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United States General Accounting Office
Washington, D.C. 20548

SUMMARY OF THE STATEMENT OF ROLLEE H. EFROS ON H.R. 5858

H.R. 5858, a private relief bill, provides compensation to certain silver dealers for losses found equitably due them by the Chief Commissioner of the Court of Claims. The dealers' claims result from the actions of the Treasury Department in terminating the silver marketing program on May 18, 1967.

The General Accounting Office fully supports the basic measure of recovery recommended by the Chief Commissioner. H.R. 5858 also provides for simple interest in addition to the equitable recovery. It is clearly the prerogative of the Congress to award interest in this case. However, in making this determination, attention should be given to a longstanding practice by the courts not to award interest against the Government even in the case of equitable claims. Absent H.R. 5858, this case does not appear to fall within the few, limited exceptions to the general rule.

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STATEMENT OF
ROLLEE H. EFROS, ASSOCIATE GENERAL COUNSEL
BEFORE THE
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
ON
H.R. 5858

Mr. Chairman and Members of the Committee:

H.R. 5858 is a private relief bill to compensate certain silver dealers for losses found to be equitably due them by the Chief Commissioner of the Court of Claims. The measure provides relief to Mocatta and Goldsmid, Limited (Mocatta), Sharps, Pixley, and Company, Limited (Sharps), and Primary Metal and Mineral Corporation (Primary).

The dealers' equitable claims result from the silver marketing program of the Treasury Department, begun in 1963 and terminated on May 18, 1967. This is a longstanding matter in which the General Accounting Office has had some involvement. We are pleased to testify and hope that our comments will be helpful to the Committee.

Prior to May 18, 1967, in order to maintain the price of silver below the level for profitable melting of United States silver coins, the Treasury Department openly bought and sold silver at a pegged price of just over $1.29 per fine troy ounce. Procedures under the program were as follows. To buy silver bullion from the Treasury a purchaser placed an order, stated in

multiples of 1000 ounces, with the Federal Reserve Bank. Because of weight variations, the exact value of the order could not be determined until specific bars were identified by the Assay Office, at which time the purchaser was informed of the precise dollar amount due. After paying the exact price to the Federal Reserve Bank, the purchaser was given a receipt for the silver bars identified to fill the order, and subsequently took delivery at the Assay Office. The delivery deadline for the silver was ten working days after the order was placed.

By 1967 the need for the silver-pegging program had lessened because silver certificates were replaced by Federal Reserve Notes, and silver coins by "clad" coins. This was also a period of especially high demand for Government silver. At the close of business on May 18, 1967, the Treasury Department announced that its silver marketing program was terminated, effective immediately. However, in actual practice, regular orders received on May 18 were not routinely processed and would not be honored. This was in accordance with internal Treasury directives and the effect was the retroactive termination of the silver program at the close of business on May 17, 1967.

On May 18, 1967, Mocatta, Sharp, and Primary each ordered silver at $1.29 per ounce from the Treasury. On that day each of the claimants also went "short" — a common dealer practice of taking more orders from customers to buy silver than had actually been purchased. The silver dealers first learned that their May 18 orders were dishonored on June 2, 1967, the regular ten-day delivery deadline, by which time the market price of silver had risen to $1.80 per ounce. Because they were obligated to cover their short positions at prices considerably higher than $1.29 per ounce, the dealers suffered substantial losses. The claims are based on the fact that the claimants had relied on Treasury's pegged price in accepting orders from their customers on May 18.

In 1969, the General Accounting Office testified before this Committee on the manner and consequences of Treasury's termination of the silver marketing program, reporting the findings of our own investigation. At that time we concluded that there was no legal liability to any of the claimants under contract theories, but strong equitable considerations in favor of each of the dealers named in H.R. 5858. In our 1969 testimony, we offered no objection to a then pending resolution to refer the matter to the Court of Claims.

That resolution, H. Res. 108, was adopted, and under the congressional reference procedure, the case was transferred to the Court of Claims. The Court has completed its consideration of the questions of law and equity generated by the claims of Mocatta, Sharp, and Primary, and has reported its findings to the Congress.

The Court of Claims has determined that the claimants are equitably entitled to recovery from the United States. According to the Chief Commissioner's report, the proper measure of recovery is equal to the difference between Treasury's pegged price of $1.29+ per ounce and the open market price on June 2, 1967 of $1.80, multiplied by the number of ounces ordered by each claimant on May 18, 1967, less the claimants' regular anticipated profit of 5/8 of one U.S. cent per ounce. Based on the Court of Claims' interpretation of the language of H. Res. 108, the Court specifically declined to find that the recovery should be increased by interest, leaving that determination to the Congress.

H.R. 5858 applies the Chief Commissioner's stated formula in determining the amount equitably due each claimant. We are in full agreement that this basic measure of recovery is appropriate. H.R. 5858 also includes simple interest at 6 per cent per year from from June 2, 1967, to the date of payment.

Again, we concur in the conclusion of the Court of Claims that interest can be awarded at the discretion of the Congress. We would point out, however, that had this suit been brought by the claimants on their own motion, 28 U.S.C. § 2516(a) would have prohibited the award of interest by the Court of Claims, absent a specific contract or Act of Congress. To our knowledge, there is no provision in either a contract or statute which would authorize the payment of interest.

In this regard, it may be helpful to review the distinction between legal and equitable recovery. In very broad terms, the basis for awarding legal damages is to make the plaintiff "whole". Interest may be awarded in conjunction with legal damages to compensate the plaintiff for the loss of the use of money. On the other hand, the theory behind an equitable recovery is simply to correct an "unfairness," and a different measure of recovery applies. In an unjust enrichment case, the benefit conferred is returned to the claimant. And where, as in this case, there has been no windfall, but only detrimental reliance by the claimant, equity seeks to restore the amount of that detriment. As a general rule, interest is not a component of equitable recoveries.

28 U.S.C. § 2516(a) is the statutory embodiment of a firmly established rule that interest on either legal or equitable claims is generally not recoverable against the United States. According to the Chief Commissioner, the claimants argue that they are entitled to interest because of the number of years the case has been pending. Without characterizing the length of time it has taken to resolve this matter, we note that the Supreme Court has applied the general rule to prohibit the payment of interest on equitable grounds even where the Government has unreasonably delayed payment. (United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947).)

The claimants' attorney has cited our Office to three cases where the Court of Claims has awarded interest. These cases arose in situations where the plaintiffs' original actions against the United States involved injury to their lands. In two of the cases a "taking" was alleged. Had the facts supported a finding that there was a taking by the Government, the Fifth Amendment would have guaranteed these plaintiffs "just compensation." In this specific context, interest is viewed as a component of just compensation. Although no taking was found in these instances, the Court of Claims awarded compensation for delay by the Government. We have reviewed the three cases, and in our opinion they may be factually distinguished from the claims we are considering. Further, they represent a departure from the general rule on interest, as expressed in the great majority of Court of Claims cases.

In conclusion, we support the provisions of H.R. 5858 which adapt the Court of Claims' report on the proper measure of recovery for the claimants. We suggest that the Committee may wish to give further consideration to the desirability of including interest payments as well, in view of the general practice discussed before.

At this time, I will be happy to answer any questions you may have.