



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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Dear Mr. Secretary:

By letter dated August 29, 1972, the Assistant Secretary of Agriculture for International Affairs and Commodity Programs has requested our concurrence as to the legality of certain proposed modifications in the Commodity Credit Corporation's barter program.

The Assistant Secretary's letter describes the barter program, as presently set forth at 7 CFR 1495.1-1495.8, as follows:

"The Commodity Credit Corporation (CCC), since 1950, has conducted a barter program. This program was designed originally to exchange high-storage-cost, deteriorative agricultural commodities in CCC inventories for less-expensive-to-store, nondeteriorative strategic materials for stockpiling. However, over the past ten to twelve years, the program has gone through a number of revisions. Barter for strategic materials is no longer a part of the program, and almost all of the agricultural commodities exported are from private stocks.

"Since its inception the barter program has been carried out through CCC-contracts with U.S. firms. Today, these contracts require the contractor to furnish foreign goods or services, or funds to buy them, to other government agencies, and to export U.S. agricultural commodities to eligible countries. The other government agencies reimburse CCC for the value of what they receive from the contractors. CCC is obligated to pay contractors for the f.o.b. value of the private stock commodities exported.

"Contracts are signed with those firms submitting the lowest offers (expressed as a percentage of the value of the goods, services, or funds to be supplied). The value of the commodities to be exported represents the dollar value of what is to be supplied by the contractor plus the dollar value of the contractor's percentage offer (barter differential). Contractors use the barter differential to marginally reduce the selling price of the commodities to be exported and to cover various costs incident to performance of their contracts. Between 30 and 35 different firms hold barter contracts at any

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one time. In addition, during a year, about 250 export traders in grains, cotton, vegetable oils, tallow and grease, and tobacco participate in the barter program as commodity export agents of barter contractors.

"It is our belief that the CCC barter program generates export sales through regular commercial channels. To the extent that such sales are additional to those which would otherwise be made commercially, the program achieves its purpose. As pointed out in your report of [February 12, 1971], to the Congress, entitled 'Balance-of-Payments Benefits Achieved by the Department of Agriculture Through an Increased Agricultural Barter Program' [B-163536], it is not possible to establish a system which will guarantee that barter exports will not displace any commercial exports. In order to minimize such displacements, however, foreign markets for U.S. commodities are analyzed by USDA specialists. If it is determined that barter program assistance can help to develop, maintain, or increase a U.S. market, the market is designated an eligible destination for barter shipments of the particular commodity. Generally, when a country has not been a substantial cash market for the commodity and cannot be expected to become one in the near future, it is designated 'B', and barter exports are allowed to that country without restriction. When a country has a history of substantial U.S. cash sales but it appears that U.S. exports can be increased or maintained through barter, the country is designated 'A', and barter exports are permitted after review and approval on a case-by-case basis. Major U.S. markets for U.S. commodities, where there is little or no likelihood that barter exports would increase total sales, are designated 'X', and barter exports are not allowed. It is planned to continue this system.

"At the present time, a listing of eligible export destinations for each eligible commodity is attached to and incorporated by reference in each barter contract. The listing is fixed for all exports under that contract for the 14 to 18 months allowed the contractor for meeting his export obligations."

The Assistant Secretary then describes the proposed program modifications, which are published as a proposed rule making at 37 F.R. 6205-6207 (March 25, 1972):

"* * * In view of the depletion of CCC stocks, all exports will be from private stocks. The export of an agricultural commodity to a foreign country will, in general, be eligible for application to a barter contract if, at the time of the export sale, the commodity is an eligible barter commodity and the foreign country is an eligible barter destination. As changes are made in the eligibility of commodities and countries, updated lists will be distributed to barter contractors and the export trade. Thus, we will be able to react more promptly to shifting world market forces.

"We also plan to provide that, at the time of export, the exporter must be either a barter contractor or a firm which has arranged to make the export under a barter contract. We will not require that the exporter, at the time of the export sale, have been a barter contractor or a firm which has made such an arrangement with a barter contractor.

"After these program modifications, export sellers, upon whom the success of the program depends, will be placed in a position of knowing when they sell an eligible commodity to an eligible destination that the later export can qualify as a barter export. This will permit them to take immediate advantage of a favorable market situation without risking the loss of sales by waiting until they become barter contractors or arrange to make their exports under barter contracts. Equally important, U.S. exporters competing with foreign sellers in the less favorable barter markets will not first have to obligate themselves to export under barter contracts without having made sales to cover all or a significant part of their export obligations. This will encourage a wider and more active participation in the program, especially by firms with comparatively limited resources.

* * * * *

"Barter contracts to be signed under the revised program will not require a causal relationship between a particular barter contract and the export sale of a commodity in the sense that, after the barter contract is signed, the barter contractor must sell the commodity himself or arrange with another firm to sell the commodity after the arrangement is made. Moreover, in the case of some export sales, it may not be clear that the export

would not have taken place without the barter program. We believe it is clear, however, that the great bulk of the exports which will be applied under the barter program will be exports which would not have taken place in the absence of the barter program. It is our belief that the modification of the barter program will bring about the export of additional commodities.

"CCC will publish in the Federal Register the essential provisions of the new program, pointing out that if exporters sell eligible commodities to eligible destinations, the subsequent exports may generally be applied to barter contracts. In addition, the new program will be made known to present contractors and other barter exporters through USDA information channels. Thus, any exporter will know that after having made such an export sale, he may obtain a barter contract himself or arrange with a barter contractor to make the export under the barter contract. He will know that if he enters into a barter contract after having made such a sale, he will receive the full benefit of the barter differential for the ensuing exports. He will also know that if, after having made such a sale, he enters into such an arrangement with a barter contractor, he will receive a part of the differential due the barter contractor for exports applied to the barter contract. In this manner, the modified barter program will provide additional stimulation for exports into those markets where U.S. commodities require barter program assistance.

"Accordingly, it seems clear that CCC will, under the modified barter program, cause agricultural commodities to be exported and that the barter program aids in the development of foreign markets for agricultural commodities, within the meaning of Section 5(f) [of the Commodity Credit Corporation Charter Act, discussed infra]."

Finally, our views are requested as follows:

"The proposed changes in the barter program which are outlined herein are needed to make the program more responsive to changing market situations. However, before instituting these changes and publishing them as regulations, we would appreciate your early concurrence in our position that there

would be no legal objection to the program even though there may not be a causal relationship between a particular barter contract and the export sale of a commodity applied to the contract, and even though in the case of some sales it may not be clear that the export would not have taken place without the program."

The present barter program is based upon the substantive authority set forth in section 4(h) and section 5(d) and (f) of the Commodity Credit Corporation Charter Act (Charter Act), approved June 29, 1948, ch. 704, 62 Stat. 1070, 1071, 1072, as amended, 15 U.S.C. 714b(h) and 714c(d) and (f); and in sections 302 and 303 of the Agricultural Trade Development and Assistance Act of 1954, popularly known as "Public Law 480," approved July 10, 1954, ch. 469, 68 Stat. 454, 458-459, as amended, 7 U.S.C. 1431 and 1692. Section 4(h) of the Charter Act, as amended, provides, inter alia:

"* * * Notwithstanding any other provision of law, the Commodity Credit Corporation is authorized, upon terms and conditions prescribed or approved by the Secretary of Agriculture, to accept strategic and critical materials produced abroad in exchange for agricultural commodities acquired by the Corporation. * * *"

Subsections 5(d) and (f), as amended, authorize the Corporation, respectively, to "remove and dispose of or aid in the removal or disposition of surplus agricultural commodities" and to "export or cause to be exported, or aid in development of foreign markets for, agricultural commodities."

Section 302 of Public Law 480, as amended, provides in part:

"In order to prevent the waste of commodities whether in private stocks or acquired through price-support operations by the Commodity Credit Corporation before they can be disposed of in normal domestic channels without impairment of the price-support program or sold abroad at competitive world prices, the Commodity Credit Corporation is authorized, on such terms and under such regulations as the Secretary of Agriculture may deem in the public interest: (1) upon application, to make such commodities available to any Federal agency for use in making payment for commodities not produced in the United States; [and] (2) to barter or exchange such commodities for strategic or other materials as authorized by law * * *."

Section 303 of Public Law 480, as amended, provides in part:

"The Secretary [of Agriculture] shall, whenever he determines that such action is in the best interest of the United States, and to the maximum extent practicable, barter or exchange agricultural commodities owned by the Commodity Credit Corporation for (a) such strategic or other materials of which the United States does not domestically produce its requirements and which entail less risk of loss through deterioration or substantially less storage charges as the President may designate, or (b) materials, goods, or equipment required in connection with foreign economic and military aid and assistance programs, or (c) materials or equipment required in substantial quantities for offshore construction programs. He is directed to use every practicable means, in cooperation with other Government agencies, to arrange and make, through private channels, such barter or exchanges or to utilize the authority conferred on him by section 4(h) of the Commodity Credit Corporation Charter Act, as amended, to make such barter or exchanges. In carrying out barter or exchanges authorized by this section, no restrictions shall be placed on the countries of the free world into which surplus agricultural commodities may be sold, except to the extent that the Secretary shall find necessary in order to take reasonable precautions to safeguard usual marketings of the United States and to assure that barter or exchanges under this Act will not unduly disrupt world prices of agricultural commodities or replace cash sales for dollars. * * *

The evolution of the statutory provisions discussed above reflects a consistent interest on the part of the Congress in expansion of the barter program. As originally established by section 416 of the Agricultural Act of 1949, approved October 31, 1949, ch. 792, 63 Stat. 1051, 1058, barter was apparently designed simply as one method of usefully disposing of perishable food commodities acquired by CCC through price support operations, in return for less perishable items required for Government strategic stockpiles. However, barter authority was greatly expanded by enactment of sections 302 and 303 of Public Law 480. Among other things, these sections authorized barter as a means of acquiring materials needed in connection with foreign economic and military assistance programs and offshore construction, as well as strategic materials for stockpiling.

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In addition, the Secretary of Agriculture was directed to employ barter as a priority method for disposing of agricultural commodities owned by the CCC. In making these changes, the Congress recognized and emphasized the value of the barter program in developing international markets for American agricultural commodities. See, e.g., H. Rept. No. 1776, 83d Congress, 2d sess., pp. 5-6, 9-11; 100 Cong. Rec. 8280 (June 15, 1954) (Remarks of Representative Hill).

Authority to barter was further broadened by section 6 of the act approved September 6, 1958, Pub. L. 85-931, 72 Stat. 1790, 1791, which amended generally section 303 of Public Law 480. Enactment of this provision was designed to overcome a practice undertaken by the Secretary of Agriculture whereby prospective barter contractors were required to demonstrate that each particular barter transaction contemplated would increase, rather than supplant, existing foreign markets for agricultural commodities exported by conventional means. See generally, remarks of Senators Ellender and Humphrey, at 104 Cong. Rec. 4641-4650 (March 18, 1958). Senator Ellender specifically criticized the administrative practice of placing upon exporters the burden of establishing "additional-ity," as follows:

"* * * While the flexibility of barter arrangements permits the price reductions necessary to make the commodity move, generates the dollar exchange necessary to such movement, and therefore does increase overall exports, it is almost impossible to show that any particular barter contract will result in the so-called additionality required by the revised program. * * *"
Id. at 4644.

This practice was addressed in the Conference Report on the 1958 act, H. Rept. No. 2694, 85th Cong., 2d sess., pp. 7-8:

"One of the important changes made in existing law by the amendment reported herewith is that it relieves the Secretary of the responsibility of making a finding that barter transactions would protect the funds and assets of the Commodity Credit Corporation. Instead, the Congress has made the policy decision that barter is in the best interests of the country as a whole and intends and directs that the barter program be carried out substantially as it was prior to May 1957 [when the Secretary of Agriculture imposed proof of additionality upon exporters].

* * * * *

"The deletion of the language pertaining to the protection of assets was specifically designed to remove the legal base which permitted the Secretary to require so-called certificates of additionality to be furnished by contractors to establish that any sale through barter would be in addition to normal cash sales. Nor is anything in this bill to be construed to permit the requiring of such certificates of additionality."

The Conference Report also discussed other aspects of the barter program as follows:

"The House amendment contained a limitation of \$500 million on the amount of barter the Secretary could engage in any one year. This has been removed from the bill agreed to by the conferees. This is a clear indication on the part of the conference committee that it did not want any such dollar limitation on the authority of the Secretary to exchange essentially valueless surpluses for materials of lasting value.

* * * * *

"In the past the burden of proof as to additionality has been on the contractors in relation to each contract proposed by them. Under the language of the bill, that burden of proof has been shifted to the Secretary and, in exercising that authority, he is required to follow substantially the same procedures as are followed in title I of Public Law 480. However, it should be noted that the safeguarding of usual marketings is limited to the safeguarding of usual marketings of the United States. It is not intended that the usual marketings of other nations shall be a basis of consideration in the approval of a barter transaction.

"Furthermore, in the exceptions granted to the Secretary, he is required to assure that a particular barter transaction will not unduly disturb world prices of agricultural commodities. The conferees were aware that prior to May 28, 1957, barter contractors were offering nominal discounts in order to dispose of the commodities abroad. These discounts normally were around 1 to 2 percent. * * * This bill contemplates that a discount of a few percent will not unduly disturb the world prices and not be the basis for establishing restrictions. If a discount is reported above this reasonable rate, the Secretary should take appropriate precautions and action to guard against the disturbing effect of such a large discount.

"The Secretary was also directed to assure that a barter sale does not replace a cash sale for American dollars. The burden of proof is on the Secretary to establish that the barter deal does in fact replace a cash sale for American dollars. If such a finding is made, it is the intention of the conferees that the particular barter transaction should be rejected."
Id. at 8-9.

Finally, the Conference Report added the following direction with respect to the barter program generally:

"The details of the barter provisions included in this conference report are relatively unimportant. Congress is not so much concerned with the administrative details of the Secretary's operations as that he should carry on an aggressive and effective barter program. Had he been doing so, there would have been no need for any barter legislation in this bill." Id. at 7.

Section 205(c) of the Mutual Security Act of 1959, approved July 24, 1959, Pub. L. 86-108, 73 Stat. 246, 250, amended section 416 of the Agricultural Act of 1949, as amended, to authorize barter from private stocks, in addition to stocks acquired by CCC in its price support operations.

As indicated by the foregoing, the barter program was originally conceived primarily as a means of making productive use of surplus agricultural commodities owned by CCC—initially by acquiring stockpile items, and later by generating supplies to meet offshore construction and other overseas needs. However, as noted in our report of February 12, 1971, supra, p. 4, the program has now evolved into a means of pursuing the following major objectives:

- increasing exports of domestically produced agricultural commodities,
- realizing balance-of-payments advantages, and
- assisting in achieving international policy goals.

Under the modifications now proposed, the barter program would be based entirely upon subsections 5(d) and (f) of the CCC Charter Act, which authorize the Corporation to dispose or aid in the disposition of surplus agricultural commodities, and to export, cause to be exported, or aid in

the development of foreign markets for, agricultural commodities [see proposed rulemaking, supra, statement of authority]. Several major program changes would be effected. It is stated that in view of the depletion of CCC stocks, all future barter exports would be made from private stocks. Since the overall thrust of the proposed program changes is to increase flexibility, we have some reservations concerning the need and desirability of firmly excluding from barter any CCC stocks which may be available. On the other hand, we recognize that the proposed modifications represent perhaps the final transition of the program from the original context of simply disposing of surplus Government stocks to the more general objectives of promoting agricultural exports and effecting balance-of-payments advantages. Moreover, we believe that the statutory authority in support of this transition is clear. Accordingly, we cannot conclude that this change goes beyond the scope of administrative discretion.

Our attention is directed primarily to a series of changes which would constitute a new fundamental approach to the mechanics of the program. First, barter participation would be made possible in the case of export sales arranged prior to formal application for barter. This would be accomplished by applying to such transactions commodity and destination eligibility criteria in effect at the time of sale, rather than those in effect at the time of the subsequent export [proposed rulemaking, supra, § 1495.13(a)]. Secondly, exporters would be required to become barter contractors only by the time of export, thereby affording barter participation with respect to sales by exporters who were not under barter contracts at the time of sale [id.]. Thirdly, formal application for barter with respect to particular sales would not irrevocably bind the seller or CCC to apply the ensuing export to a barter contract [id., § 1495.18]. Under the existing program, participation is limited to exports undertaken by exporters who are barter contractors at the time of sale, under eligibility criteria fixed by their particular contracts; and the contract imposes specific export obligations which must be met within the contract period. The proposed changes in the mechanics of the program are designed to afford exporters some assurance of barter eligibility at the time of sale, and thereby enable them to take immediate advantage of favorable market situations. These changes will also enable CCC to make prompt and frequent revisions in eligibility criteria in response to shifting world market forces. It is anticipated that the general effect of these modifications will be to increase flexibility and to achieve wider and more active participation in the barter program, thereby increasing overall exports and expanding foreign markets. On the other hand, it is suggested that under the new approach it will be difficult to establish a causal relationship between a particular export sale and the barter program, and to demonstrate that particular sales would not have taken place without the program.

The general purposes reflected in this new approach are clearly consistent with the congressional mandate for an aggressive barter program, and with the thrust of the recommendations in our 1971 report that the program should be more flexible and responsive to world market conditions. Moreover, as noted previously, the Congress has recognized the difficulty of relating particular transactions to the overall objective of increasing exports; and has, in effect, indicated that such difficulties should not unduly inhibit the program's operation. Accordingly, we believe that the administrative determination stated in your submission--that the new approach will generally result in increased exports and foreign markets--is sufficient to overcome the possibility of diminished control on a case-by-case basis. This is not, however, to minimize the importance of taking reasonable precautions to prevent interference with conventional exports and existing foreign markets. It is clear that the barter premium is, in effect, a subsidy, provided for the purpose of advancing the objectives discussed previously. To the extent that the premium is applied to transactions which would have taken place without it, no benefit is received. In other words, there is no doubt that the barter program is designed to promote additional exports and new and expanded markets, and not to underwrite conventional export transactions. It appears that the viability of the program changes will depend, in the long run, upon careful and frequent evaluation on the part of CCC of commodity and destination criteria, as well as review of individual barter transactions.

For the reasons stated above, we have no legal objection to implementation of the proposed changes in the barter program. However, it is apparent to us that the critical significance of evaluation under the revised program will, in addition to expanding agency evaluation responsibilities, enlarge the scope of information required by this Office in carrying out our audit activities. For this reason, and in view of difficulties which we have experienced in obtaining complete information in connection with our audits of other agricultural export programs, it is requested that the barter program be further revised to provide specifically in the regulations that "the Secretary of Agriculture and the Comptroller General or any of their duly authorized representatives shall have access to and the right to examine all books, documents, papers, and records of barter contractors related to or bearing upon such contracts and transactions thereunder. All such books, documents, papers, and records shall be

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retained by barter contractors, and the rights of access and examination provided herein shall be effective, until the expiration of three years after final payment under any barter contract."

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

The Honorable
The Secretary of Agriculture