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B-226718.2 August 19, 1987

Number: B-226718.2

Date: 1987-08-19

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The Honorable Lawton Chiles Chairman, Committee on the Budget United States Senate

Dear Mr. Chairman:

This is in response to your letter, dated July 15, 1987, requesting a legal opinion from our Office concerning the scope of the legal authorities of the Department of Defense (DOD) and the Federal Financing Bank (FFB) in connection with DOD's guarantee of Foreign Military Sales (EMS) loans made by the FFB.

In particular, you expressed concern about the depletion of the Guaranty Reserve Fund (GRF) which is used by DOD as a revolving fund to pay claims on FMS-guaranteed loans. See 22 U.S.C. Sec. 2764. As explained in your letter, the GRF is unable to "cover anticipated defaults and reschedulings." This shortage of funds in the GRF will be greatly exacerbated by the expected 1988 rescheduling of Egyptian FMS loans which will result in lost interest payment to the FFB of approximately $530 million. In your letter you advised us of an Administration "arrangement where the managers of the FF8 and the GRF would deliberately delay FFB demand on the GRF for reimbursement in order to create financial flexibility for the Defense Security Assistance Agency." You characterize this arrangement as an "unprecedented change" in the way FFB handles guaranteed loans.

You have asked us to answer five specific questions involving the legality of the Administration "arrangement" and other issues related to the financial obligations and responsibilities of DOD and FFB under the FMS- guaranteed loan program. Because there was insufficient time to ascertain the precise nature of the so-called "arrangement," particularly as it would operate in the Egyptian situation, we must necessarily treat your questions as a series of hypotheticals. In this context, we do not think that the FFB is authorized to delay for an unreasonable period of time making its demand for payment from DOD, once the borrower has failed to make payment when due.

Date: September 30, 1987 To: Director, OCR From: Assistant General Counsel, Robert H. Hunter

Subject: Enforceability of GAO Opinion concerning DOD's guarantee of FMS Loans made by FFB (B-226718.2, August 19, 1987).

On September 29, 1987, I spoke with Bill Dauster (224-3961), Chief Counsel of the Senate Budget Committee, concerning the above opinion to Senator Chiles.

The opinion concluded that DOD is legally obligated to use authority provided in the 1987 Supplemental Appropriations Act to reimburse FEB for FMS loan defaults and reschedulings from unobligated balances in accounts specified in the supplemental. Mr. Dauster reflected Senator Chiles' concern that DOD would not comply with GAO's opinion by the end of the fiscal year and asked what GAO could do to enforce its opinion. He was particularly interested in the possibility of GAO seeking judicial enforcement of the opinion.

I told Mr. Dauster that the opinion did not deal with the expenditure of appropriated funds (except to the extent it could be read to preclude DOD from spending unobligated balances in the specified accounts for purposes other than payments to FFB) so that the use of GAO's exception authority was not a realistic enforcement mechanism. I then expressed the opinion that GAO lacks authority to seek judicial enforcement of its opinions and decisions unless such authority is provided by statute, as in the case of the Impoundment Control Act, for example.

Mr. Dauster was not surprised by my answer and said that he was merely exploring enforcement options, including the possibility that Senator Chiles himself would seek judicial enforcement of our opinion.

Mr. Dauster's concern about DOD's compliance with our opinion is well founded. In a September 3, 1987, response to our opinion, the DOD General Counsel disagreed with our position on the mandatory nature of the Supplemental Appropriations Act language. A copy of that letter, without enclosures, is attached to this memo.

In a follow-up conversation, Mr. Dauster inquired about the possibility of a GAO audit of FFB to determine the status of its billings to DOD for loan defaults and/or reschedulings (i.e., whether FFB has agreed with DOD not to seek payment until some indefinite future time). I discussed this possibility with John Simonette, Associate Director, AFMD, who agreed to have his staff discuss it with Mr. Dauster.

Attachment

cc: Mr. Socolar Mr. Van Cleve Mr. Hinchman Mrs. Efros Mr. Simonette, AFMD Mr. Belkin Mr. Maguire Mrs. Carter Office of Policy Index & Files

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Mr. Charles A. Bowsher Comptroller General U.S. General Accounting Office Washington, D.C. 20548

Dear Mr. Bowsher:

This is the Department of Defense (DOD) response to the General Accounting Office unnumbered letter report, "Activities and Legal Authorities of the Department of Defense and the Federal Financing Bank," dated July 22, 1987, GAO Control Number B-226718.2/OSD Case 7365.

The Department regrets that it was not possible for your office to wait for our response before issuance of the GAO opinion of August 19, 1987, but nevertheless appreciates the opportunity to comment on the important issue of the depletion of the Guarantee Reserve Fund (GRF) and available means to replenish it. It is

imperative that the Congress and the Administration resolve this issue in a way that is consistent with U.S. law but which also does not further impair the ability of the U.S. to carry out a rational and reasonable foreign policy. One of the replenishment alternatives being considered by several Members of Congress would require the transfer to the GRF of approximately $500 million from security assistance programs that already have been decimated by Gramm-Rudman-Hollings. The Administration has two other approaches, which were originally outlined in a 1385 special report to the Congress on the GRF situation and which the Department considers still to be viable in the current budget climate. These are (1) a permanent indefinite appropriation, and (2) the use of receipts from old direct credit loans to replenish the GRF. Either of these options would meet the requirement to replenish the GRF without virtually eliminating security assistance for all countries other than the few whose programs are earmarked by the Congress.

As far as the Egyptian rescheduling is concerned, the State Department is currently staffing a draft bilateral debt rescheduling agreement for Egypt for interagency approval and for incorporation of interest rates. Under this proposed agreement, Egyptian arrearages and debt service payments due from January 1, 1987, through June 30, 1988, on Foreign Military Sales (EMS) guaranteed loans will be rescheduled for future payment. The EMS debts, which are covered by this proposed agreement, include all principal, interest, and late charges due during the consolidated period, plus arrearages and late charges due prier to January 1, 1987. The total amount of rescheduled EMS debt is estimated at $l,246.5 million, of which $568.5 million represents prospective amounts due to the Federal Financing Bank (FFB). A detailed listing of the payments to be covered under this refinancing is enclosed at Tab A. In the event that Egypt defaults on payments under the revised payments schedule, the GRF then would be liable to pay the FFB according to that schedule. In this respect, the Department of Defense concurs with the position outlined in Deputy Secretary of State Whitehead's letter of July 27, 1987, to Representative Obey. A copy of that letter is enclosed at Tab B.

With regard to your five questions, the Department of Defense would have deferred answer to Questions one and two to the Treasury Department since those questions dealt with the legal authorities of the FFB. The Department of Defense concurs with the conclusions you reached in answering Questions three and four. We are, however, concerned with your answer to Question five.

We recognize that the situation posed by Question five is unique, but we believe that it can be resolved by normal rules of statutory construction. As you apparently recognize, on its face the use of the term "may" rather than "shall" demonstrates that the provision authorizes rather than requires the Department of Defense to use the other funding source identified in the provision to pay claims against the GRF when funds in the GRF are inadequate for that purpose.

Since the provision seems reasonably clear, there appears to be no need to turn to its legislative history. But when we do so turn, we reach the same conclusion that you reached in your August 19, 1987 opinion; namely, that the legislative history supports the conclusion that the provision is not mandatory.

We find it difficult to conclude that, when both a provision and its legislative history are consistent in meaning, it is possible to conclude that the provision has an opposite meaning.

Your conclusion is based on the statement that "the FFB was never intended to bear any risk of loss when serving as a guaranteed lender." We agree with this statement. But the statement was as true before the provision in question was enacted in the Supplemental Appropriation Act of 1987 as it is after its enactment. It was true when Congress permitted, indeed required, only a relatively small amount of funds to support the much larger obligations of the FMS-guaranteed loan program. It would be true when and if there were defaults that require DOD to make payments to FFB when DOD did not have the funds to do so. Thus, even before enactment of the Supplemental, the statement did not address "how" a loss would be covered; it only addressed "that" a loss for FFB be covered from other sources. Enactment of the provision of the Supplemental did not change any basic concepts. It merely provided a way to cover some or all of the losses. This new authority must be examined in its own right to see how extensive it is and whether it is permissive or mandatory. If it is permissive, and if it is not used, we merely revert to the status quo ante; namely, Congress providing a way to cover FFB losses.

Thus we do not agree with your conclusion that the provision has the opposite meaning from its words and legislative history.

Sincerely,

L. Niederlehner Deputy General Counsel

Enclosures