

B-225834.2-O.M.

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April 11, 1988

DIGEST

The Commerce Department is not authorized to retain registration fees collected at the overseas trade shows it sponsors. Such fees are not "contributions" within the meaning of section 105(f) of the Mutual Educational and Cultural Exchange Act of 1961, because they are contractual and not voluntary in nature. B-89294, Aug. 6, 1963, and 25 Comp. Gen. 637 (1946). These fees should be deposited in the Treasury as miscellaneous receipts.

# Memorandum

## LIMITED DISTRIBUTION

Date: April 11, 1988

To: Associate Director, NSIAD-TEF - Allan Mendelowitz

From: Associate General Counsel - Rollee H. Efros *RE*

Subject: Commerce Department's "Reimbursable Program Account"--B-225834.2-O.M.

Your memorandum of March 17, 1987 requested that we resolve questions related to the propriety of the Commerce Department maintaining and using a "Reimbursable Program Account."<sup>1/</sup> For the reasons explained below, we are of the opinion that the Commerce Department Reimbursable Program Account is unauthorized. The proper disposition of the funds in the Reimbursable Program Account would be to deposit them in the Treasury as miscellaneous receipts.

Since Commerce has maintained the Reimbursable Account for almost 30 years, it could be argued that Congress' long-standing inaction with respect to the funds could be interpreted as approval of Commerce maintaining a Reimbursable Program. However, inferred congressional acquiescence is not a basis for justifying a practice which is not otherwise legally authorized.

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<sup>1/</sup> In December 1986, my staff assisted in preparing your testimony before the House Subcommittee on Commerce, Transportation and Tourism on "Expo Maquila 86" and the Commerce Department's sponsorship of that event. You found that the expenses of mounting Expo Maquila 86 were paid from the Commerce Department's Reimbursable Program Account. Responding to the question of whether the funds used were subject to a restriction in the Fiscal Year 1987 Continuing Resolution, my staff raised the additional question of whether Commerce is authorized to maintain a Reimbursable Program Account at all. We agreed to surface the issue in your testimony but defer resolution of the question until a later time to allow complete analysis.

## Statutory Authority For Trade Shows

In the interest of improving international relations, the Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, 75 Stat. 527, codified at 22 U.S.C. §§ 2451-2459, authorized a wide variety of international transactions and interchanges. These included United States participation in or the conduct of international trade fairs and commercial exhibitions overseas. Section 102(a)(3), 22 U.S.C. § 2452(a)(3). Executive Order 11034, dated June 25, 1962, delegated to the Commerce Department authority to conduct trade shows in foreign countries. The 1961 Act also encouraged the involvement of nongovernmental entities in carrying out the Act. Section 105(f) of the Act provides in the first sentence:

"Foreign governments, international organizations and private individuals, firms, associations, agencies, and other groups shall be encouraged to participate to the maximum extent feasible in carrying out this Act and to make contributions of funds, property, and services which the President is hereby authorized to accept, to be utilized to carry out the purposes of this Act."

Section 105(f), codified at 22 U.S.C. § 2455(f).

The executive order did not delegate to Commerce the authority to accept contributions, but, since fiscal year 1962, the authority in the first sentence of section 105(f) has been extended to Commerce in its annual appropriation acts. See, e.g., Pub. L. No. 87-125, 75 Stat. 268; Pub. L. No. 100-202, § 101(a), 101 Stat. 1329-3. The Congress has never provided statutory authority for Commerce to create a revolving fund for conducting trade shows.

## Reimbursable Program Account

The corpus of Commerce Department's Reimbursable Program Account consists of registration fees charged to exhibitors at Department-sponsored trade shows. Originally, monies collected were used strictly to offset the expenses of conducting each show, but the purposes were later expanded as detailed below. Commerce cited section 105(f) of the 1961 Act, quoted above, as authority for conducting trade shows on a self-sustaining basis. It also relied on an informal discussion with GAO attorneys in 1959, the import

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of which was summarized in a 1970 memorandum from Commerce's Office of General Counsel as follows:<sup>2/</sup>

"(1) Although the 1956 statute stated that industry participation and contributions were to be 'encouraged,' the payments or fees which the exhibitors were required to agree to make as a condition precedent to their participation in the exhibition fell within the spirit and intent of 'contributions' under the statute (now section 105(f)); (2) the written participation agreement should not be cast in terms of a lease or rental arrangement; (3) contributions could vary measured by exhibition space to be occupied; (4) the contributions to defray exhibit costs were appropriate to carry out the basic legislation; and (5) as gifts specifically authorized by statute, they would be available for reimbursement of the appropriation."

In 1970, Commerce expanded its exhibitor participation agreement to include additional fees over and above the recovery of costs. The new fee was "for use in funding market development, hospitality, and other promotional and operational costs of the Exhibition." "Hospitality" included receptions, and entertainment. "Hospitality," the agreement made clear, could include entertainment in connection with activities other than the particular exhibit that generated the fee.

It is not surprising then, that after this time, the Reimbursable Program Account began to show "profits" (surplus of revenue over expenses) from its trade show activities. It was the "profits" that funded the Department's Expo Maquila and other uses unrelated to trade shows discovered by your staff.

In expanding the reimbursable program account, Commerce relied on an internal legal opinion. The 1970 opinion concluded that if the Department were to add what amounts to an entertainment surcharge to the exhibitor's registration fee, the additional monies collected would also constitute "contributions" allowed by section 105(f). Because the section 105(f) proviso is appended to the International Trade Administration's annual appropriation, the General

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<sup>2/</sup> Memorandum dated November 6, 1970, from Assistant General Counsel Alfred Meisner to the Deputy Assistant Secretary for Administration, Lawrence E. Imhoff.

Counsel's memorandum reasoned that section 105(f) contributions could be applied to any purpose related to the promotion of international trade.<sup>3/</sup>

#### Meaning of 105(f) Contributions

Shortly after the 1961 Act was passed, this Office issued an opinion interpreting "contributions" under section 105(f) of the Act (B-89294, Aug. 6, 1963). We analyzed an agreement between United Artists Corporation and the United States Information Agency (USIA) to produce and domestically distribute a film made from clips of USIA films first produced for overseas distribution. The agreement specified that, after full cost recovery by United Artists and a 2-year period of exclusive distribution rights, any further revenues generated by United Artists from commercial domestic showings of the film were to be turned over to USIA or applied to USIA's overseas creditors at its direction.

We decided that the net proceeds from the film, which were to go to USIA, were not "contributions" under section 105(f). In the absence of any definitive legislative history, we concluded that "contributions" were analogous to gifts and were not intended to encompass amounts paid under contractual arrangements. Our conclusion meant that the money received could not be retained nor its use directed by the USIA. Instead, it was required to be deposited into the Treasury as miscellaneous receipts.

Since the exhibitor participation agreements are unquestionably contractual and not donative in nature, the 1963 opinion would prohibit retaining exhibitor fees in any amount collected at overseas trade shows, whether used to offset costs of conducting the show, to engage in "hospitality" events, or to carry out other departmental activities.

#### Assessments v. Contributions

Our 1963 opinion relates specifically to section 105(f), but also reflects the general requirement that, absent statutory authority, moneys collected by the United States in the course of carrying out government functions must be deposited into the Treasury as miscellaneous receipts.

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<sup>3/</sup> In general, we would take the position that any legitimate section 105(f) contributions must be applied solely to the purpose of conducting trade shows under the authority of the Mutual Educational and Cultural Exchange Act. That issue, however, is outside the scope of this memorandum.

31 U.S.C. § 3302(b) (1982). In addition, it reflects the general rule that, even when an agency has statutory authority to accept contributions, assessments and fees generated by an agency's activities should be treated as miscellaneous receipts. 25 Comp. Gen. 637 (1946).

A more recent case applying this general rule is B-195492, March 18, 1980. That case had similar facts to the Commerce situation and involved funds received by the National Park Service Cooperating Association. By an unwritten mutual agreement reached at a national conference, vendors in the National Parks agreed to contribute 1/2 of 1 percent of their gross sales to the Cooperating Association Fund. The Fund, in turn, sponsored promotional events and the like. In our opinion, we reaffirmed the rule that an involuntary assessment must be deposited as miscellaneous receipts, whereas, with the proper statutory authority, a contribution can be retained by the agency and used for appropriate purposes.

The distinction between the two situations is based on the general rules mentioned above and on the fact that contributions are by nature voluntary. As evidence of the voluntary nature of the Cooperating Association Fund contributions, we pointed to the fact that, without penalty, about a third of the total number of vendors declined to contribute.

By contrast, there is nothing voluntary about the registration fees (including the entertainment surcharge) exacted by the Commerce Department in the Exhibitors Agreement. Indeed, signing the printed form agreement is a precondition of participating in the Exhibition.

While it is unfortunate that our earlier informal views were at variance with the rationale used in the Comptroller General decisions discussed above, that rationale clearly must control the use of the funds at issue.

#### Conclusion

Considering the above, we think retention of the fees generated by the Commerce Department's "Reimbursable Program" is unauthorized because Commerce has no authority to retain fees it collects in exchange for the privilege of exhibiting. Such fees are required to be deposited into the Treasury as miscellaneous receipts.