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WASHINGTON, D.C. 20548

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The Honorable James H. Jones  
Chairman, Committee on the Budget  
House of Representatives

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Dear Mr. Chairman:

This responds to your letter dated July 28, 1981, in which you asked us to inquire into the Department of Housing and Urban Development's (HUD) Housing Counseling Assistance program. Specifically, you asked us to determine whether a deferral of Budget authority must be reported under the Impoundment Control Act because of the Department's failure thus far in fiscal year 1981 to obligate funds appropriated for the program. For the reasons stated hereafter, we conclude that a deferral report is not required.

Funding for the Housing Counseling Assistance Program

Congress provided \$16 million for the Housing Counseling Assistance program in the Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1981, Pub. L. No. 96-526, 94 Stat. 3044, 3049 (December 15, 1980). The program is comprehensive and encompasses many types of counseling, including default, prepurchase, and other assistance, information, and advice to homeowners, home buyers, and tenants. The Act that funded the program, however, also provided at section 414(a) that an agency cannot obligate more than 30 percent of its funds in the last quarter of fiscal year 1981, without an appropriate waiver from the Director of the Office of Management and Budget.

On March 17, 1981, the President proposed a rescission (rel-13) of \$6 million in the program. The President's proposal stated that the remaining \$4 million would be used only for homeowner default counseling. The funds proposed for rescission were withheld from obligation for 45 days of continuous congressional session pending consideration of the rescission proposal, as authorized by section 1012 of the Impoundment Control Act, 31 U.S.C. 1402. During this time, the agency did not obligate the remaining \$4 million.

The 45-day withholding period expired on May 17, 1981. Congress responded to the President's impoundment proposal in the Supplemental Appropriations and Rescission Act, 1981, Pub. L. No. 97-12, 93 Stat. 14, 32 (June 5, 1981), by rescinding \$3 million from the program. At this point, the remaining funds for the program were available for obligation. However, HUD did

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not obligate them during the remainder of June, the last month of the third quarter. Thereafter, the funds became subject to the 30 percent limit on fourth quarter obligations under the 1981 HUD Appropriation Act. The Office of Management and Budget declined HUD's request to waive application of the fourth quarter limitation to these funds.

Failure to Obligate Funds  
During the Third Quarter

Status of Funds Through June 9, 1981. As noted above, the President not only proposed that \$6 million of the funds for the program be rescinded, but the special message also stated that the remaining funds would be used only for homeowner default counseling. The comprehensive program originally encompassed many other types of counseling, including prepurchase, delinquency, prerental, rehabilitation, displacement, and energy conservation counseling.

Certified housing counseling agencies eligible to receive funding were rated, in part, on the basis of plans to provide comprehensive counseling assistance. These ratings are used to determine who will receive funding and in what amounts. HUD believed that it would be imprudent to award the \$4 million available for a comprehensive counseling assistance program while the President's proposal to rescind funds and limit the remaining funds to a particular type of counseling assistance was pending. Furthermore, how Congress responded to the rescission proposal would determine the amount of funds that could be obligated, and, therefore, the number and the amount of grants and contracts to be awarded. Consequently, HUD did not attempt to obligate the \$4 million during the time when the President's proposal was pending before Congress.

However, in the past, the Executive has submitted deferral proposals when it delayed obligating funds pending congressional action on a Presidential legislative proposal. For example, on January 28, 1980, the President's fourth special message for fiscal year 1980 deferred funds from the Buildings and Facilities account for the Department of Justice, Federal Prison System (200-175). The deferral was submitted in order to preserve the funds until Congress responded to a pending proposal to transfer the funds to other accounts in the Department. And on April 16, 1980, the President's seventh special message deferred funds from various accounts for the Department of Defense pending legislative action on a proposal to transfer the funds to offset requirements for additional funds in other areas.

Consequently, when HUD decided not to obligate the \$4 million until after Congress responded to the \$6 million rescission proposal, a deferral message probably should have been transmitted to the Congress. The Congress would then have had the opportunity to reject the deferral and direct the agency to obligate the \$4 million without waiting for action on the rescission proposal to be completed. In any event, what effect reporting this deferral would have had is speculative. Moreover, the issue of whether a deferral should have been reported at this stage became moot once Congress acted on the rescission proposal and the \$4 million was no longer being withheld on this basis.

Period Between Enactment of the Rescission Proposal Through July 1. After enactment of the Supplemental Appropriations and Rescission Act on June 5, 1981, OMB apportioned to HUD on June 15, 1981, the \$3 million included in the rescission proposal that was not rescinded by the Act. On June 18, 1981, the funds were allotted to the program by HUD, and together with the \$4 million not proposed for rescission, \$7 million became available for the program. However, HUD did not obligate any of the \$7 million available before the beginning of the fourth quarter. Its failure to obligate during this period appears to be based on factors relating to the efficient operation of the program. There was not enough time remaining in the third quarter to implement the program based on the funding level resulting from the Supplemental Appropriations and Rescission Act. This situation existed, in part, because the agency believed that awarding grants and contracts before the agency knew what its available budgetary resources would be for the rest of the fiscal year could have created inequities. In the agency's view, such inequities would have resulted if program decisions had been based on a funding level which did not materialize as a result of OMB's action on a request to waive the fourth quarter spending limitation.

We did not conduct the type of audit necessary to independently determine whether the agency could have obligated those funds during this period through more efficient or effective program implementation. However, based on preliminary inquiries, we found nothing in HUD's performance after June 5, 1981, which suggests that it intentionally delayed obligating funds in order to utilize the fourth quarter spending limitation or otherwise hold the program below the revised \$7 million level provided by Congress. On the contrary, the agency requested OMB to waive the limitation on fourth quarter spending in order to obligate all the funds appropriated for the program.

We do not view the Impoundment Control Act as requiring a deferral report when an agency is taking the steps it reasonably

Believes are necessary to implement a program efficiently and equitably, even if the result is that funds temporarily go unobligated. To hold otherwise would mean that an impoundment exists whenever funds are not fully obligated as soon as they first become available, regardless of any necessary programmatic or administrative considerations.

Applicability of Fourth Quarter Spending Limitation

Section 414(a) of the HUD Appropriation Act, 94 Stat. 3066, places a limitation on fourth quarter spending. Section 414(a) states that:

"No appropriations made available in this Act shall be obligated in a manner that would cause obligations from the total budget authority available to any department or establishment, as defined in section 2 of the Budget and Accounting Act 1921, or any major administrative subdivision thereof, during the fiscal year ending September 30, 1981, to exceed 30 per centum for the last quarter of such fiscal year or 15 per centum for any month in the last quarter of such fiscal year. The Director of the Office of Management and Budget may waive the requirements of the preceding sentence with respect to any program or activity if the Director determines in writing that the waiver is necessary to avoid a serious disruption in carrying out such program or activity."

We have been informally advised that OMB interprets the 30 percent limitation in section 414(a) to apply to all the funds appropriated for programs administered by the Neighborhoods, Voluntary Associations and Consumer Protection office (NVACP) in HUD. This office administers two programs--Housing Counseling Assistance and Neighborhood Self-Help Development. We understand that the OMB interpretation was based on the inclusion in section 414(a) of the phrase "major administrative subdivision" as an entity to which the limitation applies. NVACP was considered to be a "major administrative subdivision" because it is a separate office in HUD headed by an Assistant Secretary who is appointed by the President and confirmed by the Senate. Having examined the legislative history of section 414(a) and identical provisions in other appropriations acts, we find no explanation of the phrase

"major administrative subdivision" in section 414(a). Under these circumstances, we cannot conclude that OMB's interpretation of section 414(a) is improper as a matter of law.

The amount of funds appropriated to the HVACE office for both the Housing Counseling Assistance and Neighborhood Self-Help Development programs in fiscal year 1981 totaled \$19 million. Of this total, approximately \$11.1 million was rescinded by the 1981 Supplemental Appropriations and Rescission Act, leaving a total of \$7.9 million in the two accounts for obligation during the year. Applying the 30 percent limitation on fourth quarter spending to this \$7.9 million results in a limitation of \$2.37 million on the amount which may be obligated by the HVACE office in the fourth quarter. Funding for the Neighborhood Self-Help Development program was terminated by the 1981 Supplemental Appropriations and Rescission Act, after approximately \$908,000 had been obligated for the program. Therefore, HUD plans to obligate all of the \$2.37 million for the Housing Counseling Assistance program in the fourth quarter. Agency documents show that approximately \$617,000 was obligated prior to the fourth quarter for a special training and assistance contract. Therefore, the total funding level for the program would be approximately \$2.987 million out of the \$7 million appropriation which remained for the Housing Counseling Assistance program after enactment of the Act. Because these are annual funds, the remainder of the \$7 million, or \$4.013 million, will expire at the end of the fiscal year.

Section 414(a) provides a means by which an agency can obtain a waiver of the fourth quarter spending limitation from the Director of OMB. On June 30, 1981, HUD requested that OMB waive the fourth quarter spending limitation for five programs, including the Housing Counseling Assistance program. On July 30, 1981, OMB approved three of the Department's requests, but denied the waiver request for the Housing Counseling Assistance program. Consequently, HUD will be able to obligate only \$2.37 million in the fourth quarter for the Housing Counseling Assistance program.

Applicability of the Impoundment Control Act to section 414(a) Withholdings

The applicability of the Impoundment Control Act to the failure of the Executive Branch to obligate budget authority depends not only on the existence of unobligated budget authority, but also on the reason why the failure to obligate occurred. The fact that funds go unobligated does not, by itself, constitute an impoundment. Impoundments generally occur, in effect, because the Executive decides to stop or slow a program that otherwise would proceed unhindered and in accordance with statutory prescriptions.

The Impoundment Control Act operates on the premise that when Congress appropriates money to an agency, the agency is required to obligate the funds. The Act also provides a mechanism by which the Executive, subject to congressional control, can deviate from this requirement. Ordinarily, unless the Executive invokes this mechanism, the appropriated funds must be obligated.

Section 414(a) of the 1981 BUD Appropriations Act is based on the premise that agencies should plan their obligations so that no more than 30 percent of the funds need to be obligated during the fourth quarter. Once agencies are faced with a situation in which more than 30 percent of the funds remain at the beginning of the fourth quarter, section 414(a) requires that the funds (in excess of 30 percent) not be obligated unless the requirement is waived by the Director, OMB. Without such waiver, funds in excess of 30 percent simply are unavailable. Thus, invoking the mechanism of impoundment is unnecessary and inappropriate, unless one ascribes an intention, evidenced by a reading of the two acts together, that the Director of OMB must, with regard to section 414(a) funds, either exercise the waiver and obligate the funds, or upon refusing to exercise the waiver, submit an impoundment report to the Congress and permit the Congress to decide whether the funds should be obligated. We find no such intention.

Section 414(a) does not on its face subject to congressional review the Director's discretion to waive its withholding requirement. Instead it limits that discretion only by providing that a waiver may be granted by the Director if he determines in writing that the waiver is necessary to avoid a serious disruption in a program. The express limitation upon the Director's discretion suggests to us a congressional design that the Executive, with appropriate caution, make the final decision whether funds that ought to have been obligated in earlier quarters may be obligated at all in the last quarter.

Requiring section 414(a) withholdings to be accompanied by impoundment proposals under the Impoundment Control Act effectively would annul the discretion section 414(a) provides the Director of OMB. Funds withheld under section 414(a) that expire at the end of the year, under this view, would require an act of Congress on a rescission bill, pursuant to section 1012 of the Impoundment Control Act, 31 U.S.C. 1402, in order for the Executive to continue withholding section 414(a) funds. The withholding of no-year funds pursuant to section 414(a) would be subject to a similar reconsideration, this in the form of a "deferral"

proposal that could be overturned by one House of Congress, under section 1013 of the Act, 31 U.S.C. 1403.

This view of the statutory scheme also creates the irony that while Congress has provided itself the means to reverse an OMB decision to withhold funds in accordance with the basic concern expressed by section 414(a), it has left itself no means of contradicting an OMB decision to enter into an obligation of funds that section 414(a) clearly discourages.

We believe the Acts cannot be read reasonably to reduce section 414(a) of the HUD Appropriation Act to a mandate for the submission of impoundment proposals under the Impoundment Control Act, and that the proper understanding of the statutory scheme envisioned by these two Acts does not permit transforming what appears to be discretion vested solely in the Executive into discretion vested ultimately in the Congress. For the reasons stated, we conclude that the Impoundment Control Act is not applicable to section 414(a) withholdings.

Sincerely yours,

MILTON J. SOCOLAR

Acting Comptroller General  
of the United States