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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20348

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AUG 1 1979

The Honorable William Proxmire  
Chairman, Committee on Banking,  
Housing, and Urban Affairs  
United States Senate

Dear Mr. Chairman:

You have requested our interpretation of two provisions in the Defense Production Act of 1950 and our opinion on the effect of a provision in section 305(e) of S. 932 (96th Congress). Your letter indicates that you need an early response and therefore we have dispensed with our normal practice of requesting the views of the agencies responsible for administering the legislation in question.

Title III of the Defense Production Act of 1950, as amended, 50 U.S.C. App. §§ 2091-2094, contains several authorities designed to expand American defense production capacity and to increase the supply of certain strategic materials. Section 301 of the Act, 50 U.S.C. App. § 2091, permits certain Federal agencies, when authorized by the President, to guarantee loans to Government contractors to enable them to perform contracts made for the purposes of the national defense. Section 302 authorizes the President to make provisions for direct loans to private businesses for the expansion of capacity, the development of technological processes, or the production of essential materials. Section 303 authorizes the President to purchase strategic materials for Government use or resale, to encourage exploration and development of strategic minerals and metals, to subsidize the production of strategic materials, and to encourage the production of substitutes for strategic materials which are in short supply.

INTERPRETATION OF PROVISIO  
IN SUBSECTION 717(a)

The proviso in subsection 717(a) of the Act, which was added by section 2 of the Defense Production Act Amendments of 1975, Pub. L. No. 94-152, 89 Stat. 810, states:

"\* \* \* That all authority hereby or hereafter extended under title III of this Act shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation Acts. \* \* \*"

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The purpose of this proviso, added to the 1975 Act on the House floor, was explained by its sponsor, Representative Ashley, as follows:

"Mr. Chairman, the reason I offer this amendment is to make it absolutely clear that there is no backdoor financing in the existing Defense Production Act, or any intent in existing law, now or as amended, to violate the normal appropriations process. This amendment merely assures and reaffirms the fact that no purchases or contracts to expend funds can be considered unless the Congress has duly appropriated such funds." (121 Cong. Rec. 36616 (1976).)

In our opinion, this proviso requires that, with respect to the authorities granted in sections 302 and 303 of the Act, the exercise of which will result in the actual expenditure of funds, Congress must appropriate these funds before the authorities can be used. With respect to the loan guarantee authority in section 301, the proviso requires that a statement be made in the agency's appropriation act specifically setting forth the extent to which the agency may guarantee loans in that fiscal year.

You ask whether the proviso requires a direct appropriation for each specific project. In our opinion this is not necessary. For authorities other than the loan guarantee authority, the proviso is satisfied by a lump-sum appropriation containing funds to carry out Title III of the Defense Production Act. For the loan guarantee authority of section 301, the proviso merely requires that the appropriation act set an aggregate dollar limit on the loans that may be guaranteed in the current fiscal year. An example of such a provision is section 859 of the Department of Defense Appropriation Act, 1979, Pub. L. No. 95-457, 92 Stat. 1231, 1253, which provides:

"During the current fiscal year, the Department of Defense may guarantee loans pursuant to Title III of the Defense Production Act of 1950 as amended (50 U.S.C. App. 2091, 64 Stat. 800) in an amount not to exceed \$ 30,000,000."

You further ask whether funds can be "reprogrammed" for Title III loan guarantees without congressional approval. We shall answer this question in giving our interpretation of subsection 301(d) of the Act (inadvertently referred to as "302(d)" in your letter).

INTERPRETATION OF  
SECTION 301(d)

Subsection 301(d) of the Act, 50 U.S.C. App. § 2091(d), provides:

"Each guaranteeing agency is authorized to use for the purposes of this section any funds which have heretofore been appropriated or allocated or which hereafter may be appropriated or allocated to it, or which are or may become available to it, for such purposes or for the purpose of meeting the necessities of the national defense."

The House Committee on Banking and Currency explained this provision as follows:

"Subsection (d) authorizes the use by guaranteeing agencies, for purposes of this section, of any funds appropriated or allocated, or otherwise available, to them for national defense purposes." (H.R. Rept. No. 2759, 81st Cong., 2d Sess. (1950).)

In our opinion, subsection 301(d) acts as permanent authority for any guaranteeing agency to transfer or reprogram funds available to it for the purposes of national defense for use for the purposes of section 301. Thus, under subsection 301(d), a guaranteeing agency may repay defaulted loans without a specific appropriation for that purpose, so long as it has available funds appropriated for the purposes of the national defense, as that term is used in the Defense Production Act.

You ask whether there is a conflict between subsection 301(d) and the proviso in subsection 717(a). In our opinion, there is no conflict between these two subsections. As we have stated, subsection 301(d) permits a guaranteeing agency to repay defaulted loans with any funds appropriated for national defense purposes. However, subsection 301(d) does not authorize guaranteeing agencies to enter into new loan guarantees. Under subsection 717(a), a guaranteeing agency may guarantee new loans in a fiscal year only to the extent specifically provided in its appropriation act. There is no conflict between these subsections because 717(a) limits the authority to enter into new guarantees while 301(d) merely designates which funds may be used to repay a default, should one occur.

With respect to your question concerning reprogramming of funds for loan guarantees without congressional approval, as indicated above, funds appropriated for national defense purposes can be reprogrammed, or transferred, to repay defaulted loans without the approval of Congress. However, since actual annual authority, rather than available funds, is necessary in order to guarantee new loans, a guaranteeing agency cannot use reprogramming to enter into new loan guarantees without congressional approval.

Although we have concluded that the proviso in subsection 717(a) limits the loan guarantee authority in section 301, we suggest that the Committee consider whether it might be wise to amend section 301 itself to make this limit clear. We suggest that the following language be added after the semicolon in subsection 301(a):

"Provided, That in any fiscal year, guaranteeing agencies may make such guarantees only to the extent specifically provided, in advance, in an appropriation act."

#### IMPLICATIONS OF WAIVER IN S. 932

You ask that we describe the implications of the broad waiver from procurement laws granted in subsection 305(c) of S. 932 (96th Congress). That subsection provides that purchases, commitments to purchase, and resales under section 305 of the Act "may be made without regard to the limitations of existing law, regarding the procurement of goods or services by the Federal Government," with certain specified exceptions.

We are unable to fully reply to your request within the time limits indicated in your letter. Evaluation of the implications of this waiver would require careful analysis not only of S. 932 and the entire Defense Production Act, but also of every statute containing any limitation on Federal procurement.

The waiver in subsection 305(c) applies on its face to all laws regarding the procurement of goods or services by the Federal Government. The debate in the House indicates that the provision was meant to apply only to procurement laws and was not meant to waive laws relating to labor protection, small business set-asides, or the environment. See 125 Cong. Rec. H5151-52 (daily ed., June 26, 1979). However, the language of the waiver is so broad that it can be interpreted

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as applying, (for example) to such labor protection statutes as the Walsh-Healey Act, 41 U.S.C. §§ 35-45, to the Small Business Act, 15 U.S.C. §§ 631 et seq, as amended by Public Laws 95-89 and 95-507, and to the Clean Air Act, 42 U.S.C. § 1857h-4, as well as to the Federal Property and Administrative Services Act, 41 U.S.C. §§ 251-60, and the Armed Services Procurement Act, 10 U.S.C. §§ 2301-14. If it is the intent of the Committee that the waiver be limited to specific procurement laws, we suggest that the language be modified as follows:

"Purchases, commitments to purchase, and resales under subsection (b) may be made without regard to the limitations on the procurement of goods or services by the Federal Government contained in the Armed Services Procurement Act, as amended, (10 U.S.C. §§ 2301-2314), the Federal Property and Administrative Services Act, as amended, (41 U.S.C. §§ 251-260), and section 3709 of the Revised Statutes (41 U.S.C. § 5), except \* \* \*."

Sincerely yours,

Signed Elmer B. Staats

Comptroller General  
of the United States

**END**