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

B-202568

September 11, 1981

The Honorable David Pryor
United States Senate

Dear Senator Pryor:

This is in response to your request for our opinion as to "the legality and propriety" of certain actions taken by the Small Business Administration (SBA) in connection with its disaster loan program, including "the total cut-off" of funding for the disaster loan program and "the reissuance of new regulations" governing that program.

In your letter to our Office, you expressed your concern with respect to farmers in Arkansas and other states that have been adversely affected by the revised regulations and the accompanying "cut-off" of funding. In this respect, your letter reads in pertinent part as follows:

> "These farmers had met SBA's deadlines, filed their applications in good faith and were assured by everyone they talked to, including local officials, that although approvals and funding might be a slow process, the money would eventually be forthcoming to fund approved loans.
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> "Now it appears that SBA is going to change their rules in the middle of the game and has drawn up new regulations which will impose a credit elsewhere test and limit loans to 60 percent of the verified loan amount.
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> "I would like the opinion of your office of the legality and propriety of SBA's actions both with respect to the total cut-off of the funding of these loans and the reissuance of new regulations. Is the Government vulnerable to legal action by the farmers whose applications were not yet processed? Have proper procedures been followed for withholding this funding and for the issuance of the new regulations?"

In response to our request for its report on this matter, SBA explained its actions in connection with the questions you raise, as follows:

"Due to unprecedented drought conditions last summer, we found that our appropriation could not meet the requirements of our disaster programs as of early March, for the remainder of the fiscal year.

"Because of this excessive demand, we had exhausted the funding apportioned to the Small Business Administration by Office of Management and Budget through the end of the second quarter. This necessitated an immediate suspension of the approval of disaster loans until we could obtain the apportionment of additional funding.

"It seemed fairer to reduce the amount of loss compensation to all businesses rather than to compensate some fully and refuse all assistance to others. Also, in order to serve those in greatest need, the inability to obtain the credit from other sources became an eligibility requirement. * * *"

For the reasons set forth hereafter, it is our view that SBA's actions in connection with this matter were within its administrative discretion in administering the disaster loan program.

Under section 7(b) of the Small Business Act, 15 U.S.C. § 636(b), SBA is authorized to make disaster loans as follows:

"(b) The Administration also is empowered--

"(1) 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 because of floods, riots or civil disorders, or other catastrophes;

"(2) 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 to any small business concern located in an area affected by a disaster * * *."

(Loans under subsection (b)(1) of the Small Business Act, 15 U.S.C. § 636(b)(1), commonly referred to as "physical loss" loans, are made to homes and businesses for the repair or the replacement of physical property damaged or lost in a disaster. Loans under subsection (b)(2) of the Small Business Act, 15 U.S.C. § 636(b)(2) generally known as "economic injury" loans are made to small business concerns that suffer a substantial economic injury as a result of a disaster.)

SBA has issued regulations, set forth at 13 C.F.R. Part 123, that govern its disaster loan programs. Effective March 19, 1981, SBA revised its regulations to provide for the first time that physical loss disaster loans to businesses pursuant to 15 U.S.C. § 636(b)(1), would only "be made to the extent that the required financial assistance is not available from private sources * * *." 46 Fed. Reg. 18527 (1981), amending 13 C.F.R. § 123.3(a)(1). Also, SBA's revised regulations provide that physical disaster loans to business "shall not exceed sixty (60) percent of the actual physical loss resulting from the disaster * * *", with certain exceptions not relevant here. 46 Fed. Reg. 18528, amending 13 C.F.R. § 123.5(a). Prior to these amendments, the regulations had not set any limit on the percentage of a loss suffered by an eligible borrower that could be covered by an SBA loan.

As a general rule, agencies charged with the statutory responsibility of administering a Government program are accorded great deference with respect to the promulgation and interpretation of regulations implementing the program. Ordinarily, regulations are deemed to be within an agency's statutory authority and consistent with Congressional intent unless shown to be arbitrary or inconsistent with the statutory purpose. B-201706, March 17, 1981; 58 Comp. Gen. 635, 638 (1979). SBA is not treated any differently from other agencies in this respect.

The Small Business Act, 15 U.S.C. § 636(b)(1) and (2), grants SBA broad discretion in its disaster loan program "to make such loans * * * as the Administration may determine to be necessary or appropriate * * *." On numerous occasions, the courts have recognized SBA's broad discretion under this and similar statutory provisions (such as 15 U.S.C. § 636(a), which authorizes SBA's business loan program). For example, in Monter v. United States, 440 F. Supp. 44 (M.D. Pa. 1977), aff'd, 586 F.2d 835 (3d Cir. 1978), the court, in upholding certain disaster loan regulations, issued by SBA, as well as SBA's interpretation of those regulations, held as follows:

> "The power to interpret SBA regulations is vested in the Administrator, and the regulations will be sustained if they are reasonable and consistent with the statute and if the Plaintiff fails to show a weighty reason to overrule them * * *.

> "The Small Business Administration Act, 15 U.S.C. § 636(b) gives the Administrator broad discretionary powers in providing for disaster assistance loans." Also, see Dubrow v. Small Business Administration, 345 F. Supp. 4 (C.D. Cal. 1972); and Capital Refrigeration, Inc. v. United States, 375 F. Supp. 462 M.D. Pa. 1973).

We too have consistently recognized the broad discretion granted SBA in connection with all of its statutory loan programs. For example, in our opinion to the Chairman of the House Select Committee on Small Business, B-164380, March 3, 1969, we considered SBA's authority to amend a regulatory provision it had adopted in connection with its business loan program authorized by 15 U.S.C. § 636(a). The amended regulation enlarged the circumstances under which SBA could make a business loan for the purpose of financing a change of ownership of the small business. In our opinion, we said the following:

> "The last-quoted provision of law [15 U.S.C. § 636(a)] is very broad and, among other things, authorizes the making of SBA loans to small business concerns for the purposes specified therein in order to carry out the policies set forth in section 2(a) [of the Small Business Act]. * * * It is our view, however, that under the above-cited and quoted provisions of law, the Administrator of SBA may affect a change of policy consistent with law if he determines a change is necessary to effectuate the policy or policies enunciated in section 2 of the SB Act or, as provided in section 4(d), that the public interest involved requires such a change of policy.
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> "Accordingly, in view of the broad authority contained in the provisions of law cited and quoted above, we would not question the legality of the amended SBA regulation or loans made pursuant thereto, if the loans are otherwise in compliance with the SB Act."

Thus, it is clear that SBA's authority to issue and amend its regulations cannot be questioned, provided the regulations that are adopted are not in conflict with any relevant statutory requirements.

We do not believe that the amended regulations at issue here are in any way in conflict with the underlying disaster loan legislation. With respect to the newly imposed requirement that physical disaster loans not exceed sixty percent of the actual physical loss suffered by a business, there is nothing in the relevant statutory provisions or their legislative history that sets either a minimum or maximum percentage of loss that SBA is required to cover when it approves a disaster loan. Considering SBA's broad discretionary authority to make such loans as it considers necessary or appropriate, we believe it is necessarily left to SBA as the lender, to determine how much credit should be extended to a particular borrower, taking into account such things as the borrower's need, the amount of money that is available, and the urgency of competing claims for the funds. (See enclosed copy of Department of Justice memorandum to the Special Counsel to the Director, Office of Management and Budget.)

With respect to the amendment providing that physical disaster loans to businesses should only be made to the extent that the required assistance is not otherwise available from private sources, including the applicant's own resources, section 231 of the Disaster Relief Act of 1970, as amended, 15 U.S.C. § 636a provides that in administering the disaster loan program authorized by 15 U.S.C. § 636(b)(1) and (2), SBA:

> "(2) to the extent such injury, loss, or damage is not compensated for by insurance or otherwise, may grant any loan for repair, rehabilitation, or replacement of property damaged, or destroyed, without regard to whether the required financial assistance is otherwise available from private sources." (Emphasis added.)

We believe it is significant that this provision is set forth in discretionary rather than mandatory terms. Thus, while this provision clearly allows SBA to approve disaster loans without having to take into consideration the availability of credit from other sources, SBA is not prohibited from taking this factor into consideration if it chooses to do so. In fact, SBA's prior regulations already required applicants for economic injury loans to use "personal and/or business assets" to "the greatest extent feasible."

The holding of the Court in Capital Refrigeration, Inc. v. United States, 375 F. Supp. 462, supra, supports our view of the discretionary provisions in SBA's legislative authority. At issue in that case was SBA's authority to require applicants for disaster loans to post security before the loan application would be approved. The court stated:

> "* * *While 15 U.S.C. § 636(b) does not require an applicant to render assurances of his ability to repay, neither does it affirmatively preclude such a consideration, for the SBA may make such loans as it 'may determine to be necessary or appropriate' because of floods or other catastrophes.
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> "* * *I conclude that 15 U.S.C. § 636(b) does not bar the SBA from considering an applicant's ability to repay, and that the Administrator has discretionary authority to determine the nature and extent of the collateral required." 375 F. Supp. at 464.

Similarly, it is our view that SBA has the discretionary authority under the disaster loan legislation to impose the type of "credit elsewhere" test provided for in the revised regulations.

The next issue we must resolve involves the applicability of the revised regulations to those farmers whose applications had already been filed with SBA but which had not yet been processed prior to March 19, 1981, when the revised regulations took effect. Although our Office has considered questions involving the applicability of amended regulations on numerous occasions, the issue generally involved the possible retroactive effect of the new regulations. In those cases we have consistently held that "once valid regulations are issued the rights thereunder become fixed and although such regulations may be amended prospectively to increase or decrease the rights given thereby they may not be so amended retroactively." 40 Comp. Gen. 242, 247 (1960) and cases cited therein. Also see 44 Comp. Gen. 472, 475 (1965). The obvious corollary to that rule is that prior regulations are no longer applicable after the revised regulations have become effective.

In all likelihood, we would not have raised any objection had the new regulations provided that they would only apply to applications filed after March 19, 1981, and that the prior regulations would govern all applications filed prior to that date. However, the regulations

actually adopted by SBA, which because of the financial emergency were made applicable to "disaster loans approved on or after" March 19, 1981, regardless of the date on which the application was filed, did not exceed SBA's authority.

As noted above, SBA, like other executive agencies, has broad discretion with respect to the promulgation and interpretation of its regulations. This includes the authority to establish the effective date of those regulations. Moreover, our decisions in several cases tend to support, at least by implication, SBA's position in this regard. For example, in B-178704, October 3, 1973, we said that "the regulations in effect at the time of the execution of a contract fixed the rights of the parties under that contract." Following the same rationale here, the date on which SBA formally approves a loan should be controlling for purposes of determining which regulations are applicable.

Also, our conclusions in a series of cases involving an SBA regulatory provision requiring lenders in SBA's business loan program to notify SBA of default by the borrower are relevant. After our decision in B-181432, February 19, 1976, holding that SBA could not legally purchase an SBA loan unless the lending institution had complied with the provision in SBA's regulations requiring the lender to notify SBA within 30 days of a default, SBA proceeded to amend the applicable regulations several times. In determining which regulations would be applicable in a particular situation, we said in B-181432, September 4, 1979, that the "regulations that were in effect when a particular loan went into default would be controlling." Thus, it is the event that formalizes the relationship between the parties which is the date for determining the applicable regulations.

Until SBA acts to approve or disapprove a loan application, a discretionary decision, an applicant has no vested right to a loan and SBA is in no way obligated to the applicant. Therefore, SBA's decision to consider the day of loan approval as the determining date on which the rights of the parties becomes fixed, as it has done here, is consistent with our holding in the above quoted case.

The final issues raised in your submission concern the procedures followed by SBA in connection with the withholding of disaster loan funding and the issuance of new regulations. With respect to the funding question, SBA has stated that it merely suspended approval of disaster loans temporarily for the period of March 9 to March 23, 1981, until it could "obtain the apportionment of additional funding." We are unaware of any applicable procedural requirements that an agency must satisfy before implementing such a temporary suspension

of funding in these circumstances. To the contrary, since SBA operates under the same budgetary restrictions and limitations as other Government agencies, even though disaster loans are funded out of a revolving fund, it is prohibited by statute from incurring obligations in excess of the total amount of available funds or the amount of funds apportioned by OMB. The Antideficiency Act, 31 U.S.C. 665, provides:

> "(a) No officer of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein * * *
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> "(h) No officer or employee of the United States shall authorize or create any obligation or make any expenditure (A) in excess of an apportionment or reapportionment * * *."

In a prior case, we recognized that SBA's disaster loan program necessarily operated under budgetary restrictions when we held that "the Small Business Administration may not grant relief under the Southeast Disaster Relief Act in the absence of appropriated or allotted funds for the purpose." 46 Comp. Gen. 198, 200 (1966).

Further, in Dubrow v. Small Business Administration, 345 F Supp. 4, supra, which in some respects is similar to the situation at issue here, the Court upheld SBA's authority to change its requirements administratively for approving disaster loan applications filed in connection with the 1971 Los Angeles earthquake. In that case, because continued approval of new applications at the same rate as past applications "would far exceed the balance of authorized funds," SBA had "sought to preserve the few remaining millions of dollars to those able to establish eligibility by a clear showing of need for the amount requested and reasonable ability to repay." The court held that under the circumstances the administrator had not abused his discretion or acted beyond the scope of his authority.

Similarly, in the present situation, SBA acted by formally changing its regulations in order to insure that SBA's disaster loan program operated "within its total budgetary resources" as it is authorized and, in fact, required to do by law. We therefore cannot object to the procedure it followed.

The remaining procedural issue involves SBA's authority to adopt new regulations without prior notice. Although the Administrative Procedures Act, 5 U.S.C. § 553, ordinarily requires agencies to publish notice of a proposed new regulation, or amendment of an existing one,

in the Federal Register to give interested parties the opportunity for comment, the Act contains several exceptions to this requirement. Pursuant to 5 U.S.C. § 553 (a) agencies are exempt from the notice requirements with respect to any rule relating to "agency management or personnel or public property, loans, grant, benefits, or contracts." (Emphasis added.) Furthermore, 5 U.S.C.§ 553 (b) provides for another exception to the notice requirement "when the agency for good cause finds (and incorporates the finding in a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable unnecessary, or contrary to the public interest."

To some extent, SBA has waived the "loans" exception permitted by 5 U.S.C. § 553 (a) by adopting the provision set forth in 13 C.F.R § 101.9 as follows:

> "SBA is governed as a matter of policy by the public participation provisions of the Administrative Procedure Act, 5 U.S.C. § 553, notwithstanding the exemptions given by such section 553 for matters relating to * * * loans * * *. "

However, it is clear for several reasons that this regulatory provision does not prohibit SBA from amending its existing disaster loan regulations without prior notice of the proposed change as it did in this case. First, another provision in SBA's regulations specifically provides that due to the special nature of the disaster loan program, the regulations governing disaster loans cannot anticipate all of the possible contingencies and problems that may arise, and the regulations are therefore "subject to change without advance notice and publication in the FEDERAL REGISTER." 13 C.F.R. § 123.0

Second, 13 C.F.R. § 101.9 itself provides:

> "Where, as provided by 5 U.S.C. § 553 it is determined that such public participation procedures would be impracticable, unnecessary, or contrary to the public interest, a specific finding to this effect shall be published with the rules or regulations in question. * * *"

The amended regulations in question here are accompanied by an explanation of the reasons SBA could not allow prior notice and public participation in the rulemaking process, as follows:

> "The drought catastrophies of the past summer have placed a severe strain on funds available for disaster assistance. In addition, the critical national economic fiscal circumstances preclude supplemental appropriations. The President has there-

> fore directed that SBA adopt policies, forthwith, intended to insure that SBA's Disaster Loan Fund operate within its total budgetary resources of $2.379 billion for the entire 1981 fiscal year. For these reasons SBA avails itself of its authority pursuant to §123.0 (a) of its Disaster Loan regulation, * * * to change without advance notice certain regulations affecting disaster business loans. The Acting Administrator has determined that the need to resume Disaster Loans Assistance immediately to eligible persons in a rational and equitable way within the Small Business Administrations's limited resources presents a circumstance contemplated by 13 C.F.R. §§ 101.9 and 123.0 (a), thus rendering impracticable and contrary to the public interest any delay in the effectuation of these amendments. * * *"

As stated above, we believe this explanation is a valid one.

In accordance with the foregoing, it is our view that SBA's actions with respect to the temporary suspension of disaster loan funding and the adoption of amended regulations governing that program did not exceed its statutory authority. Therefore, it is our view that the Government would not be vulnerable to successful legal action by farmers who may have been adversely affected by the regulatory amendments that were adopted. We realize that SBA's actions will cause great hardship to Arkansas farmers and other disaster victims. However, the budgetary restraints proposed by the President and accepted by the Congress in response to the national economic situation have forced SBA, as well as other agencies, to take this type of action which will necessarily hurt those who would have otherwise received Federal assistance.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure