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DIGEST: FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) LACKS AUTHORITY TO ESTABLISH BY REGULATION A PROCEDURE ALLOWING IT TO FORGIVE CLAIMS AGAINST THE GOVERNMENT OR ACCEPT GOVERNMENT LIABILITY EVEN WHERE SUCH ACTIONS ARE FAIR AND EQUITABLE TO PERSONS WHO HAVE RELIED UPON UNAUTHORIZED ACTS OR ERRORS OF FEMA EMPLOYEES AND AGENTS. A CLEAR STATUTORY BASIS, NOT HERE PRESENT, IS REQUIRED FOR AGENTS OF THE GOVERNMENT TO DISPOSE OF A GOVERNMENT FINANCIAL INTEREST BY FORGIVING OR ACCEPTING A FINANCIAL CLAIM.

FEDERAL EMERGENCY MANAGEMENT AGENCY - AUTHORITY TO ISSUE REGULATIONS:

THE GENERAL COUNSEL OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA) HAS ASKED WHETHER THE DIRECTOR OF THAT AGENCY HAS AUTHORITY TO ISSUE A REGULATION SIMILAR TO THAT ISSUED BY THE FEDERAL CROP INSURANCE CORPORATION (THE CORPORATION) AT 7 C.F.R. SEC. 401.107 (1980) AND WHETHER SUCH A REGULATION WOULD CONFLICT WITH THE CLAIMS COLLECTION ACT OF 1966, OR GAO AUTHORITY. AS MORE FULLY EXPLAINED BELOW WE DO NOT BELIEVE THE DIRECTOR OF FEMA HAS SUCH AUTHORITY.

THE CORPORATION'S REGULATION PROVIDES AS FOLLOWS:

"NOTWITHSTANDING ANY OTHER PROVISION OF THE INSURANCE CONTRACT, WHENEVER (A) AN INSURED PERSON UNDER ANY CONTRACT OF CROP INSURANCE ENTERED INTO UNDER THESE REGULATIONS, OR ANY OTHER REGULATIONS IN THIS CHAPTER ISSUED PURSUANT TO THE FEDERAL CROP INSURANCE ACT, AS AMENDED, AS A RESULT OF A MISREPRESENTATION OR OTHER ERRONEOUS ACTION OR ADVICE BY AN AGENT OR EMPLOYEE OF THE CORPORATION, (1) IS INDEBTED TO THE CORPORATION FOR ADDITIONAL PREMIUMS, OR (2) HAS SUFFERED A LOSS TO A CROP WHICH IS NOT INSURED OR FOR WHICH THE INSURED PERSON IS NOT ENTITLED TO AN INDEMNITY BECAUSE OF FAILURE TO COMPLY WITH THE TERMS OF THE INSURANCE CONTRACT, BUT WHICH THE INSURED PERSON BELIEVED TO BE INSURED, OR BELIEVED THE TERMS OF THE INSURANCE CONTRACT TO HAVE BEEN COMPLIED WITH OR WAIVED, AND (B) THE BOARD OF DIRECTORS OF THE CORPORATION, OR THE MANAGER IN CASES INVOLVING NOT MORE THAN $20,000, FINDS (1) THAT AN AGENT OR EMPLOYEE OF THE CORPORATION DID IN FACT MAKE SUCH MISREPRESENTATION OR TAKE OTHER ERRONEOUS ACTION OR GIVEN ERRONEOUS ADVICE,

(2) THAT SAID INSURED PERSON RELIED THEREON IN GOOD FAITH, AND (3) THAT TO REQUIRE THE PAYMENT OF THE ADDITIONAL PREMIUMS OR TO DENY SUCH INSUREDS'S ENTITLEMENT TO THE INDEMNITY WOULD NOT BE FAIR AND EQUITABLE, SUCH INSURED PERSON SHALL BE GRANTED RELIEF THE SAME AS IF OTHERWISE ENTITLED THERETO." 7 C.F.R. SEC. 401.107 (1980).

THIS REGULATION PROVIDES A MEANS FOR THE CORPORATION TO GRANT RELIEF TO PERSONS

WHO MIGHT OTHERWISE OWE THE GOVERNMENT MONEY OR BE DENIED BENEFITS BECAUSE OF RELIANCE IN GOOD FAITH ON A MISREPRESENTATION OR ERROR BY AN AGENT OR EMPLOYEE OF THE CORPORATION. IN ORDER TO GRANT THE RELIEF, THE CORPORATION MUST DETERMINE AMONG OTHER THINGS, THAT TO DENY RELIEF WOULD NOT BE FAIR OR EQUITABLE. IN EFFECT, THE REGULATION ADOPTS A METHOD FOR THE CORPORATION TO PROVIDE RELIEF IN CERTAIN SITUATIONS THAT IT REGULARLY CONFRONTS WHERE IT COULD NOT BE REQUIRED TO PROVIDE RELIEF UNDER THE RULE AGAINST ESTOPPEL OF THE GOVERNMENT. THIS RULE STATES THAT THE GOVERNMENT IS NOT BOUND BY THE UNAUTHORIZED ACTS OF ITS AGENTS.

IN ADOPTING THIS REGULATION, THE CORPORATION RELIES UPON POWERS AND AUTHORITIES GIVEN IT BY CONGRESS. AMONG THESE AUTHORITIES WERE THE FOLLOWING:

"THE CORPORATION -

"(D) SUBJECT TO THE PROVISONS OF SECTION 1508(C) OF THIS TITLE, MAY SUE AND BE SUED IN ITS CORPORATE NAME ***;

"(E) MAY ADOPT, AMEND, AND REPEAL BYLAWS, RULES, AND REGULATIONS GOVERNING THE MANNER IN WHICH ITS BUSINESS MAY BE CONDUCTED AND THE POWERS GRANTED TO IT BY LAW MAY BE EXERCISED AND ENJOYED;

"(I) SHALL DETERMINE THE CHARACTER AND NECESSITY FOR ITS EXPENDITURES UNDER THIS CHAPTER AND THE MANNER IN WHICH THEY SHALL BE INCURRED, ALLOWED, AND PAID, WITHOUT REGARD TO THE PROVISIONS OF ANY OTHER LAWS GOVERNING THE EXPENDITURE OF PUBLIC FUNDS AND SUCH DETERMINATIONS SHALL BE FINAL AND CONCLUSIVE UPON ALL OTHER OFFICERS OF THE GOVERNMENT; AND

"(J) SHALL HAVE SUCH POWERS AS MAY BE NECESSARY OR APPROPRIATE FOR THE EXERCISE OF THE POWERS HEREIN SPECIFICALLY CONFERRED UPON THE CORPORATION AND ALL SUCH INCIDENTAL POWERS AS ARE CUSTOMARY IN CORPORATIONS GENERALLY ***."

7 U.S.C. SEC. 1506 (1976). (THE FEDERAL CROP INSURANCE ACT OF 1980, PUB. L. NO. 96-365, 94 STAT. 1312, SEPTEMBER 26, 1980, PASSED AFTER ISSUANCE OF THE REGULATION, AMENDED THIS SECTION BUT NOT IN ANY WAY WHICH WOULD NARROW THE CORPORATION'S AUTHORITY.)

THESE PROVISIONS, TOGETHER WITH ITS STATUS AS A WHOLLY-OWNED GOVERNMENT CORPORATION (31 U.S.C. SEC. 846 (1976)), PLACE THE CORPORATION OUTSIDE MANY OF THE RULES THAT APPLY GENERALLY TO EXECUTIVE BRANCH AGENCIES. WITHOUT DECIDING WHETHER THE CORPORATION'S POWERS PERMIT THE ESTABLISHMENT OF SUCH A RULE, IT IS ENOUGH TO ANSWER THE GENERAL COUNSEL'S QUESTION TO NOTE THAT FEMA MUST LOOK TO ITS OWN AUTHORITIES IF IT IS TO ISSUE REGULATIONS SIMILAR TO THOSE ISSUED BY THE CORPORATION.

FEMA'S AUTHORITY CONSISTS OF THE STATUTORY AUTHORITIES ASSIGNED TO IT WHEN IT WAS CREATED BY REORGANIZATION PLAN NO 3. OF 1978, 43 FED. REG. 41943, AND OTHER GENERALLY APPLICABLE PROVISIONS OF LAW. FEMA IS TREATED AS A WHOLLY-OWNED GOVERNMENT CORPORATION FOR PURPOSES OF THE FEDERAL FLOOD INSURANCE PROGRAM. 42 U.S.C. SEC. 4124 (1976). ALSO, AUTHORITIES GIVEN FEMA UNDER THE FLOOD INSURANCE PROGRAM BEAR ON FEMA'S AUTHORITY TO ISSUE REGULATIONS SIMILAR TO THOSE ISSUED BY THE CORPORATION. IF, AS IS THE CASE ACCORDING TO FEMA, THE FLOOD INSURANCE PROGRAM IS RUN BY THE GOVERNMENT WITH THE ASSISTANCE OF THE INSURANCE INDUSTRY, RATHER THAN BY THE INSURANCE INDUSTRY WITH FEDERAL FINANCIAL ASSISTANCE, FEMA CAN ADJUST AND PAY CLAIMS FOR PROVED AND APPROVED LOSSES COVERED BY AUTHORIZED FEDERAL INSURANCE. 42 U.S.C. SEC. 4072 (1976). FEMA CAN ALSO MAKE FINAL

SETTLEMENT OF ANY CLAIMS OR DEMANDS ARISING FROM FINANCIAL TRANSACTIONS AUTHORIZED FOR THE IMPLEMENTATION OF THE FLOOD INSURANCE PROGRAM. U.S.C. SEC. 4083 (1976). FINALLY, 42 U.S.C. SEC. 4125 (1976) PROVIDES:

"NOTWITHSTANDING THE PROVISIONS OF ANY OTHER LAW -

(1) ANY FINANCIAL TRANSACTION AUTHORIZED TO BE CARRIED OUT UNDER THIS CHAPTER, AND

"(2) ANY PAYMENT AUTHORIZED TO BE MADE OR TO BE RECEIVED IN CONNECTION WITH ANY SUCH FINANCIAL TRANSACTION,

"SHALL BE FINAL AND CONCLUSIVE UPON ALL OFFICERS OF THE GOVERNMENT."

NONE OF THESE PROVISIONS HOWEVER, PROVIDES A BASIS FOR A REGULATION SIMILAR TO THAT ISSUED BY THE CORPORATION. THESE PROVISIONS ALLOW FEMA TO FIX ITS LIABILITY AND PAY CLAIMS, BUT WITHIN PROGRAM AUTHORITY. THESE PROVISIONS DO NOT AUTHORIZE FEMA TO PAY WHAT IT IS NOT DULY OBLIGATED TO PAY NOR TO FORGIVE CLAIMS IN ITS FAVOR. WE ARE UNAWARE OF ANY BASIS UPON WHICH TO CONCLUDE FROM THESE AUTHORITIES THAT FEMA IS EXEMPT FROM THE CLAIMS COLLECTION ACT OF 1966 (31 U.S.C. SEC. 951 (1976)), THE JOINT STANDARDS THAT IMPLEMENT THAT ACT (4 C.F.R. PARTS 101-105), OR THE RULE THAT THE GOVERNMENT IS NOT BOUND BY THE UNAUTHORIZED ACTS OF ITS AGENTS AND THE COROLLARY RULE THAT THERE MUST BE SPECIFIC AUTHORITY FOR GOVERNMENT AGENTS AND EMPLOYEES TO RELINQUISH ANY FINANCIAL INTEREST OF THE UNITED STATES (51 COMP.GEN. 162, 165 (1971) AND CASES CITED THEREIN).

THE REGULATION ISSUED BY THE CORPORATION, WHICH FEMA ASKS IF IT MAY EMULATE, PROVIDES FOR A SITUATION IN WHICH AN AGENT OF THE UNITED STATES HAS ACTED IN AN UNAUTHORIZED MANNER, AND, AS A RESULT, AN INSURED PERSON IS INDEBTED TO THE CORPORATION FOR ADDITIONAL PREMIUMS OR HAS SUFFERED A LOSS WHICH TURNS OUT NOT TO BE COVERED BY INSURANCE. THE REGULATION EXPRESSES THE CORPORATION'S AUTHORITY IN THESE CIRCUMSTANCES IN EFFECT TO RATIFY ITS AGENT'S UNAUTHORIZED ACTIONS BY FORGIVING PAYMENT OF THE PREMIUMS OR PAYING FOR THE LOSS AS IF IT HAD BEEN COVERED. IN DOING SO, THE CORPORATION RELINQUISHES A FINANCIAL INTEREST OF THE GOVERNMENT, CONSISTING OF THE RIGHT TO COLLECT THE PREMIUMS OR TO DENY PAYMENT FOR THE LOSS, AN ACTION FOR WHICH, AS DISCUSSED ABOVE, THERE MUST BE SOME AUTHORITY, WHICH WE DO NOT FIND IN FEMA'S LEGISLATIVE CHARTER.

THE CORPORATION'S REGULATION IN QUESTION PROVIDES A HISTORICAL FOOTNOTE TO PERHAPS THE LEADING CASE STATING THE RULE THAT A GOVERNMENT AGENCY GENERALLY IS NOT BOUND BY THE UNAUTHORIZED ACTS OF ITS AGENTS, FEDERAL CROP INSURANCE CORP. V. MERRILL (332 U. S. 380 (1947)), IN WHICH THE PLAINTIFF WAS DENIED RECOVERY BECAUSE HE WAS CHARGED WITH KNOWLEDGE OF CORPORATION REGULATIONS WHICH MADE HIS CROP UNINSURABLE, EVEN THOUGH HE HAD REASONABLY RELIED ON ERRONEOUS REPRESENTATIONS BY THE CORPORATION'S AGENT THAT IT WAS INSURABLE AND WOULD HAVE PREVAILED HAD THE CORPORATION NOT BEEN A GOVERNMENT AGENCY. SINCE MERRILL, THE COURTS AND THIS OFFICE HAVE RECOGNIZED SITUATIONS WHERE THE GOVERNMENT WILL NOT BE PERMITTED TO DENY THE EXISTENCE OF A LEGAL OBLIGATION (E.G. UNITED STATES V. GEORGIA- PACIFIC CO., 421 F.2D 92 (9TH CIR. 1970); 53 COMP.GEN. 503 (1974)), BUT ONLY IN VERY NARROW SITUATIONS. NOTHING IN THESE CASES APPLYING A THEORY OF EQUITABLE ESTOPPEL TO THE GOVERNMENT PERMITS AN AGENCY TO MAKE PAYMENTS OR FORGO COLLECTIONS WITHOUT STATUTORY AUTHORITY.

AS PREVIOUSLY EXPLAINED, WE CAN FIND NO CLEAR STATUTORY BASIS FOR FEMA TO ADOPT SUCH A REGULATION. IN THE ABSENCE OF CLEAR STATUTORY AUTHORITY TO FORGIVE A

GOVERNMENT CLAIM OR AUTHORITY TO ACCEPT GOVERNMENT LIABILITY, AGENCIES ARE WITHOUT AUTHORITY TO CREATE BY REGULATION PROCEDURES THAT PERMIT THEM TO EXERCISE SUCH AUTHORITY. IN PARTICULAR, FORGIVENESS OF DEBTS OWED THE GOVERNMENT WOULD BE CLEARLY CONTRARY TO THE CLAIMS COLLECTION ACT AND JOINT STANDARDS ISSUED THEREUNDER WHICH ESTABLISH SPECIFIC STANDARDS FOR THE COMPROMISE OF DEBTS OWED THE GOVERNMENT AND THE TERMINATION OF DEBT COLLECTION EFFORTS. 4 C.F.R. PARTS 103-104. ACCORDINGLY, AS PREVIOUSLY STATED, THE DIRECTOR OF FEMA DOES NOT HAVE THE AUTHORITY TO ISSUE A REGULATION SIMILAR TO 7 C.F.R. 401.107.