly of United States Treasury and federal agency securities. The Board of Governors has also issued an interpretation to Regulation H—Membership of State Banking Institutions in the Federal Reserve System (12 CFR Part 208) to permit state member banks to purchase shares in a money market mutual fund whose portfolio consists entirely of assets that the bank may purchase directly.

EFFECTIVE DATE: The reserve computation period beginning June 4, 1985.

FOR FURTHER INFORMATION CONTACT: J. Virgil Mattingly, Associate General Counsel (202/452-3430), or Elaine M. Boutilier, Attorney (202/452-2418), Legal Division, Board of Governors of the Federal Reserve System, Washington, D.C. 20551

SUPPLEMENTARY INFORMATION:

List of Subjects

12 CFR Part 204

Banks, banking, Currency, Federal Reserve System, Penalties, Reporting requirements.

12 CFR Part 208

Banks, banking, Federal Reserve System; Reporting requirements, Securities.

12 CFR Part 217

Advertising, Banks, banking, Federal Reserve System, Foreign banking.

Pursuant to its authority under sections 9 and 19 of the Federal Reserve Act (12 U.S.C. 321 *et seq.* and 461 *et* seq.), the Board amends 12 CFR Part 204, Regulation D, 12 CFR Part 208, Regulation H and 12 CFR Part 217, Regulation Q as follows:

PART 204—[AMENDED]

1. Regulation D (12 CFR Part 204) is amended by adding a new § 204.124 as follows:

§ 204.124 Repurchase agreement involving shares of a money market mutual fund whose portfolio consists wholly of United States Treasury and Federal agency securities

(a) The Federal Reserve Act, as amended by the Monetary Control Act of 1980 (Title I of Pub. L. 96-221) imposes Federal reserve requirements on transaction accounts and nonpersonal time deposits held by depository institutions. The Board is empowered under the Act to determine what types of obligations shall be deemed a deposit (12 U.S.C. 461). Regulation D—Reserve Requirements of Depository Institutions exempts from the definition of "deposit" those obligations of a depository institution that arise from a transfer of direct obligations of, or obligations that are fully guaranteed as to principal and interest by, the United States government or any agency thereof that the depository institution is obligated to repurchase (12 CFR 204.2(a)(1)(vii)(B)). A parallel exemption in Regulation Q—Interest on Deposits exempts from the definition of "deposit" obligations that evidence an indebtedness arising from a transfer of direct obligations of, or obligations that are fully guaranteed as to principal and interest by, the United States or any agency thereof that the bank is obligated to repurchase (12 CFR 217.1(f)(2)).

(b) The National Bank Act provides that a national bank may purchase for its own account investment securities under limitations and restrictions as the Comptroller may prescribe (12 U.S.C. 24, ¶ 7). The statute defines investment securities to mean marketable obligations evidencing indebtedness of any person in the form of bonds, notes, and debentures. The Act further limits a national bank's holdings of any one security to no more than an amount equal to 10 percent of the bank's capital stock and surplus. However, these limitations do not apply to obligations issued by the United States, general obligations of any state and certain obligations of federal agencies. In addition, generally a national bank is not permitted to purchase for its own account stock of any corporation. These restrictions also apply to state member banks (12 U.S.C. 335).

(c) The Comptroller of the Currency has permitted national banks to purchase for their own accounts shares of open-end investment companies that are purchased and sold at par (i.e., money market mutual funds) provided the portfolios of such companies consist solely of securities that a national bank may purchase directly (Banking Bulletin B-83-58). The Board of Governors has permitted state member banks to purchase, to the extent permitted under applicable state law, shares of money market mutual funds ("MMMF") whose portfolios consist solely of securities that the state member bank may purchase directly (12 CFR 208.123).

(d) The Board has determined that an obligation arising from a repurchase agreement involving shares of a MMMF whose portfolio consists wholly of securities of the United States government or any agency thereof [1] would not be a "deposit" for purposes of Regulations D and Q. The Board believes that a repurchase agreement involving shares of such a MMMF is the functional equivalent of a repurchase agreement directly involving United States government or agency obligations. A purchaser of shares of a MMMF obtains an interest in a *pro rata* portion of the assets that comprise the MMMF's portfolio. Accordingly, regardless of whether the repurchase agreement involves United States government or agency obligations directly or shares in a MMMF whose portfolio consists entirely of United States government or agency obligations, an equitable and undivided interest in United States and agency government obligations is being transferred. Moreover, the Board believes that this interpretation will further the purpose of the exemption in Regulations D and Q for repurchase agreements involving United States government or federal obligations by enhancing the market for such obligations.

PART 208—[AMENDED]

2. Regulation H (12 CFR Part 208) is amended by adding a new § 208.123 as follows:

§ 208.123 Purchase of shares of a money market mutual fund whose portfolio consists wholly of securities that the member bank may purchase directly.

(a) The National Bank Act provides that a national bank may purchase for its own account investment securities under limitations and restrictions as the Comptroller may prescribe (12 U.S.C. 24, ¶ 7). The statute defines investment securities to mean marketable obligations evidencing indebtedness of any person in the form of bonds, notes, and debentures. The Act further limits a national bank's holdings of any one security to no more than an amount equal to 10 percent of the bank's capital stock and surplus. However, these limitations do not apply to obligations issued by the United States, general obligations of any state and certain obligations of federal agencies. In addition, with certain limited exceptions, a national bank is not permitted to purchase for its own account stock of any corporation. These restrictions also apply to state member banks (12 U.S.C. 335).

(b) The Comptroller of the Currency has permitted national banks to purchase for their own accounts shares of open-end investment companies that are purchased or sold at par (i.e., money market mutual funds) provided the portfolios of such companies consist solely of securities that a national bank may purchase directly.

(c) The Board of Governors has determined to permit state member banks to purchase shares of money market mutual funds ("MMMF") whose portfolios consist solely of securities that the state member bank may purchase directly. The purchase by a state member bank of shares of such a MMMF is functionally equivalent to the bank's purchase of the securities that comprise the portfolio of the MMMF. A bank that purchases shares of a MMMF acquires an undivided equitable ownership interest in the securities that comprise the MMMF portfolio. Moreover, purchase of shares of such a MMMF would not result in speculative risks or wide fluctuations because the bank currently may purchase directly the assets comprising the MMMF portfolio and because of the rules of the Securities and Exchange Commission concerning MMMFs. Indeed, by providing greater scope for diversification, particularly for smaller banks, allowing the purchase of such MMMF shares may contribute to lower risk than purchase by the state member bank of the assets comprising the MMMF portfolio directly.

(d) The Board has adopted the following conditions, similar to those adopted by the Comptroller of the Currency for national banks, to ensure that in those cases in which a state member bank may purchase securities in limited amounts, the bank does not

[1] The term "United States government or any agency thereof" as used herein shall have the same meaning as in § 204.2(a)(1)(vii)(B) of Regulation D, 12 CFR 204.2(a)(1)(vii)(B).

exceed the limitations indirectly through the purchase of MMMF shares:

(1) The fund is an open-end investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 and Securities Act of 1933 or a privately offered fund sponsored by an affiliated commercial bank.[2]

(2) When the fund's assets consist solely of and are limited to obligations that are eligible for investment without limit by a state member bank, there is no limit on the bank's investment. But where the fund contains securities subject to the bank's investment or lending limitations, investment in the MMMF may not exceed these investment or lending limitations. Where the state member bank purchases shares in more than one fund containing securities subject to the bank's investment or lending limitations, the bank's aggregate investment in such funds may not exceed these investment or lending limitations. Where the state member bank purchases such securities directly, the aggregate maximum allowable investment in such MMMF(s) is reduced accordingly.

(3) The fund's shares are bought and sold at par (i.e., the fund is a money market fund).

(4) The shareholder has an equitable and equal proportionate undivided interest in the underlying assets of the fund.

(5) Shareholders are shielded from personal liability for acts or obligations of the fund.

(6) The bank's investment policy, as formally approved by its board of directors, specifically provides for such investments; prior approval of the board of directors is obtained for initial investments in specific funds and recorded in the official board minutes; and procedures, standards, and controls for the implementation of such investments are established.

(7) The bank conducts reviews at least monthly of its holdings of investment company shares to ensure that such investments are in accordance with the foregoing principles.

(e) State member banks would also be subject to any other restrictions imposed by applicable state law.

PART 217—[AMENDED]

3. Regulation Q (12 CFR Part 217) is amended by adding a new § 217.161 as follows:

§ 217.161 Repurchase agreements involving shares of a money market mutual fund whose portfolio consists wholly of United States Treasury and Federal agency securities.

(a) The Federal Reserve Act, as amended by the Monetary Control Act of 1980 (Title I of Pub. L. 96–221) imposes federal reserve requirements on transaction accounts and nonpersonal time deposits held by depository institutions. The Board is empowered under the Act to determine what types of obligations shall be deemed a deposit (12 U.S.C. 461). Regulation D—Reserve Requirements of Depository Institutions exempts from the definition of "deposit" those obligations of a depository institution that arise from a transfer of direct obligations of, or obligations that are fully guaranteed as to principal and interest by, the United States government or any agency thereof that the depository institution is obligated to repurchase (12 CFR 204.2(a)(1)(vii)(B)). A parallel exemption in Regulation Q—Interest on Deposits exempts from the definition of "deposit" obligations that evidence an indebtedness arising from a transfer of direct obligations of, or obligations that are fully guaranteed as to principal and interest by, the United States or any agency thereof that the bank is obligated to repurchase (12 CFR 217.1(f)(2)).

(b) The National Bank Act provides that a national bank may purchase for its own account investment securities under limitations and restrictions as the Comptroller may prescribe (12 U.S.C. 24, ¶ 7). The statute defines investment securities to mean marketable obligations evidencing indebtedness of any person in the form of bonds, notes, and debentures. The Act further limits a national bank's holdings of any one security to no more than an amount equal to 10 percent of the bank's capital stock and surplus. However, these limitations do not apply to obligations issued by the United States, general obligations of any state and certain obligations of federal agencies. In addition, generally a national bank is not permitted to purchase for its own account stock of any corporation. These restrictions also apply to state member banks (12 U.S.C. 335).

(c) The Comptroller of the Currency has permitted national banks to purchase for their own accounts shares of open-end investment companies that are purchased and sold at par (i.e., money market mutual funds) provided the portfolios of such companies consist solely of securities that a national bank may purchase directly (Banking Bulletin B–83–58). The Board of Governors has permitted state member banks to purchase, to the extent permitted under applicable state law, shares of money market mutual funds ("MMMF") whose portfolios consist solely of securities that the state member bank may purchase directly (12 CFR 208.123).

(d) The Board has determined that an obligation arising from a repurchase agreement involving shares of a MMMF whose portfolio consists wholly of securities of the United States government or any agency thereof[3] would not be a "deposit" for purposes of Regulations D and Q. The Board believes that a repurchase agreement involving shares of such a MMMF is the functional equivalent of a repurchase agreement directly involving United States government or agency obligations. A purchaser of shares of a MMMF obtains an interest in a *pro rata* portion of the assets that comprise the MMMF's portfolio. Accordingly, regardless of whether the repurchase agreement involves United States government or agency obligations directly or shares in a MMMF whose portfolio consists entirely of United States government or agency obligations, an equitable and undivided interest in United States and agency government obligations is being transferred. Moreover, the Board believes that this interpretation will further the purpose of the exemption in Regulations D and Q for repurchase agreements involving United States government or federal obligations by enhancing the market for such obligations.

By order of the Board of Governors, March 26, 1985.

William W. Wiles,

Secretary of the Board.

[FR Doc. 85–7621 Filed 4–1–85; 8:45 am]

BILLING CODE 6210-01-M

[2] This provision concerning a privately offered fund sponsored by an affiliated commercial bank is a limited provision applicable only to a privately sponsored fund of a subsidiary of a holding company whose shares may be purchased only by other subsidiaries of the holding company.

[3] The term "United States government or any agency thereof" as used herein shall have the same meaning as in § 204.2(a)(1)(vii)(B) of Regulation D, 12 CFR 204.2(a)(1)(vii)(B).