COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-34706 December 5, 1947

Honorable Charles A. Eaton, Chairman,

Select Committee on Foreign Aid,

House of Representatives.

My dear Mr. Chairman:

I have your letter of November 24, referring to the investigations being carried on by your Committee with respect to the organization and administration of foreign aid and recovery programs, and your request for such information as is available to the General Accounting Office on the subject of Government corporations with respect to three specific questions, the first of which is as follows:

"(1) The actual significance of the use of the corporate form, from the standpoint of appropriations, expenditures, accounting, purchases, receipts, lawsuits, etc."

Of course, in the short time available it is not possible to furnish a definitive analysis and report, but it is believed the following comments will be found helpful to the Committee.

1. Appropriations: It is not possible to generalize with completeness as to the actual significance of the use of the corporate form, from the standpoint of appropriations, for the reason that no

consistent policy has been adopted by the Congress in financing the corporations, nor, in fact, is it necessarily true that there should be entire uniformity in this regard. In general, however, it may be said that if the more usual form of capitalization is employed, the significant difference with respect to appropriations is that the corporation is given a lump sum in the form of capital stock or authority to borrow, with further authority to use and reuse the sum, and particularly to treat it as a revolving fund, thus permitting the reuse of receipts such as repayment of loans, receipts from the sale of goods, and the like, whereas the normal departmental rule is that income of all types (unless specially excepted) must be deposited to the general fund of the Treasury and is not reused unless appropriated by Congress. The corporation's funds need not be reappropriated; the only comparable requirement is that the over-all budget program of each wholly-owned corporation must be submitted to Congress each year.

There are exceptions both ways to this perhaps too broad generality; thus, certain corporations' expenditure-type activities are carried on under regular annual appropriations which revert to the Treasury unless obligated during the year for which the appropriation is made, while in the case of numerous departments and agencies revolving funds have been established by act of Congress. In other words, there is no <u>necessary</u> distinction between the corporation and the department as to appropriations, but the more frequent characteristic is that the corporation has a single revolving fund while the department operates on an annual grant of funds

without the authority to reuse income or receipts.

2. Expenditures: In the matter of expenditures there is not a clear line of distinction for the reason that, while corporations were formed largely for the reason that administrators preferred to find a method of procedure which would permit expenditures by whatever rules they, themselves, chose to adopt, this feature has not until very recent times been the subject of general Congressional enactment, and it cannot be said with confidence that Congress has announced a policy with respect to expenditures of corporations as such. Instead, the approach has been to grant to certain corporations an all-inclusive authority to determine for themselves the character and necessity of their expenditures and the manner in which they shall be incurred, allowed, and paid. Where such language appears in the act chartering the corporation, there can be no question but that Congress has determined that the Congressional or statutory rules otherwise directing how the public monies shall be spent are not of their own force to apply to the corporation, but rather that the corporation shall determine for itself what methods, procedures, etc. should be employed.

Where the language as to determining the manner of expenditure, etc., does not appear in the corporate charter, the question is not at all clear. Those operating on behalf of the corporations undoubtedly would assert the right to make such determinations on the basis of the rationale for the employment of the corporate form in the first place, and there are numerous legal materials (not in the form of specific legislation or direct judicial holdings) strongly supporting that view.

However, my attention has never been drawn to an act of Congress specifying that the laws of the land do not apply to Government corporations merely because they are Government corporations, and in the absence of such indication of Congressional policy, I am not in a position to conclude broadly what difference, if any, there is as to expenditures where the corporate charter does not contain the language above referred to. Some distinction may be found, of course, where the restrictive statutes in terms apply only to the direct expenditure of appropriations as such.

3. Accounting: The matter of accounting is somewhat more readily describable. The accounting required of the departments spending the appropriations of the Congress follows a well-settled and long-established practice, even antedating the formation of our Government. In essence the procedure consists of "advancing" a sum appropriated to an individual officer operating with or for the department responsible for the expenditure. That officer at that time becomes, technically, indebted to the United States for that amount until he "accounts" for the same. This is done by the process of showing a lawful expenditure of the sum, with the result that if, in the opinion of the auditors (or, on appeal, of the Comptroller General), the expenditure is shown to have been an unlawful one, no credit is allowed for the item, the officer's indebtedness remains, and he is subject to suit therefor in the United States courts, at which stage the question of legality of the expenditure is

tested judicially. The ruling of the accounting officer is binding upon the departments but, of course, is not binding in any way upon Congress or the courts.

In recent years that procedure has been altered slightly for the civilian operations of the Government by the enactment of the Certifying Officers Act, under which the particular person responsible and accountable for the legality of the expenditure is not the fiscal officer to whom the money was advanced and who drew the check, but, rather, is the "certifying officer" who approved the payment and on whose approval the disbursing officer relied.

The result, of course, of that audit and settlement procedure is that the payments are made by the administrative officer at the risk of the subsequent disallowance by the General Accounting Office, and in the event of such disallowance, assuming its correctness, the amount is recoverable by the Government either from the payee who received it in error, or from the officer responsible for the payment, or from his surety. The audit procedure varies widely according to the circumstances and needs of the situation; that is, it may call for a voucher audit here in Washington (which may be more or less detailed), or it may be found more appropriate to make a field audit at the site of the operations. Also, the audit does not necessarily call for a review of each item of expenditure; it is essential that under that plan all expenditures are at least <u>subject</u> to such audit.

On the other hand, the accounting required of corporations proceeds upon a somewhat different basis. In the Government corporation control acts of 1945 Congress directed for the first time that the General Accounting Office undertake annually to make a commercial, corporate type of audit of the financial transactions of all the Government corporations. Also, the Comptroller General was authorized to utilize that type of audit (in those few cases where the corporations are financed by departmental-type appropriations) for the purpose of settling the accounts of the officers to whom appropriations are advanced. A regulation has just been adopted to that effect, so that the same audit procedure will apply to corporations, whether they be financed by a capital grant or by an annual expenditure type of appropriation. The commercial, corporate type of audit comprehends an examination of the actual books and records of the agency, and a survey of its transactions on a test-check basis, leading up to a comprehensive annual report to the Congress, to the President, and to the corporation. The result, of course, is an over-all or agency-wide survey type of audit which does not necessarily call for examination of detailed transactions, but which does include a resume of the entire function under review, its background, authority, and methods of operation.

The remaining significant difference is that the survey type of audit depends upon corrective action being taken by the management or by Congress to prevent future errors, but it does not include any independent machinery for collection back where erroneous payments are found to have been made. On the other hand, the accounting required for

appropriations does not call for a survey or periodic report on the operations as a whole, but it does include the important element of control of expenditures through the power of disallowance and the specific authority for, and mechanics of, collection back where erroneous disbursements are shown to have occurred.

4. Purchases: The important distinction with respect to purchases is that created by section 9 of Public Law 600, approved August 2, 1946, 60 Stat. 809 when (and, as I believe, for the first time) Congress gave thorough consideration to the asserted freedom of corporations from Congressional control and directed that in the single case of purchase and sale transactions the corporations should be required to follow the departmental statute as to advertising for bids, only when there is involved an item of expenditure from their administrative expense funds, which comprises a relatively minor class of transactions. In contrast, where operating expenses are involved, the corporation is not normally required by statute to advertise before purchasing; whether it shall do so is left to administrative regulation or discretion.

5. Receipts: The matter of receipts has been perhaps sufficiently covered above; to reiterate, the department normally must deposit its receipts into the general fund of the Treasury, without authority to reuse them as such, while generally the Government corporation retains its receipts in a revolving fund and may reuse them without Congressional reappropriation. The only restriction in that regard would be that the expenditure somehow must be within the framework of the corporate purpose

and must be within the budgetary program passed upon by Congress in the annual Government Corporation Appropriation Act, although I do not understand that this sanction would necessarily include a limitation upon the amount of money expended for any corporate program, unless adopted by specific Congressional action.

6. Law suits: The matter of law suits does involve a certain distinction. Normally a Government department by itself is not suable, for the reason that the department is not an entity apart from the Government and is entitled to the immunity from suit which attaches to the sovereign. The corporation, however, is suable as such, and that distinction has been given full effect by the administrative agencies and by the courts (see Keifer & Keifer v. R.F.C., 306 U.S. 381). To a certain extent within the past year that difference has lost significance because of the enactment of the Federal Tort Claims Act, Sec. 410 60 Stat. 843 since now that branch of litigation with respect to tort claims is covered by that act, irrespective of the prior difference characterizing the corporations. For suits under contracts the difference is not perhaps as real as it may appear to be on the surface, since, under the Tucker Act, Mar. 3, 1887 24 Stat. 505 the Government is fully suable for breaches of contracts by the departments, and since, in fact, the Government has also a number of times been held to be suable for the defaults of Government corporations. Thus, the difference is believed to be largely one of procedure and not of substantive importance.

Your second question is:

"(2) What important statutory provisions of a restrictive or exemptive nature apply to government corporations which do not apply to other government agencies, and correlatively what restrictive and exemptive measures apply to ordinary government agencies which do not apply to government corporations."

Although freedom from general laws regulating the administration of Government departments and agencies is frequently cited as one of the principal reasons for the creation of Government corporations, in practice that freedom has varied greatly, depending on the language of the corporation's charter or other enabling legislation as well as the language of the general laws. A good many of the Government corporations have specific authority in their charters to determine and prescribe the manner in which their obligations shall be incurred and their expenses allowed and paid (RFC), sometimes specifically without regard to the provisions of any other law governing the expenditure of public funds (HOLC). In other cases such determinations are expressly made final and conclusive upon all other officers of the Government.

However, other statutes have modified such broad authority. Annual appropriation acts authorizing the expenditure of corporate funds for administrative expenses have limited the amount and specified the objects of such expenses. Also, the practice has become prevalent in some such cases of granting special authority to incur expenses for which express authority is required by general provisions of law. Such appropriation acts have even prohibited the use of corporate funds for certain purposes. Examples of these types of provisions will be found in Title III of the Government Corporations Appropriations Act of 1947, see 302, 60 Stat. 595

In cases where the board of directors has authority to determine the corporation's expenses, without regard to other law, the Comptroller General has held that in the absence of the exercise of such authority, the general law applied.

Most of the so-called "restrictive statutes" apply to appropriated funds and so are claimed by the corporations not to affect nonappropriated funds of a Government corporation. Other statutes, directed at Government activities in general, may by their terms or interpretation affect the corporations. Public Law 600, 79th Congress, approved August 2, 1946, authorizing certain administrative expenses in the Government service, applies to wholly-owned Government corporations. One reason that the question as to what statutes do or do not apply to the Government corporations has not been fully settled is that until recently the General Accounting Office has had no occasion to pass on expenditures of most such corporations.

For that reason, it is not possible to answer your question definitively and in general terms; an important specific difference as to the law governing public purchasing has been explained above.

Your third question is as follows:

"(3) The distinction in foreign law between the operation on their territory of foreign-owned public corporations or their subsidiaries, as opposed to field offices of executive agencies of foreign governments."

One phase of this question—that is, whether a Government corporation may not operate abroad more conveniently and more effectively where a commingling of activities with the local governments may be required—has already been extensively covered by the report of the Committee on

Foreign Affairs of the House of Representatives issued in connection with the bill to reincorporate the Institute of Inter-American Affairs (House Report No. 955, 80th Congress). Another phase involves the question whether the freedom from local taxation, police regulation, customs laws, and other incidence of foreign law to which the United States would be entitled under the doctrine of sovereign immunity, may in some countries be lost where the choice is made to operate not directly as a Government operation, but indirectly through the medium of a corporation, especially so if the charter be obtained under foreign law. In the time available I am not in position to examine the question adequately, but a number of useful references on this question are found in Volume II of Hackworth's Digest of International Law at pages 471, 475-487. See also the references in Judge Mack's opinion in The Pesaro, 277 Fed. 473; Hersey, The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution, 27 Mich. Law Rev. 751.[1/]

It is recognized that the foregoing discussion is not an adequate treatment of many of the questions you raise, and it is suggested a more helpful treatment definitely could be furnished if there were available specific data as to what activities the contemplated agency is planned to undertake. If I can be of further aid in the matter, particularly along the lines just suggested, please feel free to call

---

1/ It may be found necessary to provide by statute, by treaty, or by Executive agreement for this immunity in carrying out the program.

upon me. If you prefer, it might be more effectively considered through the medium of an informal discussion with members of my staff, who, of course, would be available at your call.

Sincerely yours,

(Signed) Lindsay C. Warren

Comptroller General
of the United States.