



**Comptroller General
of the United States**

Washington, D.C. 20548

B-220507.24

October 31, 1991

The Honorable Glenn English
Chairman, Subcommittee on Conservation,
Credit, and Rural Development
Committee on Agriculture
House of Representatives

Dear Mr. Chairman:

You have requested the views of the General Accounting Office as to the extent to which the Federal Agricultural Mortgage Corporation (Farmer Mac or the Corporation) is statutorily authorized to conduct two new programs and to issue debt instruments, e.g., notes, to finance them.

Farmer Mac was created by the Agricultural Credit Act of 1987¹ (the 1987 Act) and is a federally chartered instrumentality of the United States and an institution of the Farm Credit System.² The 1987 Act authorized Farmer Mac to guarantee the timely payment of principal and interest on securities backed by pools of first mortgage loans issued by certain institutions (poolers).³ This arrangement was designed to facilitate the development of a secondary market in rural housing and agricultural real estate mortgage loans so as to provide additional long-term credit to farmers and ranchers and rural homeowners.⁴ Nevertheless, few institutions have expressed interest in forming pools of such loans and issuing securities to investors. To encourage other institutions to participate, Farmer Mac proposes to purchase (or have an affiliated company purchase) mortgage-backed securities issued by poolers with funds obtained through the issuance of notes and other indebtedness to private parties or the public (the Farmer Mac I proposal). Farmer Mac would hold the securities indefinitely and eventually try to sell them to investors.

In 1990, the Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 Act) amended the legislation governing Farmer Mac to enable the Corporation to create a secondary

¹ Pub. L. No. 100-233, 101 Stat. 1686.

² 12 U.S.C. § 2279aa-1(a)(1) and (2).

³ 12 U.S.C. § 2279aa-1(b).

⁴ 12 U.S.C. § 2279aa note.

market for loans made to farmers by banks and guaranteed by the Farmers Home Administration (FmHA).⁵ (FmHA guarantees 90 percent of the outstanding balances on farm loans made by private lenders.) The secondary market would be created by the Corporation's guaranteeing the timely payment of interest and principle on securities backed by pools of FmHA guaranteed loans.⁶ In addition, the 1990 amendments also expressly authorized Farmer Mac or its affiliate to act as a pooler ("certified facility") of such loans.⁷ Farmer Mac plans to become a pooler. To raise the funds necessary to purchase the FmHA guaranteed portions of these mortgages, it will issue notes and other indebtedness to the public or private parties (the Farmer Mac II proposal). It has already issued \$50 million of such notes. Under this proposal, Farmer Mac would hold the loans indefinitely and eventually try to sell securities backed by a pool of such loans to investors.

We have carefully reviewed several legal opinions concerning the authority for Farmer Mac I and II proposals, including opinions prepared by Farmer Mac's attorneys.⁸ Based on our analysis, including a review of these opinions, we believe that the Farmer Mac I proposal is not authorized and that the Farmer Mac II proposal is authorized.

With regard to the Farmer Mac I proposal, Farmer Mac's attorneys assert that Congress's objective in establishing the Corporation was to facilitate the development of a secondary market for agricultural mortgages.⁹ Given this

⁵ Pub. Law No. 101-624, 104 Stat. 3834.

⁶ 12 U.S.C. 2279aa(9)(B).

⁷ 12 U.S.C. § 2279aa(3)(B).

⁸ The Congressional Research Service (CRS), the Farm Credit Administration (FCA), and Farmer Mac's attorneys, Brown & Wood, and Fried, Frank, Harris, Shriver & Jacobson, have issued opinions regarding the statutory authority for the Farmer Mac I and II proposals. Your Subcommittee requested CRS views. FCA's opinion was prepared as the agency charged with regulating Farmer Mac.

⁹ Section 701, Subtitle A, Title VII of the 1987 Act. As stated by Congress, the purposes of Title VII of the Act, which created Farmer Mac, are:

"(1) to establish a corporation chartered by the Federal Government;

legislative purpose, they find that the statute provides Farmer Mac with both explicit and implicit authority to purchase and hold poolers' securities and to issue debt obligations to finance such purchases. The Corporation has express authority to "purchase" any securities, as well as authority to hold personal property.¹⁰ In addition, they argue, the authority to purchase and hold poolers securities may be implied as incident to Farmer Mac's statutory purpose of providing a secondary market arrangement for agricultural mortgages.¹¹ With respect to the issuance of debt obligations, Farmer Mac has the express authority (i) "to enter into contracts and make payments with respect to the contracts,"¹² (ii) "to make and perform contracts, agreements, and commitments with persons and entities both inside and outside the Farm Credit System,"¹³ and (iii) to "sell any securities or obligations."¹⁴ Also, they assert that Farmer Mac's authority to issue obligations is

"(2) to authorize the certification of agricultural mortgage marketing facilities by the corporation;

"(3) to provide for a secondary marketing arrangement for agricultural real estate mortgages that meet the underwriting standards of the corporation-

"(A) to increase the availability of long-term credit to farmers and ranchers at stable interest rates;

"(B) to provide greater liquidity and lending capacity in extending credit to farmers and ranchers; and

"(C) to provide an arrangement for new lending to facilitate capital market investments in providing long-term agricultural funding, including funds at fixed rates of interest; and

"(4) to enhance the ability of individuals in small rural communities to obtain financing for moderate-priced homes." (Emphasis supplied.)

¹⁰ 12 U.S.C. 2279aa-(3) (c) (12).

¹¹ 12 U.S.C. 2279aa-3(c) (13).

¹² 12 U.S.C. 2279aa-3(c) (9).

¹³ 12 U.S.C. 2279aa-3(c) (11).

¹⁴ 12 U.S.C. 2279aa-3(c) (12).

incidental to the Corporation's express power to purchase securities and to its statutory purpose.

We believe that Congress has not provided Farmer Mac with explicit or implicit authority to purchase and hold poolers' securities. The explicit and implicit authorities Farmer Mac's attorneys adduce to support their position depend upon what we regard as an incorrect view of the specific role Congress assigned Farmer Mac in the 1987 Act. The act established Farmer Mac as a corporation with specific legislative duties¹⁵ and set out a list of general powers to be used to conduct its corporate business.¹⁶ Farmer Mac's legislative duties are to guarantee the timely payment of principal and interest on securities backed by pools of farm loans and rural housing loans, and to establish standards for the loans eligible to be included in loan pools and for the qualification of institutions to act as loan poolers.

The statement in the purpose clause that the legislation is to provide for "a secondary market arrangement" for agricultural mortgages does not constitute a grant of authority to Farmer Mac. Certainly, it does not authorize Farmer Mac's undertaking secondary market activities in addition to the issuance of payment guarantees. The purpose clause of a statute sets forth Congress's objectives in enacting such legislation. It does not provide authority for carrying out these objectives. These are provided, expressly or by implication, in other parts of a statute. Thus, in the 1987 Act, provisions other than the purpose clause specify what activities the Corporation is to carry out to meet congressional objectives.

The guarantee of timely payment on poolers' securities was the vehicle Congress selected to carry out the statutory objective to create a secondary market arrangement for agricultural mortgage loans. By contrast, similar congressionally chartered corporate institutions have received much broader legislative authority to carry out their statutory objective of secondary market development for loans. For example, a legislative purpose in establishing both the Student Loan Marketing Association (Sallie Mae) and the Federal National Mortgage Association (Fannie Mae) was to create secondary market facilities for certain types of loans.¹⁷ In carrying out this legislative

¹⁵ 12 U.S.C. § 2279aa-1(b)(1)-(3).

¹⁶ 12 U.S.C. 2279aa-3(c)(1)-(13).

¹⁷ 20 U.S.C. § 1087-2(a) (Sallie Mae) and 12 U.S.C. § 1716 (Fannie Mae).

objective, Congress gave each corporation specific authority to engage in broader activities than Farmer Mac. Fannie Mae is authorized to purchase housing mortgages, and to pool such loans to issue securities backed by them.¹⁸ Sallie Mae has authority to purchase, repurchase, sell, pool and to warehouse student loans.¹⁹

In summary, we believe Congress specified the scope of Farmer Mac's activities available for carrying out its legislative objectives. An expansion of the scope of these activities would require a legislative change. Farmer Mac's general corporate powers and incidental powers can only be used to carry out the role Congress assigned to Farmer Mac. The purchase of poolers' securities, as provided under the Farmer Mac I proposal, is a substantively different activity than guaranteeing the timely payments on mortgage-backed securities. This activity (1) would make Farmer Mac, rather than the investors in poolers' securities, the source for financing the secondary market, and, (2) would obviate the need for congressionally authorized payment guarantees since Farmer Mac does not need to guarantee itself as an investor.

With regard to the Farmer Mac II proposal, it is clear that the 1990 amendments to Farmer Mac's governing legislation explicitly authorize the Corporation to purchase the FmHA guaranteed portions of farm loans. The amendments specifically added Farmer Mac (or its affiliate) as a pooler with respect to these FmHA guaranteed loans.²⁰ A pooler forms a pool of loans by purchasing them from their original lenders. Thus, we believe Farmer Mac has explicit authority to purchase the FmHA guaranteed loans in order to form loan pools.

The next question is whether Farmer Mac can borrow funds, e.g., issue notes, to purchase the FmHA loans. Both Sallie Mae and Fannie Mae have specific legislative authority to borrow in order to finance their secondary market operations.²¹ In the 1987 Act, which created Farmer Mac, Congress did not explicitly provide the Corporation with the general authority to borrow funds.²² The 1987 Act did,

¹⁸ 12 U.S.C. 1719(a) and (d).

¹⁹ 20 U.S.C. § 1087-2(d).

²⁰ 12 U.S.C. § 2279aa(3)(B) and 9(B).

²¹ 20 U.S.C. § 1087-2(h) (Sallie Mae) and 12 U.S.C. § 1719(b) and (e) (Fannie Mae).

²² The 1990 Act also did not provide Farmer Mac with explicit borrowing authority.

however, authorize Farmer Mac to "exercise such other incidental powers as are necessary" to carry out the power and duties of the Corporation.²³

The test that courts have applied to determine whether an activity is authorized as incident to the express powers of a federally chartered corporation is whether the activity is directly related to the performance of those expressly authorized powers. Arnold Tours v. Camp, 472 F.2d 427, 432 (1st Cir. 1972).²⁴ We believe that Farmer Mac's proposal to issue notes to finance the purchases of FmHA guaranteed loans meets this test. It is directly related to the express legislative purpose of Farmer Mac II, i.e., to authorize Farmer Mac to act as a pooler of such loans in order to develop a secondary market for them. The Corporation will use the borrowed funds to purchase the FmHA guaranteed loans.

Our conclusion finds additional support in the views of the Senate Committee on Agriculture, Nutrition, and Forestry. The Committee recognized that Farmer Mac would have to borrow as a pooler under certain circumstances. In considering the bill authorizing Farmer Mac to be a pooler of FmHA guaranteed loans, which became law, the Committee noted

"With respect to risks Farmer Mac will face in connection with pooling FmHA guaranteed loans, the Committee has concluded that . . . Farmer Mac . . . could face . . . some cost of carry to the extent that it may have to borrow funds to cover delinquent farmer payments during a limited (90 to 120 day) period before


²³ 12 U.S.C. § 2279aa-3(c) (13).

²⁴ The Tours case concerned the incidental powers clause of the National Bank Act. National banks are federally chartered corporations with specific purposes and appear to be the organizations most similar to government sponsored enterprises (GSEs). There are few cases construing the incidental powers of GSEs. The few cases reported employ the test developed in Tours. See, Association of Data Processing Service Organizations v. Federal Home Loan Bank Board 568 F.2d 478 (6th Cir. 1977) and Central Bank N.A. v. Federal Home Loan Bank Board of San Francisco, 430 F.Supp. 1080 (N.D. Cal 1977), vacated and remanded, 620 F.2d 309 (9th Cir. 1980).

the [FmHA] guarantee could be triggered and paid to the pool."²⁵ (Emphasis supplied.)

In conclusion, it is our view that, with respect to the Farmer Mac I proposal, the Corporation is not statutorily authorized to purchase the securities of qualified poolers. Farmer Mac's authorizing legislation establishes a limited role for the Corporation, the issuance of payment guarantees, in the development of a secondary market for agricultural and rural housing loans. With regard to the Farmer Mac II proposal, Farmer Mac is expressly authorized to act as a pooler of FmHA guaranteed loans, and to carry out this legislative activity, is impliedly authorized to borrow funds to purchase such loans.

Sincerely yours,


for Comptroller General
of the United States

²⁵ Rep. No. 101-357 (July 6, 1990) p. 261, reprinted in 1990 U.S. Code Cong. & Admin. News 4915.