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B-149685, Mar. 20, 1968

Number: B-149685

Date: 1968-03-20

B-149685, MAR. 20, 1968

TO MR. MOOT:

BY LETTER OF FEBRUARY 12, 1968, YOU STATED THAT IT IS YOUR DESIRE, UNDER AUTHORITY OF SECTION 303 (B), OF THE SMALL BUSINESS INVESTMENT ACT OF 1958, AS AMENDED, 15 U.S.C. 683 (B) TO INCREASE PARTICIPATION OF THE PRIVATE SECTOR OF THE NATIONAL ECONOMY IN SMALL BUSINESS ADMINISTRATION LENDING PROGRAMS BY ENCOURAGING INSTITUTIONAL LENDERS TO FINANCE SMALL BUSINESS INVESTMENT COMPANIES, THROUGH GUARANTEEING SUCH LOANS MADE BY INSTITUTIONAL LENDERS TO SBIC-S.

YOU POINT OUT THAT THIS WOULD BE SIMILAR TO A LIQUIDITY GUARANTY PROGRAM INITIATED BY SBA IN 1961 UNDER WHICH LENDERS COULD REQUIRE SBA TO PURCHASE THE OUTSTANDING BALANCE OF A LOAN AT ANY TIME, BUT THAT THE PRESENT PROPOSAL CONTEMPLATES GUARANTY AGAINST DEFAULT. YOU REQUEST THAT WE CONFIRM YOUR AUTHORITY TO ENGAGE IN THE PROPOSED PROGRAM.

SECTION 303 (B) OF THE ACT, PRIOR TO ITS AMENDMENT BY SECTION 205 OF THE SMALL BUSINESS INVESTMENT ACT AMENDMENTS OF 1967, PUBLIC LAW 90 104, 81 STAT. 270, PROVIDED THAT:

"TO ENCOURAGE THE FORMATION AND GROWTH OF SMALL BUSINESS INVESTMENT COMPANIES, THE ADMINISTRATION IS AUTHORIZED (BUT ONLY TO THE EXTENT THAT THE NECESSARY FUNDS ARE NOT AVAILABLE TO THE COMPANY INVOLVED FROM PRIVATE SOURCES ON REASONABLE TERMS) TO LEND FUNDS TO SUCH COMPANIES EITHER DIRECTLY OR BY LOANS MADE OR EFFECTED IN COOPERATION WITH BANKS OR OTHER LENDING INSTITUTIONS THROUGH AGREEMENTS TO PARTICIPATE ON AN IMMEDIATE OR DEFERRED (STANDBY) BASIS. * * "

THE UNDERSCORED LANGUAGE WAS ADDED BY PUBLIC LAW 88-273, APPROVED FEBRUARY 28, 1964, 78 STAT. 146. BY DECISION OF SEPTEMBER 4, 1962, B 149685, THIS OFFICE HAD RULED THAT AUTHORITY EXISTED FOR THE GUARANTY PROGRAM INITIATED BY SBA IN 1961, DESPITE THE ABSENCE OF SPECIFIC AUTHORIZATION THEREFOR. THE UNDERSCORED LANGUAGE WAS ADDED IN 1964 TO MAKE CLEAR BY SPECIFIC STATUTORY REFERENCE THAT THE CONGRESS CONCURRED IN THE EXERCISE OF SUCH AUTHORITY. SEE OUR DECISION OF MARCH 15, 1965, B- 149685, WHEREIN WE RELIED UPON SECTION 303 (B) AS QUOTED ABOVE TOGETHER WITH ITS LEGISLATIVE HISTORY TO SUPPORT THE CONCLUSION THAT SBA WAS AUTHORIZED TO INSTITUTE A PROGRAM IDENTICAL TO THE ONE WHICH IS NOW IN QUESTION.

THE REASON FOR THE QUESTION ARISING LIES IN THE FACT THAT THE 1967 AMENDMENTS REWROTE SECTION 303 (B) TO REVISE SIGNIFICANTLY THE BASIC STRUCTURE OF SBA FINANCING FOR SBIC-S. IN MAKING THIS REVISION, THE CONGRESS DELETED THE WORDS "OR DEFERRED (STANDBY)" FROM THE PHRASE UNDERSCORED IN THE PORTION QUOTED ABOVE.

ALTHOUGH THE LEGISLATIVE RECORD DISCLOSES IN PRECISE DETAIL THE REASONS AND PURPOSE FOR REWRITING SECTION 303 (B), WE DO NOT FIND ANY MENTION OF INTENT RELATED TO DELETION OF THE CRITICAL WORDS WHICH SPECIFICALLY AUTHORIZE DEFERRED PARTICIPATION LOANS. SEE HOUSE REPORT NO. 660, SEPTEMBER 25, 1967, AT PAGE 9; AND SENATE REPORT NO. 368, JUNE 27, 1967, AT PAGE 13.

IN 1962 WE HELD THAT BANK DISBURSED PROGRAMS UNDER GUARANTY BY SBA WERE AUTHORIZED IRRESPECTIVE OF THE LACK OF SPECIFIC STATUTORY PROVISION THEREFOR, AND IT FOLLOWED THAT INSERTION OF THE SPECIFIC AUTHORITY EMBODIED IN THE UNDERSCORED PORTION OF THE QUOTE WAS, IN A SENSE, SUPERFLUOUS. HOWEVER, THE SPECIFIC CLARIFYING LANGUAGE HAVING BEEN PROVIDED, CAN IT BE SAID THAT ITS DELETION CARRIES NO LEGAL SIGNIFICANCE?

ORDINARILY, WE WOULD BE REQUIRED TO GIVE SOME MEANING TO THE KIND OF CHANGE IN STATUTORY LANGUAGE IN QUESTION. NEVERTHELESS, IN THE INSTANT CASE, WE BELIEVE THE ONLY MEANING WE COULD ASCRIBE -- THAT DELETION OF THE WORDS INVOLVED WAS INTENDED AS A CANCELLATION OF THE AUTHORITY THEY COVERED -- IS SO AT VARIANCE WITH THE PRIOR HISTORY OF THE STATUTE, THAT IN THE ABSENCE OF ANY RELATED EXPLANATORY MATERIAL IN THE LEGISLATIVE HISTORY ON SUCH AN IMPORTANT ASPECT, WE ARE RELUCTANT TO CONCLUDE THAT THE DELETION WAS LEGISLATIVELY SO INTENDED. IN OTHER WORDS, WE BELIEVE THAT FROM THE STANDPOINT OF THE CONGRESSIONAL INTENT IN REWRITING SECTION 303 (B), OMISSION OF THE WORDS "OR DEFERRED (STANDBY)" MAY WELL HAVE BEEN INADVERTENT.

ACCORDINGLY, YOU ARE ADVISED THAT WE WILL NOT OBJECT TO YOUR EXERCISING AUTHORITY TO GUARANTEE BANK LOANS MADE BY INSTITUTIONAL LENDERS TO SBIC-S, PROVIDED THAT THE COMMITTEES ON BANKING AND CURRENCY OF BOTH THE SENATE AND THE HOUSE OF REPRESENTATIVES STATE THEIR APPROVAL OF THE PROPOSED PLAN.

A COPY OF THIS LETTER IS BEING FURNISHED TO THE CHAIRMEN OF THE SENATE AND HOUSE BANKING AND CURRENCY COMMITTEES.