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B-137896 December 4, 1958

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Honorable John Sparkman, Chairman Select Committee on Small Business United States Senate

Dear Mr. Chairman:

Your letter of November 6, 1958, acknowledged November 7, transmitted a copy of a letter received by the Committee from Mr. Maurice Balor, President of the Colorado Insurers Association, Inc., explaining of the actions by the Department of Defense in establishing a self-insurance program for military post exchanges, service clubs, and similar activities.

Mr. Baker's letter apparently has reference to regulations by the military departments pursuant to Department of Defense Directive 5515.6 of November 3, 1956, copy enclosed. The military departments were directed to issue regulations to effectuate the policy set forth therein providing for the payment of all substantiated tort, contract, and compensation claim arising out of the operation of nonappropriated fund activities solely from nonappropriated funds. In connection therewith and for the use and information of the Committee, you request a report covering (1) the statutory authority, if any, under which the Department of Defense has established the self-insurance program, and (2) a comparison of the coverage and costs of insurance offered by private companies with coverage and costs of the program being provided by the Government.

Military post exchanges and similar activities are established and operated by virtue of regulations of the military departments. To our knowledge the only statutory basis for such activities is the authority to prescribe regulations for the government of the military services granted by section 20 of the act of July 15, 1870, 16 Stat. 319, as amended, and section 1547, Revised Statutes, 70A. Stat. 165, 375, codified as 10 U.S.C. Supp. V. 3061 and 6011, respectively. In considering the authority for establishment of post exchanges, the Supreme Court of the United States in the case of Standard Oil Co. v. Johnson, 316 U.S. 481, at pages 483-4, said:

"On July 25, 1895, the Secretary of War, under authority of Congressional enactments promulgated regulations providing for the establishment of post exchanges. These regulations have since been amended from time to time and the exchange has become a regular feature of Army posts. That the establishment said control of post exchanges have been in acccordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law."

These activities are largely financed and operated through the use of nonappropriated funds as distinguished from public funds. See 9 Comp. Gen. 411, 11 id; 161; 20 id. 189. That is to say, the revenues and receipts derived from operation of exchange activities do not insure to the benefit of the Treasury and are not accounted for as public funds, nor are the expenditures connected therewith related to the payment of obligations incurred under authority of appropriated funds.

In view of the authority of the Department of Defense to provide for the establishment of military exchanges and similar activities, and to promulgate regulations governing their operation, and considering the nature of the funds involved therein, such as establishment of the self- insurance program under consideration, properly are for determination by the Department. In this connection, you doubtloses are aware of the settled policy of the United States to assume its own risks for possible tort liability, and that appropriated funds generally may not be used, in the absence of specific statutory authority, for the payment of insurance premiums therefor. See 19 Comp. Gen. 798; 35 id. 391.

With regard to the information requested in item 2 of your letter, we understand that much information will be obtained by the Committee Staff from the Department of Defense.

If we can furnish any further information in this matter please let us know.

Sincerely yours,

JOSEPH CAMPBELL Comptroller General of the United States

Enclosure