

Memorandum

July 30, 1985

TO : Director, RCED - J. Dexter Peach

FROM : *for* General Counsel - Harry R. Van Cleve**LIMITED DISTRIBUTION**SUBJECT: Federal Crop Insurance Corporation Transfer
B-218812-O.M.

Group Director Clifton W. Fowler has asked about the propriety of a \$50 million transfer from the Federal Crop Insurance Corporation's (FCIC) fiscal year 1985 appropriation for Administrative and Operating Expenses to the appropriation for the FCIC Fund. The transfer was effected under the authority of section 2257 of title 7 of the United States Code. For the reasons given below, we find the transfer improper.

BACKGROUND

The FCIC is a wholly owned Government corporation created in 1938 as an agency of the United States Department of Agriculture. Its purpose is to promote the national welfare by improving the economic stability of agriculture through a system of crop insurance. 7 U.S.C. § 1502. The Federal Crop Insurance Act of 1980, Pub. L. No. 96-365, 94 Stat. 1312, expanded the FCIC's functions by establishing a nationwide cost-sharing insurance program, providing higher coverage levels, and encouraging broad participation by having the FCIC subsidize a portion of the farmer's insurance premiums. 7 U.S.C. § 1508; see H.R. Rep. No. 809, 98th Cong. 2d Sess. 50 (1984).

The FCIC receives funds from capital stock subscriptions from the U.S. Treasury, premium income from farm producers, and appropriations for Federal premium subsidies, indemnity payments, and administrative and operating expenses, 7 U.S.C. §§ 1504, 1508(b), 1516(a). Among other things, the appropriation for administrative and operating expenses covers salaries of FCIC employees, payments for agents' commissions, and the direct cost of loss adjusters for crop inspections and loss adjustments. See id. § 1516(a).

Although not specifically provided for in the 1980 Act, beginning with fiscal year 1982, monies have been appropriated to an account designated as the FCIC Fund. The Fund is a recipient of premium income and is used to pay insurance indemnities to farm producers. E.g., Pub. L. No. 97-103, 95 Stat. 1467, 1476-77 (1981). For fiscal year 1985, the FCIC was appropriated \$200 million in Administrative and Operating Expenses and \$110 million for payments to the FCIC fund. H.R. 5473,¹ 98th Cong., 2d Sess. (1984); see H.R. Rep. No. 1071, 98th Cong. 2d Sess. 16 (1984).

The materials provided to us suggest that the FCIC has experienced heavier-than-usual losses for crop year 1984 and early crop year 1985 due to adverse weather conditions. The Department of Agriculture maintains that recent cash flow projections indicate that cash reserves will be insufficient to meet existing financial obligations to farmers. Thus, as of March 19, 1985, the Corporation had \$18 million available to pay outstanding losses currently estimated to be \$85 million. To acquire additional funds the Department has used the authority of 7 U.S.C. § 2257 to transfer \$50 million from the \$200 million 1985 appropriation for Administrative and Operating Expenses, to the FCIC fund so the FCIC can meet its contractual commitments to pay insurance indemnities to producers. The Department describes the situation as an extraordinary emergency.

The Department also has sent to the Congress a request for a capital stock subscription of \$50 million, and submitted a proposal to OMB for a second supplemental appropriation of \$350 million in borrowing authority. If the Congress approves these supplemental requests, the Department states the FCIC would be in a position to transfer back the \$50 million to the Administrative and Operating Expenses account.

LEGAL DISCUSSION

In cases of need for emergency funding of indemnity payments, the Federal Crop Insurance Act of 1980 authorized the FCIC to use funds of the Commodity Credit Corporation (CCC). 7 U.S.C. § 1516(c) The Senate report discussing this provision said that use of CCC funds was intended to insure that the FCIC would be able to operate the expanded

¹/ The law continuing appropriations for fiscal year 1985 incorporated this bill as setting forth the particular appropriations to the Department of Agriculture.
Pub. L. No. 98-473, 98 Stat. 1837.

crop insurance program on an adequate financial basis even in the worst catastrophic years. S. Rep. No. 254, 96th Cong., 1st Sess. 3, 13-14 (1979). However, this authority expires 1 year after the date on which it first is used. 7 U.S.C. § 1516(c). As CCC monies were already used more than a year ago, this remedy has expired.

As an additional remedy, the Act also authorized the FCIC to issue notes to the Treasury to gain additional funds. Id. § 1516(d). This borrowing authority, however, may only be exercised to the extent provided in appropriation acts. The 1985 Appropriations Act did not provide the required authority.

As the remedies provided by the Act were not available, we must determine whether there is other authority for the transfer. It is well-settled that in the absence of statutory authority, transfers from one appropriation to another are prohibited. The prohibition is found both in statute, 31 U.S.C. § 1532, and case law, e.g., 33 Comp. Gen. 216, 217 (1953).

The Department of Agriculture relies on section 2257 of title 7 of the United States Code for its authority to make the described \$50 million transfer. That section provides:

"[N]ot to exceed 7 per centum of the amounts appropriated for any fiscal year for the miscellaneous expenses of the work of any bureau, division, or office of the Department of Agriculture shall be available interchangeably for expenditures on the objects included within the general expenses of such bureau, division, or office, but no more than 7 per centum shall be added to any one item of appropriation except in cases of extraordinary emergency."
(Emphasis added).

A provision similar to section 2257 was first included in the Agriculture Appropriation Act for fiscal year 1910. Pub. L. No. 60-330, 35 Stat. 1039, 1057. See S. Rep. No. 803, 78th Cong., 2d Sess. 23.

Informally, the Department has told us that section 2257 of title 7 allows for transfers and receipts of more than 7 percent of an appropriation when there is an extraordinary emergency. It states that the first 7 percent mentioned in section 2257 refers to the transferring appropriation and the second 7 percent to the receiving

appropriation. It also maintains that the section is not limited to transfers of miscellaneous appropriations but authorizes transfers of program appropriations as well. The Department acknowledges, however, that there is very little legislative history on the section and nothing about how the term "miscellaneous expenses" or "extraordinary emergency" is to be interpreted.^{2/}

Based on the language of section 2257, we agree with the Department that the first use of the 7 percent figure is intended to apply to the appropriation from which the transfer is to be made, and the second use, which we have underlined, applies to the receiving appropriation. Furthermore, the conference report accompanying the Agriculture Appropriations Act for 1943, Pub. L. No. 77-674, 56 Stat. 664, 698-99, in which a similar provision appeared, says that the provision would authorize interchanges within bureaus of not to exceed 10 percent of amounts appropriated to those bureaus, and the addition of not more than 10 percent to any one item of appropriation.^{3/} H.R. Rep. No. 2288, 77th Cong., 2d Sess. 4 (1943). If the 7 percent limitation were to apply only to the appropriations from which transfers are to be made, its second use would be redundant.

Accordingly, the statute would allow up to 7 percent of the \$200 million appropriated for Administrative and Operating Expenses to be transferred, i.e., \$14 million, and up to 7 percent of the \$110 million appropriated for the FCIC fund to be received. Thus, no more than \$7.70 million could be added to the appropriation for the FCIC fund. In this instance, the \$50 million transferred is substantially more than 7 percent of either of those appropriations. Thus, we must consider whether section 2257 applies to transfers from one program appropriation to another, and whether the exception to the 7 percent limitation for "extraordinary emergencies" was intended to apply both to the transferring and receiving appropriations or only to the receiving appropriation.

^{2/} We understand that your Division will be providing the Department of Agriculture with a draft report for comment. As we have not had time to formally ask the Department for its views and we are taking a position that conflicts with what the Department has done, we think it important that the Department have an opportunity to comment.

^{3/} The conferees ultimately agreed on the 7 percent figure. H.R. Rep. No. 2288, 77th Cong., 2d Sess. 4 (1942).

A literal reading of section 2257 suggests that only appropriations for miscellaneous expenses can be transferred.^{4/} It has been held that the word "miscellaneous" as used in an appropriation bill to qualify the word "expenses" means "a small appropriation for the minor and unimportant disbursements incidental to any great business, which cannot well be foreseen and which it would be useless to specify more accurately." 16 Comp. Gen. 462, 463 (1936), quoting Dunwoody v. United States, 22 Ct. Cl. 269, 280 (1887), aff'd, 143 U.S. 578 (1892).

The legislative history of section 2257 indicates that the provision was to be used in limited situations. S. Rep. No. 803, 78th Cong., 2d Sess. 23 (1944); H.R. Rep. No. 1198, 78th Cong., 2d Sess. 18 (1944); Agriculture Department Appropriation bill for 1943: Hearings before the Subcomm. of the House Comm. on Appropriations, 77th Cong., 2d Sess. 474-75 (Pt. 2 1942). The cited committee reports show that the authority was to be used particularly where unforeseen emergencies arose during periods when the Congress was not in session, and mentioned as examples fires occurring at field stations, water supply systems failing, and insect or plant diseases breaking out.

Consistent with this narrow reading, in 33 Comp. Gen. 214, 215-16: (1953), we found improper a proposed transfer from appropriations of the Department of Agriculture's Production and Marketing Administration to the amounts provided for emergency feed and seed assistance. We said it was extremely doubtful that the provision contemplated transfers of funds other than those available for general or miscellaneous purposes. Id. at 215-16.

On the other hand, there is support in the legislative history, the practice, and our jurisprudence for reading the provision as comprehending transfers from any appropriations of a bureau, office or division so long as they are to another appropriation within the same bureau, office, or division. For example, in hearings on the Agriculture Appropriations Bill for 1939, the Secretary of Agriculture emphasized that the transfer authority was to be used sparingly, but provided a list showing numerous transfers

^{4/} We recognize that in recent years appropriations to the Department of Agriculture have not included appropriations for miscellaneous expenses per se. Nevertheless, there have been similar appropriations to various bureaus designated as administrative expenses.

between salary and expense appropriations. Department of Agriculture Appropriations Bill for 1939: Hearings before a Subcomm. of the Senate Comm. on Appropriations, 75th Cong., 3d Sess. 37-46. This point also was made in hearings on the Agriculture Department Appropriations Act for 1943. Department of Agriculture Appropriations Bill for 1943: Hearings before the Subcomm. of the House Comm. on Appropriations, 77th Cong., 2d Sess. 476-77 (Pt. 2 1942). Furthermore, in 33 Comp. Gen. at 215, the Department's position was that section 2257 was not limited to transfers from "miscellaneous" or "administrative" expense appropriations but authorized "free interchange, within the limits specified, between the appropriations of a bureau, division or office of the department." We understand this to be the Department's present position and practice.

Implicitly, we accepted this reading in B-123498, April 11, 1955. There we found proper a transfer from the Forest Service's "Forest Roads and Trails" appropriation. We also repeated what we had said in 33 Comp. Gen. at 216 that the transfer authority was to be used "in unexpected or unforeseen situations which develop during the course of a fiscal year * * * and which were not foreseen at the time the appropriation law for such bureau or office was enacted." Thus, we emphasized not the kind of appropriations but rather the situations that would support transfers.

As section 2257 is intended to be used in emergency situations, we agree that a literal reading limiting transfers only from miscellaneous expense-type appropriations could defeat its purpose. Nevertheless, though we think the provision does authorize transfers from appropriations for specific purposes, consistent with its legislative history showing that the provision was to be used sparingly, we do not think the provision was intended to authorize large transfers of funds from one program appropriation to another. In this instance, of course, the amounts transferred and received represented substantial proportions of both appropriations to the FCIC.

More critically, we do not think the exception to the 7 percent limitation for extraordinary emergencies applies to the transferring appropriation. The phrase "except in cases of extraordinary emergency" is used in the clause describing the receiving appropriation but not that describing the transferring appropriation. Thus, the natural reading of the sentence is that the exception for extraordinary emergencies applies only to the receiving appropriation.

Had there been a comma between the words "appropriation" and "except" in the underlined portion of section 2257, as quoted above, arguably the phrase might apply to the transferring appropriation as well. Although punctuation, or the lack of it, should not necessarily govern the interpretation of a statute, punctuation is a part of an act and may be considered in its interpretation, particularly when intent is uncertain. 2A Sutherland, Statutory Construction, § 47.15 (Sands 4th ed. 1973). Fithian v. St. Louis & S.F. Ry. Co., 188 F. 842, 845 (C.C. W.D. Ark. 1911). We note that when the transfer authority first was enacted it read the same way. Pub. L. No. 60-330, 35 Stat. 1039, 1057 (1909). Moreover, the Conference report accompanying the Agriculture Appropriations Act for 1910 quoted the provision as having a semicolon between the words "office " and "but", thus sharply separating the transferring clause from the receiving clause. H.R. Rep. No. 1919, 60th Cong. 2d Sess. 4-5 (1909).

We think this reading of the section more consistent with its intended limited use. Furthermore, we think it probable that the Congress intended to put a more restrictive ceiling on the amounts that could be transferred to ensure that the transferring appropriations would continue to be available to support the activities for which they were appropriated. This safeguard, of course, normally would not be necessary for the appropriation needing the fund, and impractical in emergency situations when there would be a strong likelihood that larger amounts of funds would be needed.

Therefore since the \$50 million transferred exceeded 7 percent of the amount of the transferring appropriation, section 2257 was not used properly.

As a practical matter, we understand that the funding problem could be resolved by the Supplemental Appropriations Bill, 1985, H.R. 2577, 99th Cong., 1st Sess. (1985).^{5/} The bill will make available to the FCIC \$50 million from the sale of capital stock and \$113 million in additional borrowing authority. The \$50 million is intended to enable the FCIC to meet its financial responsibilities and to provide adequate working capital, and the \$113

^{5/} On the other hand, we point out that an Anti-deficiency Act, 31 U.S.C. § 1341, violation could occur if either of the FCIC's appropriations are obligated in excess of amounts available before supplemental appropriations are provided.

million is to be used to meet indemnity claims paid out by the FCIC Fund. H.R. Rep. No. 142, 99th Cong., 1st Sess. 17-18 (1985). Of course, consistent with our conclusion, the Department is obligated to transfer back to the Administrative and Operating Expenses appropriation that part of the amount transferred to the fund that exceeded 7 percent of the \$200 million appropriated, i.e., \$36 million.

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2. APPROPRIATIONS

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