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The Honorble Robert K. Bauman House of Representatives

Dear Mr. Bauman:

This is in response to your request for our views on whether the Fishing Vessel Obligation Guarantee program (FVOG) currently administered by the Department of Commerce, can include loadn made by Production Credit Association (PCAs) which operate under the general supervision of the Farm Credit Administration.

You state that "one of the major question which has arisen in regard to such an idea is whether or not the PCAs with their variable interest rates, would be in violation of Federal law if an attepmp was made to administer the Fishing Vessel program which was implemented with a clause which stated that interest rates must be fixed." We were subsequently informally advised by your staff that we should specifically address the question of whether Production Credit Association loans to producers or harvesters of aquatic products may be guaranteed under the Fishing Vessel Obligation Guarantee Program.

In order to more adequately respond to your inquiry, we requested the views of the Secretary of Commerce in this matter since he is the person authorized by law to implement the Fishing Vessel Obligation Guarantee program.

By letter dated December 12, 1975, the Administrator of the Noational Oceanic and Atmospheric Administration (NOAA) responded by stating that although NOAA feels that a variable rate was legally permissible, in view of the doubt expressed by the Maritime Administrtion (MarAd) and others, NOAA felt bound to decline the guarantee of variable rate obligations until such a time as there might be an authoritative disposition of the quistion of legality. It also indicated that a copy of its response to us had been forwarded to MarAd in the event it might also wish to comment. On March 31, 1976, we received the response of the General Counsel of MarAd, in which he concluded that there was no authority for use of variable rates.

The FVOG is administered by the Secretary of Commerce pursuant to authority not forth in title II of the Merchant Marine Act (Act), 1936, as amended, 46 U.S.C. Section 1271-1279 (Supp. IV, 1974). Under the PVOG, the Secretary of Commerce (Secretary), upon application by a citizen of the United States, is authorized to guarantee and to enter into commitments to guarantee, the payment of the interest on, and the unpaid balance of the principal of any obligation (meaning note, bond, debenture or other evidence of indebtedness) which is otherwise eligible to be guaranteed under title II of the act, 46 U.S.C. Section 1273(a)

Supp. IV, 1974). The Act provides that the Secretary may guarantee an obligation which aids in, among other things, financing, including reimbursement of an obliger, for expenditures previously made for construction, reconstruction, or reconditioning of a vessel or vessels owned by citizens of the United States which are designed principally for research, or for commercial use, along with other specified uses, (1) in the coastwise or inter-coastal trade (2) on the Great Lakes or on bays, sounds, rivers, harbors or inland lakes of the United states or (3) in the fishing trade or industry. 46 U.S.C. Section 1274(a)(1). Generally, MarAd guarantees long term obligations (up to 25 years) on large vessels and NOAA guarantees shorter term obligations on smaller vessels. Since PCAs generally make loans with short or intermediate terms, and since the fishing vessels on which PCAs make loans tend to be relatively small, we have been informally advised that NOAA would probably administer this program for the Secretary if he determines to guarantee PCA loans. The provisions of 46 U.S.C. Section 1274(b) Supp. IV, 1974), require, in pertinent part, that obligations guaranteed by the secretary under the PVOG program:

"(5) shall bear interest (exclusive of charges for the guarantee and service charges, if any) at rates not to exceed such per centum per annum on the umpaid principal as the Secretary of Commerce determines to be reasonable, taking into account the range of interest rates provailing in the pivate market for similar loans and the risk assigned by the Secretary of Commerce; (Emphasis supplied.)

Production credit associations are corporations organized under the Farm Credit Act of 1933, and continued under the Farm Credit Act of 1971, enacted December 10, 1971, Pub. L. No. 92-181, Stat. 583, 12 U.S.C. Section 2001 et seq. (Supp. IV, 1974). They are a part of the cooperative Farm Credit System under the immediate supervision of the Federal intermediate credit banks. Each PCA and credit bank is a federally chartered instrumentality of the United States which is chartered, regulated and supervised by the Farm Credit Administration, an independent agency of the executive branch of the Government, 12 U.S.C. Section 2002 (Supp. IV, 1974). Teh Federal intermedite credit banks have immediate supervisory responsibility over PCAs in their districts.

PCAs are organized groups of "ten or more farmers or ranchers or producers or harvesters of aquatic products desiring to borrow money under the provisions" of this Act. (Emphasis supplied.) 12 U.S.C. Section 209h (Supp. IV, 1974). A producer or harvester of aquatic products is defined by the Farm Credit Administration to be "a person(s) engaged in the production or harvesting of aquatic products for economic gain in open waters under uncontrolled conditions," 12, C.F.R. Section 613.3030(a).

One of the enumerated general corporate powers of PCAs is the power to make, guarantee, and participate in short- and intermediate-term loans, accept advance payments, and provide services and other authorized assistances, and charge fees therefor to, among others, bona fide farmers and ranchers and the producers or harvesters of aquatic products, for agricultural purposes and other requirements of sych borrowers. 12 U.S.C. Section 2093(13), 2096(a) (Supp. IV, 1974).

The relevant provisions of 12 U.S.C. Section 2096(b) (Supp. IV, 1974) provide that authorized PCA loans:

"* * * shall bear such rate or rates of interest as are determined under regulations prescribed by the board of the [Federal intermediate credit] bank with the approval of the Farm Credit Administration, and shall be made upon such

terms, conditions, and upon such security, if any, as shall be authorized in such regulations. In setting rates and charges, it shall be the objective to provide the types of credit needed by eligible borrowers, at the lowest reasonable cost on a sound business basis, taking into account the cost of money to the association, necessary reserves and expenses of the association, and services provided to borrowers and members. Teh loan documents may provide for the interest rate or rates to vary from time to time during the repayment period of the loan in accordance with the rate or rates currently being charged by the association. Such regulations may require prior approval of the bank or of Farm Credit Administration on certain clauses of loans; and may authorize a continuing commitment to a borrower of a line of credit." (Emphasis Supplied.)

Thus, the provisions of 12 U.S.C. Section 2096(b) (Supp. IV, 1974) permit a PCA to use either a fixed or a variable rate for charging interest for loans it makes and nothing in that provision of law requires one method be given preference to another in any particular loan situation. The discretion as to which method to use for charging interest is left with the PCAs. See also 12 C.F.R. Section 514.4321. However, whether the method of charging interest is fixed or variable, the rate utilized must be reasonable, as required by 12 U.S.C. Section(b). The rates of interest charged by an association are those approved by the Federal Intermediate Credit Bank, within regulations prescribed by the bank's board and approved by the Farm Credit Administration. 12 C.F.R. Section 614.4320.

On the other hand, with regard to obligations guaranteed by the Secretary under the FVOG program, 46 U.S.C. Section 2074(b)(5) merely requires that the rates of interest charged not exceedc that which the Secretary determines to be reasonable, taking into account the range o niterest rates prevailing in the private market for similar loans and the risk assumed by the Secretary.

Therefore, we find nothing in these provisions, or any other relevant provision of law that would prevent the Secretary from guaranteeing a PCA loan where he determines the rate or interest charged does not exceed that which he has determined to be reasonable for such loans and, of course, that the PCA loan was for one of the purposes, discussed above, for which the Secretary may guarantee loan obligations under 46 U.S.C. Section 1273(a). This is certainly true for fixed rate loans. As we noted above, although it is their practice to issue variable rate obligations, nothing requires the PCAs to do so. Therefore, with respect to any fixed rate obligations which PCAs mayissue, there is no question about their eligibility to participate in the FVOG program.

The issue we have specifically been asked to discuss, however, is whether the Secretary of Commerce may also guarantee PCA loans which do have variable interest rates.

The General Counsel for the Maritime Administration contends that the legislative and administrative history of section 1104(b)(5) of the Act, 46 U.S.C. Section 1274(b)(5) (Supp. IV, 1974) indicates that the Secretary is not authorized to guarantee variable interest rate loans. He states that:

"Section 1104(b)(5) in its present form resulted from the passage of P.L. 90-341, approved June 15, 1968. P.L. 90-341 was derived from identical bills, H.R. 14796 and S. 3017, introduced in the 90th Congress in 1968. The bills were submitted by the Department of Commerce upon recommendation of MarAd that the then fixed interest rate limit of five per centum (six per centum in special

cases) on bonds under the then existing insurance program be eliminated since it was becoming impossible for borrowers to secure such low rates in the investment market.

"Administratively the bills originated with the Chief, Office of Government Aid, Marad, on July 5, 1967. The wording of the proposed section was derived from Attachment B to Circular No. A-70 (Standard Interest Rate Language for Federal Credit Programs) issued February 1, 1965 by the Bureau of the Budget to the Heads of Executive Departments and Establishments. Paragraph 4 of that Circular prescribes standard language governing interest rates in proposed legislation and requires a full explanation if substantial modification is made in such language. Marad saw no reason to suggest language other than the prescribed language. In its submission of the proposed bill to Marad's General Counsel the Chief, Office of Subsidy Administration on July 7, 1957 referred to an interest rate (singular) amd spoke of the necessity for flexibility in interest rates (plural) which we interpret to mean that there would be no fixed maximum limit on an interest rate to be approved by Marad in a particular case but that individual rates of interest could fluctuate from case to case. This same reference to a singular rate is ofund in submission of the proposed legislation to the Bureau of the Budget in letter dated August 24, 1967 from the Department of Commerce and in letter dated December 20, 1967 from the Secretary of Commerce to the President of the senate and the Speaker of the House of Representatives submitting a draft bill to amend Section 1104(b)(5) (Executive Communication 1136).

"The House and Senate Report on the respective bills each refer to interest rates in the singular (see H.R. 1416, page 2, dated May 22, 1968 and S.R. 1119, page 2, dated May 14, 1968). Both reports have appended thereto the Secretary of Commerce's letter as aforesaid and the views of the Comptroller General in which the Comptroller General agrees that the maximum interest rate (singular) will have to be increased (see No. B115403 dated respectively March 15, 1968 and March 19, 1968). We interpret all of these references to the interest rate in the singular to be a recognition that the purpose of the bills was to remove the maximum limitation on the interest rate and not to introduce a variable rate of interest for an individual transaction.

"Finally, in hearing conducted before the Subcommittee on Merchant Marine and Fisheries of the Committee on Commerce of the Senate on April 30, 1968 the General Counsel, Marad, referred on pages 1 and 2 thereof to interest rate (singular) and the statement of the purpose of the bill preceding the hearings does likewise. In hearings before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries of the House on April 4, 1968 the Acting Maritime Administrator referred on Pages 105 and 107 thereof to interest rate (singular).

"Although we are aware that normally the administrative records of an executive agency would not be alluded to in determining legislative intent in the passage of a public law nevertheless we have referred to such records to corroborate the evidence found in the normal legislative hearings and reprots on P.L. 90-341. It is our contention that a full reading of executive and legislative records available and relevant to this question reveal that both governmental bodies intended only to permit the guarantee of an obligation bearing a single rate of interest and did not intend to permit the guarantee of a variable rate of interest even if confined within certain limitations. We would, however, be content to rest upon evidence of legislative intent should you see fit to

exclude evidence of administrative intent."

We might point out that the fact that the legislative or administrative history of the particular provision refers to "rate" in the singular rather than the plural is inconclusive for resolving the question presented. a loan document which allows the rate of interest therein to vary may also refer to the interest rate in the singular. See, e.g., 12 U.S.C. Section 2096(b), quoted above.

There is nothing in the language of 46 U.S.C. Section 2074(b)(5) (Supp. IV, 1974) specifically requiring the interest rates on loans guaranteed under the FVOG program to remain constant, the statute only requires that they not exceed that which the Secretary determines to be reasonable. Further, there is nothing in the language of the relevant provisions of law that would specifically prohibit the Secretary from entering into guarantee agreements that allow the interest rates on the guaranteed loans to rise or fall with changes in prevailing interest rates. The only requirement is that the Secretary determine, prior to guarantee, that the rate will be reasonable. However, as pointed out in NOAA's report to this Office, there is no reason that the range of variation could not be restricted in advance-for example, to rise or fall no more than a given percent of a designated base rate. The Secretary could then determine, prior to guarantee, that all rates which fell within the established range, would be considered to be reasonable. This approach, endorsed by NOAA, did not appear to present any particular administrative difficulties, according to NOAA's letter to us.

Therefore, we would have to conclude that the Secretary under the FVOG program may guarantee loans made by PCAs in which the interest rate amy vary, provided that the interest rate may not exceed the percentage rate per annum that the Secretary determines to be reasonable. This might require an additional provision in PCA loan documents so providing. We might also note that in determining what is a reasonable interest rate the Secretary is to consider the rates set on similar loans in the private money market and point out that the use of variable interest rates is becoming more common in the marketplace.

Further, we see nothing which would prohibit the Secretary from changing from time to time the maximum reasonable rate established pursuant to 46 U.S.C. Section (b)(5) with respect to outstanding loans on which the interest rates are variable. It is within the discretion of the Secretary to determine the best manner in which to implement this kind of arrangement.

Finally, we must point out that while not prohibited, the Secretary is not required to guarantee, under the PVOG program, loans on shich the interest rate is allowed to vary. The matter is solely within his discretion and he might determine for any number of reasons that it is not in the interest of the PVOG program to guarantee such losses or, in fact, to guarantee any loans made by PCAs.

We hope that this is of assistance to you.

Sincerely yours,

R.F. Keller Deputy Comptroller General of the United States