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DEC 9 1977

The Honorable Thomas F. Eagleton  
United States Senate

Dear Senator Eagleton:

This replies to your letter of November 22, 1977, requesting our legal opinion on several aspects of the Department of Housing and Urban Development's (HUD) determination to convert the National Flood Insurance Program from an industry-operated program with Federal financial assistance (Part A) to a Government-operated program with industry assistance (Part B). In addition to other matters, you asked us to give immediate consideration to the following:

--Electronic Data Systems (EDS) as fiscal agent.

Evaluate whether EDS qualifies as a fiscal agent under section 1340(a) of the National Flood Insurance Act of 1968, 42 U.S.C. 4071(a).

--Implementation of Part B.

Assess whether HUD's contract with EDS authorizing the reimbursement of acquisition costs for space, personnel, and hardware "reasonably necessary to operate a Part B program" is implementation of Part B or, as HUD contends, "activities preliminary to implementation," during the 30-day period reserved for congressional review. 42 U.S.C. 4071(b).

The National Flood Insurance Act of 1968 (Act), 42 U.S.C. 4001 et seq., enacted a comprehensive blueprint for the establishment of a national flood insurance program. The Act authorized the Secretary of HUD to implement an industry-operated flood insurance program with Federal assistance in accordance with Part A, 42 U.S.C. 4051, and, if the Secretary makes the determination required under section 1340(a) of the Act, 42 U.S.C. 4071(a), a Government operated program with industry assistance under Part B of the Act, 42 U.S.C. 4041. In June

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1969, HUD, acting through the National Flood Insurance Association (NFIA), an association of insurance companies formed to provide flood insurance under Part A of the Act, signed an agreement establishing the industry-Government relationship that enabled the flood insurance program to be implemented under Part A. This relationship has continued until recently. On November 2, 1977, the Secretary of HUD determined that the operation of the flood insurance program would be materially assisted by the Government's assumption of the operational responsibility for the flood insurance program. This determination and HUD's report to Congress on the reasons for the program change are reprinted at 42 Fed. Reg. 58569 (November 10, 1977).

On November 29, 1977, NFIA filed a complaint in the United States District Court for the District of Columbia challenging HUD's conversion of the National Flood Insurance Program to a Part B Government operated program. National Flood Insurers Association v. Harris, Civil Action No. 77-2028 (D.D.C., filed November 29, 1977). The plaintiff in the lawsuit alleges that HUD's determination to convert to a Government-operated flood insurance program is unlawful on two grounds. First, the plaintiff argues that unless HUD demonstrates that the Part A industry-operated program with Federal financial assistance is a "failure," or that the two sides cannot agree on the terms of the Part A program, or that a Federal takeover under Part B is "necessary," the conversion to a Part B program violates the congressional mandate that HUD operate the flood insurance program on the basis of a Part A risk-sharing joint venture between Government and the insurance industry. In this regard, plaintiff argues that HUD's November 2, 1977, report to Congress fails to satisfy the requirement that HUD may not convert to a Part B Government-operated flood insurance program absent a determination supported by pertinent findings. Second, the plaintiff points to HUD's announced intention to contract on or after December 3, 1977, with EDS as HUD's fiscal agent under a Part B program and argues that EDS does not qualify as a fiscal agent since it is not an insurance company, insurer, agent or broker, or insurance adjustment organization, as required under section 1340(a) of the Act, 42 U.S.C. 4071(a). Based on the above allegations, the plaintiff seeks the following declaratory and injunctive relief:

--declare that the HUD report to Congress, dated November 2, 1977, 42 Fed. Reg. 58569 (November 10, 1977), justifying the program change, fails to provide sufficient justification to satisfy the requirements of section 1340 of the Act, 42 U.S.C. 4071, for conversion to a Part B Government-operated flood insurance program;

--issue preliminary and permanent injunctions restraining the Secretary of HUD from proceeding with the conversion to a Part B Government-operated insurance program in reliance upon the HUD report to Congress dated November 2, 1977, 42 Fed. Reg. 58569 (November 10, 1977);

--declare that the Secretary's announced intention to contract with EDS as fiscal agent of HUD violates section 1340(a) of the Act, 42 U.S.C. 4071(a); and

--issue preliminary and permanent injunctions restraining the Secretary of HUD from contracting or otherwise agreeing with EDS to serve as the fiscal agent of HUD under section 1340(a) of the Act, 42 U.S.C. 4071(a).

We understand that a hearing on plaintiff RFIA's motion for a temporary restraining order or preliminary injunction has been set for Friday, December 9, 1977, at 10:30 A.M. in the United States District Court for the District of Columbia.

In recognition of the primacy of the judiciary to provide a meaningful resolution to the matters in litigation and because we are concerned that our opinions on matters in litigation may interfere with or prejudice the interests of a party, it is our policy not to comment on matters that are under judicial consideration. In view of the present litigation and this long standing policy, we must therefore decline to answer your questions. The status of EDS as a fiscal agent is directly in issue in the pending litigation. While the nature of the HUD-EDS contract has not as yet been brought to the court's attention, HUD's authority to enter into this contract may be dependent on another issue that is being litigated: whether HUD had a sufficient basis for making the program change. Any comment we might make regarding the nature of the HUD-EDS contract may be of no significance until this larger issue is resolved. For these reasons, I do not believe that we should collaterally intrude into the pending litigation.

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Your November letter also asked about the requirements for a Part B takeover, although an immediate response was not requested. Specifically, you asked us to

"1. \* \* \* Determine whether the flood insurance program reached that 'last resort' where it no longer can be carried out under Part A and would be 'assisted materially' by the Government's assumption of operational responsibility?"

This question, in essence, addresses the propriety of the insurance program changeover and is also presently under judicial review. Accordingly, we must also decline to comment on this issue.

Sincerely yours,

SIGNED ELMER B. STAATS

Comptroller General  
of the United States