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Authority of SBA To Sell Disaster and Non-Disaster Loans to Federal Financing Bank. B-149685. December 5, 1978. 16 pp.

Decision re: Small Business Administration; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: General Government Matters.
Organization Concerned: Federal Financing Bank.
Authority: Federal Financing Bank Act of 1973 (P.L. 93-224; 87 Stat. 937; 12 U.S.C. 2281). Small Business Investment Act of 1958 (15 U.S.C. 661). Small Business Act (15 U.S.C. 634(b); 15 U.S.C. 636). Participation Sales Act (12 U.S.C. 1717(c)). P.L. 93-135. P.L. 89-409. P.L. 95-89. 79 Stat. 824. 91 Stat. 553. 44 Comp. Gen. 549. 45 Comp. Gen. 253. 45 Comp. Gen. 370. B-149685 (1971). B-140673 (1959). H. Rept. 89-1348. S. Rept. 89-1057. S. Rept. 95-184. 112 Cong. Rec. 7311.

Clarification was requested concerning the Small Business Administration's (SBA's) authority to issue certificates to the Federal Financing Bank (FFB) evidencing ownership of a group of SBA loans and to sell direct disaster loans to FFB and guarantee payment of principal and interest at a rate which may be in excess of the rate paid to SBA by the borrower. The SBA does have authority to issue the certificates, and the proposed financing arrangements, as well as SBA's current procedure of selling individual loans to FFB with recourse, is similar to financing arrangements approved in the past. It is not authorized under existing legislation to sell direct disaster loans to FFB on a guaranteed basis either individually or collectively. Such action could result in establishment of unlimited contingent liability against SBA without congressional restraints, and SBA's proposal to sell the loans with 100% guarantees is not consistent with its statutory authority to guarantee a maximum of 90% of loans made by participating lending institutions. (HTW)

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

FILE: B-149685 DATE: December 5, 1978

MATTER OF: Authority of SBA to sell disaster and non-disaster loans to Federal Financing Bank

DIGEST:
1. Small Business Administration (SBA) does have authority to issue certificates to Federal Financing Bank (FFB) evidencing ownership of group of SBA loans. Proposed financing arrangements, as well as SBA's current procedure of selling individual loans to FFB with recourse, is sufficiently similar from legal standpoint to financing arrangements our Office has approved in past. Also, SBA has same authority to sell loans to FFB with recourse as it has to sell to other purchasers.

2. SBA is not authorized under existing legislation to sell direct disaster loans to FFB on guaranteed basis either individually or collectively. In absence of specific statutory authority or clear expression of congressional intent that SBA does have such authority to sell direct disaster loans in this manner, which, if allowed, could result in establishment of unlimited contingent liability against SBA without any congressional restraints, our Office cannot approve proposed procedure. Moreover, SBA's proposal to sell these loans with 100 percent guarantees is not consistent with its statutory authority to guarantee maximum of 90 percent of loans made in first instance by participating lending institutions.

This decision to the Administrator of the Small Business Administration (SBA) is in response to his request for our concurrence in SBA's position concerning two separate, but related, questions. The first question involves SBA's authority to issue certificates to the Federal Financing Bank (FFB) evidencing ownership of a group of SBA loans. The second question concerns SBA's authority to sell direct disaster loans to FFB and to guarantee payment of principal and interest at a rate which may be in excess of the rate paid to SBA by the borrower.

With respect to the first question, SBA maintains that issuance of these certificates evidencing ownership of a group of direct SBA loans merely represents a change of procedure to accommodate FFB's accounting. In past sales to FFB, SBA has transferred title to individual loans and debentures, although the actual loan documents have been held by SBA "acting as bailee for the purchaser." If the proposed change of procedure is made, SBA would continue to hold and service the loans as is now being done.

The Federal Financing Bank was established pursuant to the Federal Financing Bank Act of 1973, approved December 29, 1973, Pub. L. No. 93-224, 87 Stat. 937, 12 U.S.C. §§ 2281 et seq. (1976). As stated in section 2 of the Act, 12 U.S.C. § 2281, the purpose of the legislation was to assure coordination of Federal and federally assisted borrowing programs

> "with the overall economic and fiscal policies of the Government, to reduce the cost of Federal and federally assisted borrowings from the public, and to assure that such borrowings are financed in a manner least disruptive of private financial markets and institutions."

The authority of Federal agencies to finance their operations through FFB is set forth in section 6(a) of the Act, 12 U.S.C. § 2285(a) as follows:

> "Any Federal agency which is authorized to issue, sell, or guarantee any obligation is authorized to issue or sell such obligations directly to the Bank."

Also, section 18 of the Act, 12 U.S.C. § 2296, specifically provides that:

> "Nothing in this chapter shall be construed as authorizing an increase in the amounts of obligations issued, sold, or guaranteed by any Federal agency which issues, sells, or guarantees obligations purchased by the Bank."

In accordance with these provisions, the authority of SBA, as well as other Federal agencies, to issue, sell, or guarantee obligations purchased by FFB is neither greater nor less than its authority to issue, sell, or guarantee obligations to other purchasers.

As stated in SBA's submission, our Office has on several occasions upheld the authority of SBA to sell to private investors, with recourse, debt instruments representing loans SBA had made to small business investment companies (SBICs) pursuant to the Small Business Investment Act of 1958, 15 U.S.C. §§ 661 et seq. (1976). Thus, in 44 Comp. Gen. 549 (1965) we upheld SBA's authority to sell loans originally made directly by SBA to SBICs, with recourse, to private financial institutions, pursuant to what was then section 303(b) of the Small Business Investment Act of 1958, 15 U.S.C. § 683(b). Also see 45 Comp. Gen. 253 (1965), and 45 Comp. Gen. 370 (1965), in which we again upheld and, to some extent, enlarged SBA's authority to sell SBIC debt instruments to private investors, with SBA's guarantee.

Our position in these decisions was based on the broad authority granted to the Administrator in sections 5(b)(2) and 5(b)(7) of the Small Business Act, 15 U.S.C. §§ 634(b)(2) and (b)(7)(1976), and made applicable to functions under the Small Business Investment Act of 1958 by section 201 thereof, 15 U.S.C. § 693 (1976), to sell debt instruments on such terms and conditions as he determines to be reasonable. Pursuant to section 5(b)(2), the Administrator may:

> "under regulations prescribed by him, assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions and for such consideration as the Administrator shall determine to be reasonable, any evidence of debt, contract, claim, personal property, or security assigned to or held by him in connection with the payment of loans granted under this chapter, and to collect or compromise all obligations assigned to or held by him and all legal or equitable rights accruing to him in connection with the payment of such loans until such time as such obligations may be referred to the Attorney General for suit or collection."

Section 5(b)(7) further provides that the Administrator may:

> "in addition to any powers, functions, privileges, and immunities otherwise vested in him, take any and all actions * * * determined by him to be necessary or desirable in making, servicing, compromising, modifying, liquidating, or otherwise dealing with or realizing on loans made under the provisions of this chapter * * *."

Again, on March 15, 1971, SBA requested our approval of its proposed sale of guaranteed SBIC debentures to a group of underwriters for resale to private investors. The proposed plan involved SBA's purchase of $30 million of newly issued debentures from SBICs pursuant to section 303(b) of the Small Business Investment Act, 15 U.S.C. § 683(b). These debentures would be immediately sold, with SBA's guarantee of payment of principal and interest according to the terms of the instrument, to private investors by means of an underwritten public offering. If any of these debentures either went into default or if SBA experienced other difficulties in regulating the SBICs that had issued the debentures, SBA was authorized to substitute another debenture out of a pool of identical debentures, worth approximately $25 million, created by SBA specifically for this purpose. It was contemplated that debentures would be sold initially at face value to investors by a group of underwriters in denominations of $10,000 or multiples thereof. SBA's submission further explained the proposed arrangement as follows:

> "While an actual sale of the guaranteed debentures will occur and ownership of the debentures will vest in the purchasers, physical possession of the debentures will be given to a custodian bank, acting on the holders' behalf under a bailment agreement pursuant to which holders will have the right to withdraw debentures from bailment by demanding delivery thereof. The purchaser will receive a certificate stating the SBA guaranty. * * * SBA will act as servicing agent for the holders and receive payment from the SBIC's. SBA will remit to the holders the periodic interest payments (and the final repayment of principal) in the amounts and on the dates specified on the debentures (which will be the same for all debentures, whether originally sold or thereafter substituted.)
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> "In summary, the proposed sale is a sale with recourse against SBA of SBIC debentures, which is essentially the same as previously approved guaranteed sales programs."

In our decision B-149685, March 25, 1971, we concluded that:

> "* * * the proposed sale and guarantee of debentures comes within the scope of 45 Comp. Gen. 370 and our earlier decisions and is within the statutory authority of the Small Business

Administration, provided that it does not exceed any pertinent statutory limitations and the budgeted program levels."

Our decisions in the cases cited above only involved SBA loans made to SBICs under the Small Business Investment Act, whereas the present question presumably applies to loans made under the Small Business Act as well. However, the precedent established in those decisions is obviously applicable to the instant situation since our decisions in those cases were based on the broad language in sections 5(b)(2) and 5(b)(7) of the Small Business Act, authorizing the Administrator to sell and otherwise deal with loans made under the Act in such a manner and on such terms and conditions as he determines to be reasonable.

Based on the information available to us concerning this question, including SBA's submission as well as additional information informally provided to us by SBA's Office of General Counsel, it appears that the proposed sale of these certificates to FFB is in many, if not all, respects analogous to the procedure we approved in our decision B-149685, March 25, 1971.

First, in both the procedure approved in our decision of March 25, 1971, as well as that involved here, title to the individual loans would be transferred to the purchaser, although in both instances physical possession of the debt instruments would remain with a bailee holding the instruments on behalf of the purchaser. In the prior case, a designated bank was to be the bailee, while in the instant proposal the SBA would be the bailee. In both cases certificates would be issued to the purchaser indicating the transfer of title to the individual loans and setting forth SBA's guarantee assuring payment thereof, which guarantee could be satisfied by cash payment or loan substitution. Finally, in both situations, SBA would act as the loan servicing agent for the purchaser and would receive payments from the borrower and remit the appropriate amounts of principal and interest to the purchaser.

The prior decision involved SBA's authority to sell specific individual loans, whereas here SBA is proposing to sell certificates "evidencing ownership of a group of Small Business Administration loans." However, it does not appear that this difference alone dictates a different result, provided that the certificates refer to specific designated loans and actually represent a passing of title thereto. Although SBA was unable to furnish us with a sample certificate since, pending our decision, they have not yet been prepared, we were informally advised that these certificates will in fact refer to specific loans and, when transferred to FFB, will represent a transfer of ownership of the loans to FFB.

These certificates would thus be distinguishable from participation certificates issued pursuant to the Participation Sales Act, 12 U.S.C. § 1717(c)(1976), which represent a beneficial interest in an underlying pool of loans. In no real sense can it be said that a purchaser of a participation certificate issued under 12 U.S.C. § 1717(c) has gained title to any of the underlying loans. This distinction has legal significance since, pursuant to the Participation Sales Act, SBA (as well as other named agencies) can only issue participation certificates to the extent authorized in its annual appropriation act. 12 U.S.C. § 1717(c)(4). (If the transfer of certificates herein proposed to be issued and sold by SBA could be construed to constitute borrowing rather than a sale of assets, which, based on the record before us, does not appear to be the case, SBA would require specific statutory budget authority in order to engage in such transactions, regardless of whether these certificates are considered to be participation certificates.)

Essentially, we agree with the position set forth in SBA's submission that the proposed procedure is basically the same from a legal standpoint as the arrangement that SBA is currently using to sell loans to FFB on an individual basis. In accordance with the foregoing, and since SBA has the same authority to sell debt instruments to FFB as it does to other purchasers, it is our view that, while the practice SBA is proposing here as well as its present method may vary somewhat from the types of financing arrangements we have upheld in the past, we do not believe that any such differences that may exist are so substantial from a legal standpoint as to prohibit implementation of the proposed financing arrangement. Naturally, the same limitation expressed in our decision B-149685, March 25, 1971, that the sale not exceed pertinent statutory limitations and budgeted program levels, is applicable to the instant procedure.

Although we concur in SBA's position that it does have authority under its existing legislation to implement the proposed procedure, this is not to say that we in any way concur in or approve of the desirability from a policy standpoint, of engaging in this type of financing arrangement. To the contrary, we believe that it would be preferable not to extend this arrangement that was originally established, by statute, for the Farmers

Home Administration (Pub. L. No. 93-135), to SBA. In our view, the primary, if not only, reason, behind SBA's proposal is the reduction of the apparent size of the SBA budget. We believe that this action could hamper congressional budgetary control over the program. In two of our recent reports, we have addressed these proposed practices and set forth the policy of the General Accounting Office on this matter.

In our report entitled "Revolving Funds: Full Disclosure Needed for Better Congressional Control" (PAD-77-25 dated August 30, 1977), we noted on p. 59 (emphasis added):

> "The effect of congressional control on financing programs * * * depends on what is meant by congressional control. A broad interpretation of the term includes the Congress' ability to effectively determine both on an aggregate basis and on an individual program basis, what budget levels will be for a given fiscal year. Congressional control also involves the Congress' ability to effectively monitor how far its dictates (as expressed in authorizing legislation, appropriations acts, and associated hearings or other oversight activities) are being carried out. Thus the term congressional control encompasses the closely related budget control and oversight control.
>
> "Congressional control is not an absolute. For instance, a high degree of it can be very useful or may be unnecessary. It may be exercised over the amount of budget authority a program is to receive, the amount of outlays it may have during a fiscal year, program parameters, etc. The Congress may or may not choose to exercise control over specific programs for a number of reasons. Likewise, the Congress may choose a form of financing for a program with the possible result of obscuring the program's financial impact on the budget totals. Finally, the Congress may enact legislation, aimed at exerting strong control, only to have its intent distorted by administrative regulations."

On page 60 we stated:

> "Programs over which the Congress has little budgetary control also tend to be programs over which the Congress has diminished oversight control. They do not need to justify past performance to

continue receiving funds for operations. Due to the nature of congressional operations, it is likely that a program * * * whose total level of activity is largely hidden (by the netting process) would tend to avoid close annual committee oversight. This would not be if the program totally depended on the Congress for annual financing and if the program's full financial impact were reflected in the budget totals."

We concluded on page 88:

"The fundamental objective of the Congressional Budget Act of 1974 was to establish a process through which the Congress could systematically consider the total Federal budget and determine priorities for allocating budget resources. We believe this process achieves its maximum effectiveness when the budget represents as complete as possible a picture of the financial activities of Federal agencies."

More specifically, in our report entitled "Government Agency Transactions with the Federal Financing Bank Should be Included on the Budget" (PAD-77-70, August 3, 1977), we addressed the sale of certificates of beneficial ownership to FFB. Certificates of beneficial ownership (CBOs) are very similar, if not identical, to the certificates referred to in SBA's submission.

On page 11 of the report, we stated that CBOs should be considered agency borrowing:

"2. FFB purchase of Certificates of Beneficial Ownership. Because CBOs are not presently considered agency debt, FFB's purchase of this paper raises the level of Federal indebtedness. We believe that CBOs should be considered agency borrowing since the original loan remains in the hands of the agency. If one adopts this view, the level of Federal indebtedness is unchanged, but its composition is changed. Agency debt is swapped for Treasury debt."

On page 19 we summarized the CBO effect on outlay totals:

"4. FFB purchase of CBOs. If current treatment of these transactions continues, FFB purchase of this paper would be reflected on the budget as FFB loan outlay. If these securities were treated as agency obligations (as we believe they should be), they would be included in the outlays of the agency selling the paper when the proceeds were loaned out. Either way, outlays would be increased by the amount of agency lending."

On page 22 we addressed the need for full disclosure including CBOs.

"If the activities of lending agencies are not properly reflected in individual program or functional accounts, it is difficult to see how the budget process can properly allocate Federal resources among Federal credit programs, between credit programs and direct expenditure programs, and, ultimately between the public and private sectors of the economy.

"The way FFB affects the meaning of Federal outlays and deficits is not solely a function of its off-budget status. The problem with the way Federal credit assistance going through FFB is reflected in the budget results from the combined effects of FFB's off-budget status and other deviations of actual from recommended budget treatment of these activities.

"For example, FFB purchases of on-budget agency obligations are properly reflected in the budget now because of the way that borrowing is reflected in the budget and because these agencies are on the budget. If off-budget agencies which currently engage in debt transactions (borrow) with FFB were placed on the budget, their lending and direct expenditure activity would be reflected on the budget in their respective accounts, regardless of the budget status of FFB.

"If CBOs were given the recommended budget treatment--namely, if sales of these securities were treated as borrowing rather than asset sales which reduce loan outlays--then FFB purchase of these issues would be reflected in the accounts of the borrowing agencies, regardless of the budget status of FFB.

"The combined effects of eliminating the off-budget status of agencies that borrow from FFB to finance lending and of proper budget treatment of CBOs would bring a considerable amount of lending and direct expenditures, currently occurring outside of the budget, onto the budget.

"Asset sales to FFB are currently properly treated in the selling agency's account. When these securities are sold to FFB, a problem arises because the Federal Government retains possession of the loans and overall outlays are understated by the amount of FFB purchases. If FFB remains off the budget, this problem will continue to exist unless the Federal Government's continued ownership of the paper is reflected as an outlay in the account of the agency selling the paper. It might be argued that since the Federal Government still retains possession of the asset, the best place to reflect this is in the agency account. This treatment would increase the agency's outlays and would technically be at variance with recommended budget practices."

And on page 25; we recommended that the Congress require that "CBOs be treated as agency obligations and, therefore, be treated in the Federal budget as borrowing."

In summary it is our view that the SBA proposed practices would be contrary to the need for full disclosure and inclusion in the budget totals.

Moreover, although our prior decisions concerning proposed financing arrangements by SBA, particularly B-149685, March 25, 1975, did not discuss this type of policy consideration, it appears that when individual loans are "sold" to FFB under the current procedure, which was based on our decision of March 25, 1975, SBA retains at all times actual possession of the loan and all related documents, services the loan and merely forwards to FFB the payments it receives from the borrower. Accordingly, since SBA's current procedure for selling individual loans to FFB contains some of the same flaws that were the concern of the criticism set forth in the above-quoted audit reports, we believe that, to some extent, the current manner in which SBA is conducting its "refinancing" activities could be the subject of similar criticism from a policy standpoint.

SBA's second question involves the agency's authority to sell to FFB direct disaster loans made by SBA pursuant to the provisions of section 7(b) of the Small Business Act, 15 U.S.C. § 636(b)(1976), subject to a full SBA guarantee. In its submission, SBA says, in support of its position:

> "Although there is no ceiling on these loans, the direct loans made under this section are in fact, limited by the Agency's appropriation. The guaranty authority is not limited but, as a practical matter, very few lenders are willing to participate with the Agency in such loans.
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> "The proposed sale to FFB would be made subject to the Agency's guaranty. In prior discussions with SBA personnel, members of your staff expressed concern with the fact that, in theory, such sales of disaster loans could result in subjecting the Agency to unlimited liability, without Congressional restraints. In any sales of disaster loans, we will state in our Budget Request the dollar amount of disaster loans to be sold and note that we have reduced our appropriation request accordingly. Thus, unlimited liability could not be created by such sales. We are of the opinion that both §§ 5(b)(2) and 5(b)(7) are applicable to these disaster loans, since these sections refer to loans made 'under this Act, and 'under the provisions of this Act.'"

Under subsections 7(b)(1)-(8) of the Small Business Act, SBA makes various types of disaster loans. We have been advised informally that SBA is here primarily concerned with its authority to sell physical and economic injury loans made pursuant to subsections 7(b)(1) and (2). Pursuant to these subsections, SBA is authorized

> "to make such loans (either directly or in cooperation with banks or other lending institutions through agreements to participate on an immediate or deferred basis) as the Administration may determine to be necessary or appropriate * * *."

On the basis of language in section 7(a) of the Small Business Act, 15 U.S.C. § 636(a)(1976), identical to that quoted above from section 7(b), our Office has upheld SBA's authority to carry out a loan guarantee program. 51 Comp. Gen. 474 (1972); B-140673, October 12, 1959. Accordingly, we are not questioning SBA's authority to guarantee disaster loans made to eligible borrowers by participating lending institutions.

The issue is whether this authority to guarantee disaster loans made by lending institutions necessarily includes authority to guarantee direct loans made by SBA in the first instance and then sold to FFB, with recourse against SBA. There are several considerations.

First, under section 7(b) of the Small Business Act, SBA's authority to make disaster loans on a deferred basis, which is the basis for its authority to make guaranteed loans, is limited by statute to a maximum of 90 percent of the balance of the loan outstanding at the time of disbursement. Therefore, assuming that SBA is authorized to sell these direct disaster loans with its guarantee, it follows that its guarantee authority in connection with such a sale is also limited to the 90 percent statutory maximum. This would be true whether SBA were selling a direct disaster loan to FFB or to some other purchaser, since the statute makes no distinction between purchasers. It is our understanding that SBA's proposal would involve a 100 percent guarantee of the full face amount of the obligations sold to FFB, whether the loans are sold individually or collectively by means of certificates of ownership. This financing arrangement would violate the 90 percent limitation, discussed above. (SBA is legally authorized to sell its SBIC debentures, with a 100 percent guarantee since there is no similar statutory limitation in the Small Business Investment Act of 1958 on the percentage SBA can guarantee.)

In addition to the foregoing, there is another consideration which leads us to disapprove the proposed procedure. SBA states in its submission that its guarantee authority under section 7(b) is unlimited although, as a practical matter, very few lenders have been willing to participate with SBA in making such loans. Moreover, SBA states that while there is no ceiling on its disaster loan authority, direct loans are in fact limited by the agency's appropriation.

If SBA's position is upheld by our Office, the consequences could be very significant. SBA would be able to sell direct disaster loans to FFB with its guarantee and thereby to replenish its disaster loan revolving fund so as to enable it to make new disaster loans and repeat the process indefinitely. Notwithstanding SBA's argument that in its Budget Request it would state the dollar amount of disaster loans to be sold and would note that it had reduced its appropriation request accordingly, this procedure, if allowed, could theoretically build up an unlimited contingent liability against the United States, without any effective congressional restraints. We do not believe for the reasons set out below, that in authorizing SBA to establish a disaster loan program, Congress was aware of or intended such a result.

We agree with SBA that its authority to make physical and economic injury disaster loans under sections 7(b)(1) and (2) is not subject to any statutory ceiling. This is not to say, however, that there are no limitations on its authority to sell direct disaster loans that would be fully guaranteed by SBA.

Ceilings were established in Pub. L. No. 89-409, 79 Stat. 824, approved May 2, 1966, on the "total amount of loans, guarantees, and other obligations or commitments," which could be outstanding at any one time for the different programs funded out of the business loan and investment revolving fund. However, no ceiling was established on the funding of the disaster loan programs funded out of a separate disaster loan revolving fund. The House and Senate Reports on the legislation that was ultimately enacted as Pub. L. No. 89-409 explained the basis for establishing the disaster loan fund to operate in this manner as follows:

> "In order to prevent the breakdown of SBA's regular business loan program by the overriding needs of the disaster loan program, a separate revolving fund for the physical disaster loan programs has been provided in this bill.
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> "Since it is impossible to predict the extent of the need for funds to meet physical disaster requirements no authorization ceiling has been placed on the disaster loan fund. For humanitarian reasons the Congress has always been ready to provide the necessary funds to meet disaster loan needs.
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> "If a ceiling were placed on disaster loans, it is possible that the ceiling might be reached at a time when Congress was not in session. Therefore, even with funds available, loans could not be made until Congress returned to raise the ceiling.

> "Funds for the use by SBA in its disaster loan program would still be subject to the restrictions placed on the program by the Bureau of the Budget and by the Appropriations Committees of the Congress." Footnote omitted, emphasis added. H. R. Rep. No. 1348 and S. Rep. No. 1057, 89th Cong., 2d Sess. 4, 5 (1966).

The foregoing explanation reflects the legislative view that disaster loans would primarily, if not exclusively, be made, on a direct rather than guaranteed basis. Otherwise the statement that "even with funds available, loans could not be made until Congress returned to raise the ceiling" would have no meaning since it is not legally necessary that funds be available in order to guarantee a loan made by a participating lending institution. (We have informally been advised by SBA that 10 percent of the total amount of a guarantee is charged against the monies in its revolving funds.) Likewise, the reference in the explanation to restrictions placed on the program by the appropriations committees presumably means the amount of money appropriated to the disaster loan revolving fund which, with respect to loan guarantee authority, is of course no restriction at all.

It is not surprising that Congress held this view, since the primary purpose of Pub. L. No. 89-409 was to provide for a separate fund for disaster loan needs in order to avoid the total disruption that had previously occurred in SBA's business loan program because of the vast amount of money SBA had diverted out of its revolving fund to make direct disaster loans. See H. R. Rep. No. 1348 and S. Rep. No. 1057, <u>supra</u>, 2, 3. A review of the debate on the legislation in the House of Representatives further supports the view that Congress did not expect or intend that, with the passage of Pub. L. No. 89-409, SBA would be involved to any significant extent in guaranteeing disaster loans, whether made in the first instance by a participating lending institution or directly by SBA, to be subsequently sold with SBA's full guarantee. See 112 Cong. Rec. 7311-7329 (1966).

The Small Business Act was recently amended, with the enactment of Pub. L. No. 95-89, 91 Stat. 553, approved August 4, 1977, to modify the approach previously used by Congress in budgeting for SBA. That legislation authorized funding for SBA by establishing specific line item authorizations for individual loan and guarantee programs for fiscal years 1978 and 1979. Those line item authorizations established maximum amounts of direct loans, immediate participation loans, and guaranteed (or deferred participation) loans that SBA was authorized to make in fiscal years 1978 and 1979. Although an overall ceiling was established for disaster loans made pursuant to subsections 7(b)(3)-(8) no similar ceiling was placed on SBA's authority to make fiscal and economic injury disaster loans under sections 7(b)(1) and (2). This was explained in S. Rep. No. 95-184, 4, 19 (1977) as follows:

> "Ceilings were not placed on physical and economic injury disaster loans since there is no method possible to anticipate the level of demand for these programs. By leaving the authorizations open ended for these two programs, there will not be a need to legislate a supplementary authorization each time a disaster occurs.
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> *   *   *   *   *
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> "The Committee bill does not provide for a specific dollar authorization for the 7(b)(1) and 7(b)(2) disaster programs in that the loan demand for these programs cannot be accurately estimated. Instead such funds are authorized to be appropriated as may be necessary to operate the 7(b)(1) and 7(b)(2) disaster programs."

Certainly, as stated in SBA's submission, "as a practical matter very few lenders are willing to participate with the agency in such loans." In fact, based on information contained in recent hearings before the House Committee on Small Business, it appears that as of June 30, 1975, in excess of 99 percent of the total amount of all disaster loan funds disbursed and outstanding had been made on a direct rather than guaranteed basis. See "Federal Natural Disaster Assistance Programs;" Hearings before the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the House Committee on Small Business, 95th Cong., 1st Sess. 503 (1977). Moreover, our review of the legislative history of Pub. L. No. 95-89 which, in essence, adopted the same approach to the physical and economic injury disaster loan program as was established in Pub. L. No. 89-409, did not reveal anything to indicate that Congress intended that SBA be authorized to guarantee disaster loans without limitation.

In light of the very real possibility that SBA could, if its authority is upheld in this matter, establish an unlimited contingent liability against the United States, without any congressional restraints whatsoever, our Office cannot approve the proposed procedure in the absence of a specific statutory authorization or, at the very least, a clear indication that Congress intended that SBA have such authority. Neither is present here.

Moreover we do not believe that the situation would be different in any significant respect whether SBA sells its direct disaster loans individually or collectively by means of certificates representing ownership of a group of SBA loans.

For these reasons, we cannot concur in SBA's opinion that it is authorized to implement this proposal as now constituted to sell direct disaster loans to FFB with SBA's full guarantee.

R.F. Keller

Deputy Comptroller General
of the United States