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Robert R. Elliot, Esquire General Counsel Department of Housing and Urban Development Washington, D.C. 20410

Dear Mr. Elliot:

This is in response to your letter to me of November 28, 1975. You have requested us to confirm that the Department of Housing and Urban Development may, in operating the revised Housing Act, 12 U.S.C. Sec. 1715z et seq., utilize budget authority previously recorded by HUD as an obligation of the United States under 31 U.S.C. Sec. 200(a)(6).

You state that the subject budget authority was recorded on August 21, 1975, in compliance with an order of the United States District Court for the District of Columbia in the case of States v. Lynn, (Civ. Action 75- 0551), entered on August 20, 1975. This order stated in pertinent part:

"* * * that the budget authority which is the subject of Presidential deferral message D75-48, and which was authorized in acts of Congress prior to July 1, 1974, to be used pursuant to Section 235 of the National Housing Act, 12 U.S.C. 171z et seq., be recorded as an obligation of the United States pursuant to 31 U.S.C. 200(a)(6); and that defendants are directed to take whatever steps may be required to cause such obligation to be duly recorded no later than 6:00 p.m. on August 21, 1975, the recording to be effective immediately * * *"

In our decision at 54 Comp. Gen. 962 (May 15, 1975), we held that a preliminary order entered by the U.S. District Court for the District of Minnesota in Bennett v. Butz, 386 F. Supp. 1059 (D. Minn. 1974), created a valid obligation against the unexpended balance of the FY 1973 Food Stamp appropriation. The court order in Bennett provided in pertinent part that the defendants:

"* * * shall no later than June 29, 1973, record as an obligation of the United States pursuant to 31 U.S.C. 200(a)(6) and (8) all such sums appropriated for the Food Stamp Program for the fiscal year ending June 30, 1973, pursuant to Public Law 92-399, including the contingency reserve specified therein, which are not otherwise obligated as of that date or to become duly obligated thereafter * * *."

The Bennett court subsequently found that the unexpended FY 1973 Food Stamp Program appropriations balance had been in effect illegally impounded, and it entered a final order that the defendants "make available for present expenditure" all "surplus funds" which were obligated pursuant to the court's

preliminary order. 386 F. Supp. 1059, 1071-1072.

You ask whether the decision in 54 Comp. Gen. 962 is controlling in the present situation, and you suggest that the only distinction between the court order in Staats v. Lynn and that in bennett v. Butz was that the latter dealt with the lapse of an annual appropriation at the end of a fiscal year, while the former sought to prevent the lapse of budget authority required by the applicable authorizing legislation, 12 U.S.C. Sec. 1715z(h)(1) as amended by Section 211(a)(2) of the Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 671. This section provided:

"Upon the expiration of one year following August 22, 1974, the Secretary shall not enter into new contracts for assistance payments under this section utilizing authority approved in appropriation Acts prior to July 1, 1974."

We do not believe that this distinction is significant as concerns the applicability of the rule set down in 54 Comp. Gen. 962. Section 211(a)(2) of the Housing and Community Development Act of 1974 placed a limitation on the Secretary's use of contract authority which, as made clear in 31 U.S.C. Sec. 2 and 31 U.S.C. Sec 1302, is the same as any other appropriated budget authority. Viewed as such, all Section 235 budget authority which had previously been provided to remain available until expended.

31 U.S.C. Sec. 200(d) provides:

"No appropriation or fund which is limited for obligation purposes to a definite period of time shall be available for expenditure after the expiration of such period except for liquidation of amounts obligated in accord with subsection (a) of this section; but no such appropriation or fund shall remain available for expenditure for any period beyond that otherwise authorized by law."

31 U.S.C. Sec. 200(a0 states in pertinent part:

"(a) * * * no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of --

* * * * *

"(6) a liability which may result from pending litigation brought under authority of law * * *."

In our opinion at 35 Comp. Gen. 185 (1955), we said that considering the legislative history of 31 U.S.C. Sec. 200 (a)(6), the section could only be used to record obligations where the Government was definitely liable and the litigation was pending only to determine the amount of the liability. However, in 54 Comp. Gen. 962, this rule was modified to take into account the "unique" aspect of impoundment litigation. Nothing that while the underlying concern in enacting 31 U.S.C. Sec. 200 was the overobligation of funds, the concern in impoundment litigation is with the underobligation of appropriations which threatens to frustrate congressional intent, we concluded:

"In the context of this litigation, therefore, it would be incongruous to construe 31 U.S.C. Sec. 200(a)(6) in a manner permitting its application to frustrate congressional objectives unless such a result is unavoidable by the express terms of the statute. We do not believe that it is. The granting of a

preliminary order (in an action to compel the release of appropriation by the Executive branch) requiring the obligation of such appropriations reflects an independent judicial determination that the issues raised are at least substantial. Moreover, such an order, when entered within the period of appropriation availability, is consistant with normal concepts permitting obligations based upon bona fide fiscal year needs even though the obligation will not be liquidated until later. Cf. 33 Comp. Gen. 57, 61 (1953), 50 id. 589, 590-91 (1971).

"For the foregoing reasons, it is our opinion that the June 25, 1973 order in Bennett is consistent with both the letter and spirit of 31 U.S.C. Sec. 200(a)(6), and effectively established a valid obligation against the unexpended balance of the 1973 Food Stamp appropriation. Accordingly, the balance so obligated did not lapse and may be expended during fiscal year 1976."

We see no reason why the foregoing rule should not apply in the present case. Therefore, we are of the opinion that HUD may lawfully utilize the budget authority recorded as an obligation of the United States pursuant to the August 20, 1975, court in Staats v. Lynn to implement the revised Homeownership Subsidy Program under Section 235 of the National Housing Act.

Sincerely yours,

Paul G. Dembling General Counsel