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General Accounting Office  
Washington, D.C. 20548

Office of the General Counsel

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February 10, 1993

Mr. Jeffrey Axelrad  
Director, Torts Branch  
Civil Division  
Department of Justice

Dear Mr. Axelrad:

This responds to your request for our views on the availability of the Judgment Fund to pay two monetary settlements of the Farm Credit Administration (FCA): a Federal Tort Claims Act (FTCA) settlement of \$11,500 in Mace v. United States, Civ. No. 91-2620C(a), and a \$10,255.10 Freedom of Information Act (FOIA) settlement in Commodity News Services, Inc. v. FCA, C.A. No. 90-2652 (D.D.C.). As explained below, under 12 U.S.C. § 2250(b)(2), the FCA's funds are not appropriated funds, and thus not subject to the longstanding restriction on the use of appropriated funds to pay judgments. Hence, the FCA fund is available to pay litigative awards against the FCA. Consequently, payment of the instant awards is "otherwise provided for." 31 U.S.C. § 1304(a)(1) (1988). Under this analysis, the Judgment Fund is not available.

As you know, amounts owed by the United States under judgments and Justice Department compromise settlements are usually paid from the permanent indefinite appropriation commonly known as the Judgment Fund. 31 U.S.C. § 1304. To qualify for payment from this fund, the award (1) may not be "otherwise provided for;" (2) must be certified by the Comptroller General; and (3) must have been made under one of a number of specified statutory authorities, such as 28 U.S.C. §§ 2414, 2517, 2672, or 2677. 31 U.S.C. § 1304(a). Most court orders and Justice Department compromise settlements made under the FOIA and FTCA can satisfy those criteria. See B-173761-O.M., Apr. 6, 1976; GAO, Principles of Federal Appropriations Law at 11-50 (1982). However, awards against the FCA under the FOIA and FTCA do not meet the first of these criteria because payment is "otherwise provided for".

To be "otherwise provided for" under 31 U.S.C. § 1304 means that there is some other source of payment which is legally available to pay the award. 66 Comp. Gen. 157, 160 (1986). Under a rule established by the Comptrollers of the Treasury, agency appropriations are not, as a general

proposition, available to pay litigative awards. See, e.g., 1 Comp. Gen. 540, X(1922); 8 Comp. Dec. 261, X262 (1901); 8 Comp. Dec. 145, X149 (1901). That rule rendered the appropriations that fund most agencies legally unavailable to pay such awards. Thus, in most cases, even where Congress had waived sovereign immunity from suit, the resulting judgments could not be paid unless the Congress specifically appropriated funds for that purpose. 69 Comp. Gen. 40, X42 (1989); 66 Comp. Gen. 157, X159 (1986). Congress solved this problem by establishing a permanent, indefinite appropriation, the Judgment Fund, and thereby eliminated the need for specific appropriations for most of the judgments (and later, compromise settlements) which had previously required specific appropriations. See, e.g., B-115234, X May 19, 1953. All of this presumed, however, that the award to be paid was against an agency whose expenses were paid from appropriated funds.

The general prohibition with respect to the payment of litigative awards does not apply to nonappropriated funds. It was not intended to be applied to nonappropriated funds, and never in the decisions of this Office, the Comptrollers of the Treasury, or the federal courts has it been so applied. To the contrary, it has long been held that, except where such is explicitly authorized by law, the Judgment Fund may not be used to satisfy the obligations of nonappropriated fund entities. Normally, such entities must pay litigative awards against them from their own funds. E.g., B-204703, X Sept. 29, 1981. The court's decision in Cosme Nieves v. Deshler, 786 F.2d 445, X448-449 (1st Cir. 1986), contains an excellent discussion of this issue in the context of "nonappropriated fund instrumentalities."

FCA derives all of its operating funds from assessments levied on institutions of the federal Farm Credit System. 12 U.S.C. §§ 2245(d), X2249, X2250. In 1988, the Congress amended the FCA's organic legislation to provide that FCA's operating fund "shall be available, without regard to the Balanced Budget and Emergency Deficit Control Act of 1985, to pay the expenses of the [FCA]" and "shall not be construed to be Federal Government funds or appropriated monies."<sup>1</sup> 12 U.S.C. § 2250(b) X. See Pub. L. No. 100-233, § 432(a) X 101 Stat. 1660-61 (1988). Although the legislative history of this amendment does not indicate why these changes were made, they may have been in response to

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<sup>1</sup>The language of the second provision (regarding nonappropriated fund status) is virtually identical to language found in the organic legislation of the Federal Reserve Board (12 U.S.C. § 244 X) and the Office of the Comptroller of the Currency (12 U.S.C. § 481, X as amended).

decisions of this Office holding that FCA's funds are subject to the Balanced Budget and Emergency Deficit Control Act of 1985, and construing FCA's funds to be appropriated funds of the United States subject to the same general rules of appropriations law as are other appropriated funds.<sup>2</sup> In any event, given the 1988 amendments, FCA's funds are no longer appropriated funds of the United States. As such, they are no longer subject to the general rules applicable to appropriated funds. In this particular case, this means that the prohibition on the use of appropriated funds to pay litigative awards no longer applies to FCA. Accordingly, FCA's funds are legally available to pay litigative awards, unless otherwise precluded by law.

Contained in 12 U.S.C. § 2249<sup>X</sup> is a list of "necessary expenditures" for which FCA may use its fund. The FCA has expressed some concern that, because the payment of litigative awards is not specified in that list, FCA may be specifically precluded from using its funds for that purpose. However, the list in section 2249 does not appear to be a comprehensive list and thus, if we are correct on this point, does not exclude other legitimate uses. Moreover, we note that there are two other provisions in FCA's enabling statutes which authorize FCA to use its funds to pay, without exception, for all of the FCA's "operations" and "expenses." See 12 U.S.C. §§ 2245(d)<sup>X</sup> 2250(b)(1)<sup>X</sup>

Finally, we are not unmindful of FCA's argument that it has not budgeted for these awards, and that their payment might jeopardize the FCA's ability to operate within the funding ceilings that the Congress has imposed upon the FCA. Unfortunately, it has long been held that, where the payment is otherwise provided for, monetary exhaustion of the proper source of payments will not render the Judgment Fund legally available. 66 Comp. Gen. 157, 160 (1986). As we see it, there are several options open to FCA. To the extent that FCA presently has unobligated funds adequate to cover the settlements, it should pay the claimants itself. If FCA lacks the necessary amount of unobligated funds, it should so apprise the court and take the appropriate steps to obtain the funds necessary to pay these awards. FCA may also wish to consider seeking a "legislative fix" in the form of an amendment to 12 U.S.C. § 2250(b)(2)<sup>X</sup> which specifies that litigative awards against FCA shall be paid from the Judgment Fund as though it were an appropriated

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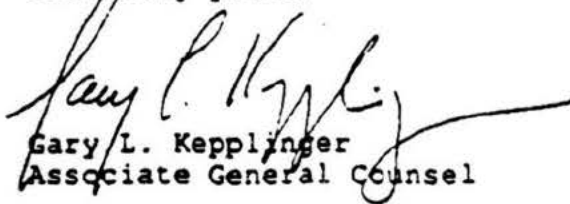
<sup>2</sup>B-210555.16-O.M., Jan. 13, 1987 (prohibition on providing employees home-to-work transportation applicable to FCA funds); B-221498.9, Feb. 25, 1986 (Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 applicable to FCA funds).

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fund agency. Unless and until FCA obtains such a legislative solution, we suggest that it take into account potential litigative awards, along with its other operating expenses, as it determines (and reports to Congress) the level of assessments needed to fully fund itself each year.

We hope these views are helpful to you in deciding upon the best position for Justice to take with respect to this matter. We look forward to working with you so that we can reach a final position as agreeable to all as the facts and law permit and in the best interest of the government.

Sincerely yours,



Gary L. Kepplinger  
Associate General Counsel

cc: Ms. Jean Noonan, Farm Credit Administration