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B-160493, Jan. 16, 1967

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B-160493, JAN. 16, 1967

TO THE SECRETARY OF COMMERCE:

IN YOUR LETTER OF DECEMBER 16, 1966, PERTAINING TO THE EXPOSITION OR FAIR KNOWN AS HEMISFAIR -68, TO BE HELD AT SAN ANTONIO, TEXAS, IN 1968, YOU REQUEST OUR OPINION WHETHER UNDER THE CONTROLLING STATUTE FEDERAL PARTICIPATION IS PRECLUDED BY THE FACT THAT VARIOUS MEMBERS OF THE EXECUTIVE COMMITTEE OF SAN ANTONIO FAIR, INCORPORATED, A NONPROFIT ORGANIZATION OF THE STATE OF TEXAS ESTABLISHED IN DECEMBER OF 1962 TO ORGANIZE, PROMOTE, CONDUCT, AND OPERATE HEMISFAIR -68, ARE ALSO OFFICERS OR DIRECTORS OF SEVERAL BANKS PARTICIPATING IN A LOAN OF $4.5 MILLION TO THE FAIR CORPORATION.

PUBLIC LAW 89-284, APPROVED OCTOBER 22, 1965 (79 STAT. 1026), ENTITLED "AN ACT TO PROVIDE FOR PARTICIPATION OF THE UNITED STATES IN THE HEMISFAIR 1968 EXPOSITION TO BE HELD AT SAN ANTONIO, TEXAS, IN 1968, AND FOR OTHER PURPOSES," WAS AMENDED BY PUBLIC LAW 89-685, APPROVED OCTOBER 5, 1966 (80 STAT. 971), TO AUTHORIZE THE APPROPRIATION OF $7.5 MILLION, IN ADDITION TO THE $125,000 ORIGINALLY AUTHORIZED,"TO CARRY OUT UNITED STATES PARTICIPATION IN THE INTERNATIONAL EXPOSITION HEMISFAIR, 1968.' HOWEVER, THE 1966 AMENDMENT ADDED A NEW SECTION, IMPOSING CONDITIONS ON UNITED STATES PARTICIPATION IN THE EXPOSITION, WHICH GIVES RISE TO THE QUESTION SUBMITTED. THAT SECTION IS IN PERTINENT PART AS FOLLOWS:

"SEC. 9. (A) NO FUNDS MADE AVAILABLE UNDER THIS ACT SHALL BE EXPENDED TO PROVIDE FOR UNITED STATES PARTICIPATION IN THE EXPOSITION, UNLESS THE SECRETARY OF COMMERCE HAS RECEIVED SATISFACTORY ASSURANCES FROM THE SAN ANTONIO FAIR, INCORPORATED, A NONPROFIT CORPORATION OF THE STATE OF TEXAS, THAT---

"/3) NO PERSON SHALL BE AN OFFICER, OR MEMBER, OR EX OFFICIO MEMBER OF THE EXECUTIVE COMMITTEE OF SUCH CORPORATION WHO SHALL HAVE A SUBSTANTIAL FINANCIAL INTEREST IN ANY ORGANIZATION DOING BUSINESS WITH SUCH CORPORATION OR IN ANY PERSONAL BUSINESS ARRANGEMENT WITH SUCH CORPORATION OR WHO SHALL BE AN ELECTED OFFICER OF ANY POLITICAL ORGANIZATION, AND

"* * * THE TERM "SUBSTANTIAL FINANCIAL INTEREST IN ANY ORGANIZATION" INCLUDES HAVING A FINANCIAL INTEREST IN ANY ORGANIZATION THROUGH SERVING AS AN OFFICER, DIRECTOR, TRUSTEE, PARTNER, OR EXECUTIVE OF SUCH ORGANIZATION, OR THROUGH NEGOTIATING WITH OR HAVING ANY ARRANGEMENT CONCERNING PROSPECTIVE EMPLOYMENT WITH SUCH ORGANIZATION, OR THROUGH HOLDING LEGAL TITLE TO OR ANY BENEFICIAL INTEREST IN OR CONTROL OVER MORE THAN 5 PERCENTUM OF THE TOTAL OF ISSUED AND SUBSCRIBED SHARE CAPITAL OF SUCH ORGANIZATION.

"/C) THE ACTION OF THE SECRETARY OF COMMERCE OR HIS DESIGNEE IN ALLOWING OR DENYING THE EXPENDITURE OF FUNDS UNDER THIS ACT TO PROVIDE FOR UNITED STATES PARTICIPATION IN THE EXPOSITION SHALL BE FINAL AND CONCLUSIVE FOR ALL PURPOSES, * * * AND NOT SUBJECT TO REVIEW BY ANY COURT BY MANDAMUS OR OTHERWISE.'

BEFORE DISCUSSING THE SPECIFIC QUESTION SUBMITTED, WHICH INVOLVES THE ABOVE QUOTED SUBSECTION 9 (A), IT MAY BE MENTIONED THAT AS THE ALSO QUOTED SUBSECTION 9 (C) MAKES THE ACTION OF THE SECRETARY OF COMMERCE IN ALLOWING OR DENYING THE EXPENDITURE OF FUNDS UNDER THE PARTICIPATION ACT FINAL AND CONCLUSIVE FOR ALL PURPOSES, WE VIEW YOUR REQUEST AS ONE FOR AN ADVISORY OPINION, AND NOT FOR A BINDING DECISION UNDER 31 U.S.C. 74.

SUBSECTION 9 (A) PROHIBITS THE EXPENDITURE OF FUNDS APPROPRIATED FOR UNITED STATES PARTICIPATION IN THE EXPOSITION, IF AN OFFICER OR MEMBER OF THE EXECUTIVE COMMITTEE OF SAN ANTONIO FAIR, INCORPORATED, HAS A SUBSTANTIAL FINANCIAL INTEREST IN "ANY ORGANIZATION DOING BUSINESS" WITH THE FAIR CORPORATION. A BANK LENDING MONEY TO A CUSTOMER, OR CLIENT, IS IN ORDINARY ENGLISH USAGE "DOING BUSINESS" WITH THE CUSTOMER OR CLIENT. "BANKING HAS BEEN CONSIDERED A TRADE OR BUSINESS. HAVING A PLACE OF BUSINESS WHERE DEPOSITS ARE RECEIVED AND PAID OUT ON CHECKS OR OTHER ORDERS AND WHERE MONEY IS LOANED UPON SECURITY IS THE PRINCIPAL SUBSTANCE OF THE BUSINESS OF A BANKER.' 10 AM. JUR. 2D BANKS SEC. 3, PAGE 26.

TURNING TO THE TRANSACTION HERE INVOLVED, WHEREBY THE FAIR CORPORATION MAY OBTAIN LOANS TOTALING $4.5 MILLION FROM THE PARTICIPATING BANKS, IT DOES NOT APPEAR THAT THE TERMS OF THE LOAN AGREEMENT WARRANT ITS CLASSIFICATION AS OTHER THAN A BUSINESS TRANSACTION. THE LOAN AGREEMENT, MENTIONING ONLY A FEW OF ITS TERMS, PROVIDES FOR INTEREST AT 5 1/2 PERCENT PER ANNUM, THE FURNISHING OF VARIOUS TYPES OF SECURITY FOR THE LOAN, INCLUDING ITS UNDERWRITING BY ACCEPTABLE FIRMS AND INDIVIDUALS AND THE IMPOUNDING AND PLACING IN TRUST OF ?60 OF EACH GENERAL ADMISSION TICKET SOLD TO THE FAIR, AND IMPOSES CERTAIN RESTRICTIONS IN THE MANAGEMENT OF THE FAIR CORPORATION REQUIRING BANK APPROVAL.

HOWEVER, THE VIEW IS ADVANCED ON BEHALF OF THE FAIR CORPORATION THAT THE RESTRICTION IN SUBSECTION 9 (A), WITH RESPECT TO AN OFFICER OR MEMBER OF THE EXECUTIVE COMMITTEE OF THE FAIR CORPORATION HAVING A SUBSTANTIAL FINANCIAL INTEREST IN ANY ORGANIZATION DOING BUSINESS WITH THE CORPORATION, SHOULD NOT BE CONSIDERED TO ENCOMPASS DOING BUSINESS WITH A BANK, AS BANKS ARE NOT ORDINARY BUSINESS ORGANIZATIONS, BUT QUASI-PUBLIC INSTITUTIONS SUBJECT TO EXTENSIVE GOVERNMENTAL REGULATIONS.

WHILE THE BUSINESS OF BANKING DIFFERS FROM OTHER BUSINESSES AND IS GENERALLY RECOGNIZED AS BEING VESTED WITH A PUBLIC INTEREST SO AS TO BE SUBJECT TO GOVERNMENTAL REGULATION, THE CONFLICTS OF INTEREST WHICH SUBSECTION 9 (A) SEEKS TO AVOID CANNOT BE PRESUMED TO BE ABSENT WHERE THE OTHER ORGANIZATION IS A BANK AND THUS OUTSIDE THE PURVIEW OF THE SECTION. BANKS, WHETHER NATIONAL OR STATE CORPORATIONS, ARE AFTER ALL PRIVATE INSTITUTIONS DOING BUSINESS FOR A PROFIT. AND IN THE PRESENT SITUATION, THAT OF A CREDITOR-DEBTOR RELATIONSHIP, WE SEE NO BASIS FOR EXCLUDING BANK OFFICERS AND DIRECTORS FROM THE OPERATION OF SUBSECTION 9 (A), PARTICULARLY SO IN LIGHT OF THE BROAD SCOPE WHICH THE SECTION, BY DEFINITION, GIVES THE TERM "SUBSTANTIAL FINANCIAL INTEREST IN ANY ORGANIZATION.'

AS IT DOES NOT APPEAR THAT THE LEGISLATIVE PURPOSE OF SUBSECTION9 (A) IS INAPPLICABLE TO AN OFFICER OR DIRECTOR OF A BANK DOING BUSINESS WITH THEIR FAIR CORPORATION, NOR DOES THE LEGISLATIVE HISTORY OF THE AMENDMENT APPEAR TO WARRANT READING INTO THE SUBSECTION AN EXCEPTION IN THE CASE OF BANK OFFICIALS OR

DIRECTORS, WE ARE OF THE VIEW THAT FEDERAL PARTICIPATION IS PRECLUDED BY THE FACT THAT VARIOUS MEMBERS OF THE EXECUTIVE COMMITTEE OF THE FAIR CORPORATION ARE ALSO OFFICERS OR ..END :