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

September 28, 1976

B-115398

The Honorable James J. Florio
House of Representatives

Dear Mr. Florio:

In response to your letter of August 12, 1976, and subsequent phone conversations with you and your staff, we have reviewed the Farmers Home Administration's (FmHA) operation of the rural construction and improvement loan programs pursuant to sections 502 and 504 of the Housing Act of 1949, as amended ("Act").

Under section 502, 42 USC 1472, FmHA is authorized to provide direct and insured loans for the purposes of constructing or improving housing and farm buildings. Under section 504, 42 USC 1474, FmHA may make loans, grants, or combined loan-grants not exceeding $5,000 per borrower for the purposes of repair or improvement of unsafe or unsanitary housing or farm buildings. Only persons who cannot qualify for a section 502 loan are eligible for assistance under section 504. 42 USC 1474(a).

In 1965, the Housing and Urban Development Act, Pub. L. 89-117, created two revolving funds--the Rural Housing Insurance Fund (RHIF) as new section 517 of the Act, 42 USC 1487, and the Rural Housing Direct Loan Account, as new section 518 of the Act, 42 USC 1488. These funds were to be used, in part, to carry out, respectively, FmHA's insured and direct rural housing loan programs. The Secretary of Agriculture was given the authority to borrow from the Treasury to operate both revolving funds; however, under section 518(c) of the Act, the level of borrowing authority for the Rural Housing Direct Loan Account was limited to amounts authorized in appropriations acts. Section 518(c) stated:

> "When and in such amounts as may be authorized in appropriation Acts, the Secretary may issue notes to the Secretary of the Treasury * * *." (Emphasis added.)

On the other hand, the borrowing authority for insured loans funded through the RHIF is not so circumscribed--no antecedent congressional action is required in order to borrow from the Treasury, nor is there a limitation on either the amounts that may be borrowed, or the period during which RHIF funds are available for obligation. 42 USC 1487.

Pub. L. 91-152, December 24, 1969, repealed section 518 of the Act--the Rural Housing Direct Loan Account--and transferred the assets and liabilities of and the authorizations applicable to that Account to the RHIF. As added in 1969, section 517(m) of the Act, 42 USC 1487(m), states:

> "The assets and liabilities of, and authorizations applicable to, the Rural Housing Direct Loan Account are hereby transferred to the [Rural Housing Insurance] Fund, and such Account is hereby abolished. Such assets and their proceeds, including loans made out of the Fund pursuant to this section shall be subject to all of the provisions of this section [i.e., section 517 of the Act, governing the RHIF]." (Emphasis added.)

Thus, since 1969, all aspects of the sections 502 and 504 programs have been funded out of the RHIF--a funding mechanism not restricted under the terms of the authorization act by appropriations act limitations on the level of borrowing authority available to implement the programs.

The Housing and Urban Development Act of 1965 also amended subsection (d) of the RHIF authorization. Section 517(d) of the Act, 42 USC 1487(d), states, in part:

> "The Secretary may, in conformity with subsections (a), (b), and (m) of this section [the provision transferring the Direct Loan Account to the RHIF, quoted above], insure the payment of principal and interest on loans * * *." (Emphasis added.)

Therefore, the RHIF is available to insure loans made pursuant to sections 502 and 504. When such activities are undertaken, all of the provisions of section 517 apply. Thus, FmHA has the

option of making direct loans using RHIF assets and holding the notes evidencing the indebtedness, or making such loans and then selling and insuring the notes.

Between 1965 and FY 1972, the appropriations for FmHA did not contain any specifications of amounts for insured loans out of the RHIF. Such language first appeared in the Department of Agriculture Fiscal Year 1972 appropriations act, Pub. L. 92-73, which provided:

> "For direct loans and related advances pursuant to section 517 (m) of the Housing Act of 1949, as amended, $10,000,000 shall be available from funds in the rural housing insurance fund, and for insured loans as authorized by title V of the Housing Act of 1945 [sic], as amended, $1,605,000,000 * * *." 85 Stat. 192.

However, the Senate Committee report on this act disclaimed any intention to amend the Secretary's authority under section 517 of the Act to utilize the RHIF without any need for prior congressional action. The Committee stated:

> "The Farmers Home Administration has been making insured loans as authorized in basic law for a number of years. For the first time the bill as passed by the House indicates specific amounts for such loans under both the Agricultural Credit Insurance Fund and the Rural Housing Insurance Fund. The underlying statutes for these Insurance Funds by their own provisions authorize loans to be made without action by Congress in the annual appropriation acts. Therefore, the indication of specific amounts in the bill does not constitute a limitation on the amount of loans which may be made and insured by the Administration." S. Rep. 92-253 92d Cong., 1st Sess. 29-30 (1971) (emphasis added).

See also, S. Rep. 92-983, 92d Cong., 2d Sess. 31 (1972).

We rendered an opinion on the nature of these appropriations in 1974, when FmHA wished to obligate a greater amount for farm operating loans under the Agricultural Credit Insurance Fund (ACIF) than had been provided in the appropriations act for

that year. The underlying authorization for insured loan expenditures from the ACIF is virtually identical to that for the RHIF. In 53 Comp. Gen. 560 (1974), copy enclosed, we said that the legislative history of appropriations actions as well as the applicable authorizing legislation confirmed the Department of Agriculture's view that the appropriations language, although in usual form, did not act as a limitation on the amounts that the Secretary could spend out of the ACIF for farm operating subsidies. We also said that, absent the legislative history, "* * * the natural and usual construction of such language * * * would be at least to impose a specific * * * limit upon operating loans * * *," and that "* * * [s]ince our conclusion is not entirely free from doubt we suggest that the matter be clarified in the context of future appropriation legislation." 53 Comp. Gen. at 562, 564.

Our 1974 opinion was based, in part, upon the above-quoted statement from the Senate Report. While this language has not been repeated in the Senate agriculture appropriations reports since Fiscal Year 1973, neither the underlying basic law nor the language of succeeding appropriations acts has changed in any way that would affect the conclusion we reached in 53 Comp. Gen. 560. Indeed, our opinion was quoted and discussed in both the Senate and House of Representatives Agriculture Appropriations Hearings for Fiscal Year 1975. See, Agriculture-Environmental and Consumer Protection Appropriations for Fiscal Year 1975, Senate Hearings, Part 1 at 942-951; and House of Representatives Hearings, Part 3 at 597-600. Despite congressional recognition of our decision, including the doubt expressed therein, no clarification of this novel funding scheme has since appeared.

Thus, because the sections 502 and 504 programs are funded out of the RHIF, we cannot say that the Secretary is limited by the appropriations language to a stated funding level for insured loans. Accordingly, the RHIF "appropriations" for sections 502 and 504 insured loans are, in effect, "advisory." Sums in the Fund as well as the Secretary's borrowing authority remain available from year to year until obligations are incurred. As a result, the amounts referred to in your letter, which are apparently unspent "advisory" amounts, remain "available for obligation."

We are informed by FmHA that the section 504 program is operated as an insured rather than a direct loan program, pursuant to the Secretary's option under the authorizing legislation, discussed above. The amounts that have appeared in the

appropriations acts for "direct loans * * * pursuant to section 517(m)" of the Act are considered by FmHA as advisory levels for operation of an insured loan program under section 504.

A threshold question in any Impoundment Control Act analysis is whether the funding method for a program involves the use of "budget authority" as defined in the Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344. Section 3(a)(2) thereof defines "budget authority" as:

> "* * * authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government."

While 42 U.S.C. 1487, the authority for the RHIF, does include "authority to insure * * * indebtedness incurred by another person * * *," it also provides authority for loans to be made out of the RHIF to be sold and insured. FmHA informed us that all RHIF insured loans are originated with Government funds, although the notes evidencing the indebtedness of the borrowers may later be sold and insured.

Since neither the RHIF authorizing legislation nor the language of subsequent appropriations acts distinguishes between authority to insure loans and authority to make loans to be sold and insured, and since projected insured loan levels have consistently appeared in the Budget since Fiscal Year 1972, we conclude that the authority to obligate funds in the RHIF for section 502 and 504 loans is "budget authority" subject to the Impoundment Control Act.

Furthermore, although the unique nature of the funding mechanism for the sections 502 and 504 programs leads us to be more circumspect in considering whether an impoundment exists here, it does not insulate the programs from the application of the Impoundment Control Act. Since the spending levels are advisory, we might conclude that there is no appropriation level by which to judge the existence of an impoundment. On the other hand, since budget authority for the program is unlimited, any spending level could be viewed as inadequate in impoundment terms because it would always be less than the available authority. Clearly, this latter view would produce

absurd results. The former view would in effect insulate these programs from the consequences one would expect under the Impoundment Control Act, and we can find no legislative intention to do this.

Therefore, we have applied the tests we would normally use were these usual appropriations, tempered to some degree by our acceptance of their advisory nature.

It has been our view that a failure to obligate the full amount of an appropriation does not, per se, constitute a withholding of budget authority within the meaning of the Impoundment Control Act. There must be sufficient evidence of behavior on the part of responsible Executive agency officials that demonstrates an intention to refrain from obligating available budget authority. In this connection, we are informed that sums obligated for the section 502 program in Fiscal Year 1976 total almost $2.3 billion out of a recommended level for all title V insured loans of about $2.7 billion for the same period. Obligations for the section 504 program amounted to about $6 million of a recommended level of $20 million. FmHA informs us that an historically low loan application level accounts for the relatively small obligation of funds under section 504. Data for the Transition Quarter are not yet available.

Given what we consider to be reasonable levels of operation under the circumstances, and absent evidence of any intention to obligate less than the sums recommended by the Congress, we are unable to say that impoundments of the sections 502 and 504 program funds exist.

We hope the foregoing will be of assistance to you.

Sincerely yours,

Comptroller General
of the United States

Enclosure