Federal Assistance: Guaranteed and Insured Loans

A. Introduction 11-3

1. General Description 11-3
2. Sources of Guarantee Authority 11-7

B. Budgetary and Obligational Treatment 11-9

1. Prior to Federal Credit Reform Act 11-10
2. Federal Credit Reform Act of 1990 11-12
   a. Post-1991 Guarantee Commitments 11-13
   b. Pre-1992 Commitments 11-18
   c. Entitlement Programs 11-19
   d. Certain Insurance Programs 11-20

C. Extension of Guarantees 11-20

1. Coverage of Lenders (Initial and Subsequent) 11-20
   a. Eligibility of Lender/Debt Instrument 11-20
   b. Substitution of Lender 11-22
   c. Existence of Valid Guarantee 11-23
   d. Small Business Investment Companies 11-26
   e. The Federal Financing Bank 11-28
2. Coverage of Borrowers 11-32
   a. Eligibility of Borrowers 11-32
   b. Substitution of Borrowers 11-33
   c. Loan Purpose 11-34
   d. Change in Loan Purpose 11-36
3. Terms and Conditions of Guarantees 11-37
   a. Introduction 11-37
   b. Property Insurance Programs Under the National Housing Act 11-38
      (1) Maximum amount of loan 11-38
      (2) Maximum loan maturity 11-40
      (3) Owner/lessee requirement 11-42
      (4) Execution of the note 11-44
      (5) Reporting requirement 11-45
      (6) Payment of premiums 11-45
   c. Small Business Administration Business Loan Program 11-47
      (1) Payment of guarantee fee 11-47
      (2) Notice of default 11-50

D. Rights and Obligations of Government Upon Default 11-51

1. Nature of the Government's Obligation 11-51
2. Scope of the Government's Guarantee 11-53
3. Amount of Government's Liability 11-55
4. Liability of the Borrower 11-57
   a. Veterans' Home Loan Guarantee Program 11-57
      (1) Loans closed prior to 1990 11-58
      (2) Loans closed after January 1, 1990 11-63
   b. Debt Collection Procedures 11-63
5. Collateral Protection 11-65

Federal Assistance: Guaranteed and Insured Loans

A. Introduction

1. General Description

The preceding chapter dealt with one of the major forms of federal financial assistance, the grant. Another major form is credit assistance, which includes direct loans and, the subject of this chapter, guaranteed and insured loans. In essence, a guaranteed loan is a loan or other advance of credit made to a borrower by a participating lending institution, where the United States Government, acting through the particular federal agency involved, "guarantees" payment of all or part of the principal amount of the loan, PIUS interest, in the event the borrower defaults. A statutory definition along these lines is found in 2 U.S.C. § 661a(3) (Supp. III 1991).[1] Depending on the particular program, the borrower maybe a private individual, business entity, educational institution, or a state, local, or foreign government. In some cases, the guarantee maybe created when a loan originally made by a government agency is subsequently sold by the agency to a third party with the government's assurance of repayment,

Strictly speaking, an insured loan and a guaranteed loan are two different things. An insured loan is one made initially by the federal agency and then sold, while a guaranteed loan is a loan made by a private lender. Occasionally, the agency's program legislation may draw the distinction. For example, the Rural Electrification Administration has authority both to make insured loans and to guarantee loans made by other lenders. Under 7 U.S.C. § 935, REA can make insured loans, defined in subsection 935(c) as loans that are "made, held, and serviced by the Administrator, and sold and insured by the Administrator hereunder." Under 7 U.S.C. § 936, REA cart guarantee loans which are "initially made, held, and serviced by a legally organized lending agency."[2] Another example is the business and industrial loan program of the Farmers Home Administration established by 7 U.S.C. $1932, again authorizing both insured and guaranteed loans. For purposes of this chapter, we use the term

[1] Similar definitions are found in GAO'S Glossary of Terms Used in the Federal Budget Process, PAD-81-27 (3d ed. 1981), and in OMB Circular No. A-34, Part VI (1991). Summary information on individual programs maybe found in the Catalog of Federal Domestic Assistance, published annually by the General Services Administration and Office of Management and Budget.

[2] For a detailed discussion of REA Credit assistance programs, see GAO report entitled Financing Rural Electric Generating Facilities: A Large and Growing Activity, CED-81-14 (November 28, 1980).

"guarantee" to refer to both guaranteed and insured loans unless otherwise indicated.

The objective of this chapter is to illustrate the kinds of issues and problems that arise in this area and the approaches used in resolving them. We have for the most part emphasized several of the better-known guarantee programs. Naturally, the extent to which any given case will have more general applicability will depend on the agency's organic legislation, program regulations, and the particular circumstances. Since program statutes and regulations are subject to change, the reader should view the discussion as merely illustrative of the particular issue involved. "

The primary purpose of loan guarantees is to induce private lenders to extend financial assistance to borrowers who otherwise would not be able to obtain the needed capital on reasonable terms, if at all. Or, as a congressional subcommittee put it, loan guarantee programs are designed to redirect capital resources by intervening in the private market decision process, in order to further objectives deemed by Congress to be in the national interests These objectives may be social (veterans' home loan guarantees), economic (small business programs), or technological (guarantees designed to foster emerging energy technologies).[4]

When the federal government guarantees a loan, the guarantee is extended to the original lender supplying the funds, generally either a private lender or the Federal Financing Bank, as well as to any subsequent assignees or purchasers of the guaranteed portion of the loan. The subsequent purchase of a guaranteed loan from the original lender is called the "secondary market." See, for example, 51 Comp. Gen. 474 (1972). Secondary market purchasers are frequently large investment entities such as mutual funds or pension funds.

Secondary market purchasers are not always waiting in the wings, checkbooks in hand. Congress has on several occasions taken action to help create, stimulate, or facilitate secondary markets by

[3]Subcomm. on Economic Stabilization, House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess., Catalog of Federal Loan Guarantee Programs x (con-ml. Print 1977).

[4]In the technological area, GAO has suggested that the loan guarantee device is best suited to situations in which the technology has been known to work and is marginally economical, with the primary investment constraint being financial. EMD-77-39, B-178726, May 9, 1977 (comments on proposed legislation).

establishing privately owned but federally chartered corporations known as "government-sponsored enterprises" (GSE). Since a GSE is a creature of Congress, the actions it may take are those authorized in its enabling legislation. 71 Comp. Gen. 49 (1991) (Federal Agricultural Mortgage Corporation, or "Farmer Mac"). For a discussion from the programatic perspective, see Federal Agricultural Mortgage Corporation: Issues Facing the Secondary Market for FmHA Guaranteed Loans, GAO/RCED-91-138 (June 1991).[6]

Under a loan guarantee, the risk against which the guarantee is made is, for the most part, default by the borrower. In some cases, however, other risks may be covered as well, and a few examples will be noted later in this chapter.

In the typical loan guarantee program, the lender is charged a fee by the agency, prescribed in the program legislation. However, there are statutory exceptions. For example, 7 U.S.C. § 936 provides that no fee shall be charged for Rural Electrification Administration loan guarantees. Where a fee is charged, its disposition, discussed later, is governed by (1) the Federal Credit Reform Act of 1990, or (2) where the Credit Reform Act does not apply, the applicable program legislation, or (3) in the absence of any guidance in the program legislation, the miscellaneous receipts statute (31 U.S.C. § 3302(b)).

A guarantee may extend to 100 percent of the amount of the underlying loan, or some lesser percentage as specified in the program legislation. E.g., 7 U.S.C. § 936 (REA, 100 percent); 42 U.S.C. § 3142(a) (Economic Development Administration business loan guarantees, 90 percent of outstanding unpaid balance). Unless otherwise provided, a maximum guarantee percentage applies only to restrict the amount the administering agency is authorized to guarantee. E.g., B-137514, November 3, 1958 (no objection to proposal for borrower to "guarantee" portion of loan not covered by government guarantee by making "irrevocable deposit" financed by separate loan, thereby providing lender with 100 percent guarantee).

[6] Since GSEs are essentially privately owned corporations, we do not address them further in this publication. Readers needing more may consult several GAO reports such as Government-Sponsored Enterprises: A Framework for Limiting the Government's Exposure to Risks, GAO/GGD-91-90 (May 1991); Budget Issues: Profiles of Government-Sponsored Enterprises, GAO/AFMD-91-17 (February 1991); and Government-Sponsored Enterprises: The Government's Exposure to Risks, GAO/GGD-90-97 (August 1990].

Banks do not loan money without interest, and the typical loan guarantee therefore covers accrued but unpaid interest as well as unpaid principal. The program statute may set a maximum acceptable rate of interest, or may authorize the administering agency to do so by regulation. Assuming there is nothing to the contrary in the enabling legislation, an agency may, within its discretion, extend its guarantees to loans with variable interest rates (rates which rise or fall with changes in prevailing rates) as well as loans with fixed interest rates. B-184857, June 11, 1976.

Credit assistance legislation frequently vests considerable discretion in the administering agency. E.g., B-202568, September 11, 1981 (imposition of "no credit elsewhere" eligibility test to meet funding shortfall within SBA's broad discretion under section 7(b) of Small Business Act); B-134628, January 15, 1958 (Civil Aeronautics Board authorized within its discretion to make payments to lender immediately upon debtor's default rather than after completion of foreclosure proceedings).

For non-entitlement programs, just as in the case of grants and cooperative agreements, GAO will not, at the request of a rejected applicant, review the exercise of an agency's discretion in rejecting an application for a loan guarantee. B-178460, June 6, 1973 (non-decision letter). Nevertheless, GAO may become involved under its other authorities (decision, account settlement, claims settlement), and may review an agency's conduct of a program under its general audit authority. For example, the Emergency Loan Guarantee Act, 15 U.S.C. §§ 1841–1852, specifically authorized GAO to audit any borrower applying for a loan guarantee, but made no mention of auditing the Emergency Loan Guarantee Board which administered the program. The issue arose in connection with the Lockheed Aircraft Corporation assistance program, carried out under this statute. GAO took the position that it had the authority to audit the Board's conduct of the program to evaluate whether the Board and borrower were complying with the statutory provisions and whether the government's interests were being adequately protected. This authority derives from GAO's basic audit statutes and does not have to be repeated in every piece of legislation. B-169300, September 6, 1972; B-169300, September 21, 1971.

2. Sources of Guarantee Authority

The authority to guarantee the repayment of indebtedness must be derived from some statutory basis. In most cases, this takes the form of express statutory authorization. Typically, the statute will authorize the administering agency to establish the terms and conditions under which the guarantee will be extended, but may also impose various limitations. An example is section 202(a)(1) of the Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. § 3142(a)(1), which authorizes the Economic Development Administration to provide financial assistance to eligible borrowers through direct business loans and loan guarantees:

> "The Secretary is authorized to aid in financing, within a redevelopment area, the purchase or development of land and facilities (including machinery and equipment) for industrial or commercial usage. . . by (A) purchasing evidences of indebtedness, (B) making loans (which for purposes of this section shall include participation in loans), (C) guaranteeing loans made to private borrowers by private lending institutions, for any of the purposes referred to in this paragraph upon application of such institution and upon such terms and conditions as the Secretary may prescribe, except that *no* such guarantee shall at any time exceed 90 per centum of the amount of the outstanding unpaid balance of such loan."

Program authority, as in the example cited, is most commonly in the form of permanent legislation authorizing an ongoing program. In addition, guarantee programs are occasionally enacted to deal with a specific crisis of limited duration, and are either not codified or removed from the United States Code when the program is completed. An example of this latter type is the Chrysler Corporation Loan Guarantee Act of 1979, Pub. L. No. 96-185,93 Stat. 1324 (1980), dropped from the 1988 edition of the U.S. Code because the authority to issue commitments and guarantees expired at the end of 1983 and all loans guaranteed were repaid in full. Guarantee programs may also be enacted as part of appropriation acts. An example is discussed in GAO's report Israel: U.S. Loan Guaranties for Immigrant Absorption, GAO/NSIAD-92-119 (February 1992).

It is also possible for loan guarantee authority to be derived by necessary implication from a statutory program of financial assistance, that is, under program legislation which does not explicitly use the term "guarantee" or "insure. " For example, the current version of section 7(a) of the Small Business Act, 15 U.S.C. § 636(a), authorizes the Small Business Administration to make loans to small business concerns as follows:

'The Administration is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern. . . for purposes of this chapter. Such financings may be made either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis."

The statute then goes onto list a number of limitations. A 1981 amendment (95 Stat. 357, 767) added the word 'guaranteed." Even before the amendment, GAO had concluded that a loan guarantee program was within the SBA's discretion under section 7. 51 Comp. Gen. 474 (1972). An earlier decision, B-140673, October 12,1959, had upheld a "deferred participation" program under section 7(a), under which SBA would purchase the agreed portion of the deferred participation loan immediately upon demand and reserve the right to recover from the lender if SBA subsequently determined that the lender had not substantially complied with the participation agreement. In view of the broad discretion granted SBA under the statute, SBA was not required to make the "substantial compliance" determination before making payment to the lender.[6]

The evolution of SBA's authority to conduct its disaster loan program, 15 U.S.C. § 636(b), followed a similar pattern. In B-121589, October 19, 1954, the Comptroller General tentatively approved a deferred participation program, strongly urging that the statute be amended to include "immediate or deferred participation" language patterned after the pre-1981 version of section 636(a). This was done and, based on 51 Comp. Gen. 474, was found sufficient to authorize SBA to guarantee disaster loans to eligible borrowers by participating lending institutions. 58 Comp. Gen. 138, 145 (1978). To remove arty doubt, the same amendment which added the word "guaranteed" to section 636(a) added it as well to section 636(b) (95 Stat. at 778).

In connection with credit assistance under the Small Business Investment Act of 1958, GAO recognized the SBA's implied authority to establish a program in which SBA would guarantee loans made by private lending institutions to small business investment companies,

[6]The primary difference between a loan guarantee program and a deferred participation loan program is that the lending institution can demand that SBA pay the outstanding balance of a deferred participation loan at anytime, but can demand SBA's purchase of the outstanding balance of a guaranteed loan only under the conditions prescribed in the regulations—generally only upon default of the borrower.

even though the statute authorized only a direct loan program. 42 Comp. Gen. 146 (1962). The decision pointed out that the legislative history of a 1961 amendment to the act clearly demonstrated that Congress intended to continue the nonstatutory "standby" guaranteed loan program that had existed for several years, and concluded therefore that the absence of specific language authorizing the program was due to the apparent belief by both Congress and SBA that such language was unnecessary and did not reflect an intent to deny SBA the authority. See also B-149685, March 20, 1968. The guarantee program is now expressly authorized in 15 U.S.C. § 683.

Authority by necessary implication cannot be derived solely from a purpose clause, but must be supported by the operative provisions of the statute. 71 Comp. Gen. 49 (1991).

Regardless of whether a loan guarantee program is established under an express statutory provision or by necessary implication, the basic responsibility for administering the program clearly rests with the agency involved. This includes the authority to determine whether or not to extend a guarantee in a particular case, and the manner in which the guarantees are to be handled. The agency has considerable discretion, subject of course to any applicable statutory requirements or restrictions.

B. Budgetary and Obligational Treatment

When a federal agency guarantees a loan, there is no immediate cash outlay. The need for an actual cash disbursement, apart from administrative expenses, does not arise unless and until the borrower defaults on the loan and the government is called upon to honor the guarantee. Depending on the terms of the loan, this may not happen until many years after the guarantee is made. It is thus apparent that loan guarantees require budgetary treatment different from ordinary government obligations and expenditures. This treatment is prescribed generally by the Federal Credit Reform Act of 1990 (FCRA). Before describing the FCRA, it is important to first describe the pre-credit reform situation because it illustrates the objectives of credit reform and because FCRA does not cover all programs.

1. Prior to Federal Credit Reform Act

Prior to credit reform, the authority to guarantee or insure loans generally was not regarded as budget authority. Indeed, the original enactment of the Congressional Budget Act of 1974 expressly excluded loan guarantees from the statutory definition of budget authority. Pub. L. No. 93-344, § 3(a)(2), 88 Stat. 297,299 (1974). Under this treatment, the extension of a loan guarantee was an off-budget transaction and was, at the extension stage, largely not addressed by the budget and appropriations process. If and when the government had to pay on the guarantee, i.e., upon default, the administering agency would seek liquidating appropriations, and these liquidating appropriations counted as budget authority. Of course, by the time a liquidating appropriation became necessary, the United States was contractually committed to honor the guarantee, and Congress had little choice but to appropriate the funds. This is an example of so-called "backdoor spending." By the time the budget and appropriations process became involved, there was no meaningful role for it to play.

When a loan guarantee is committed or issued, it cannot be known with absolute certainty when or to what extent the government might be called upon to honor it. Accordingly, and since budget authority was not provided in advance, the making of a loan guarantee, however binding on the government the commitment may have been, was treated only as a contingent liability and did not result in a recordable obligation for purposes of 31 U.S.C. § 1501(a). A recordable obligation did not arise until the contingency occurred (default by the borrower or other event as authorized in the program legislation), at which time it was recorded against the appropriation or fund available for liquidation. 65 Comp. Gen. 4 (1985); 60 Comp. Gen. 700,703 (1981).

Under this approach, the obligation was viewed as "authorized by law" for purposes of the Antideficiency Act, and there was no violation if obligations resulting from authorized guarantees exceeded available budgetary resources. 65 Comp. Gen. 4 (1985); B-226718.2, August 19, 1987.

In a limited sense, there was a certain logic to this approach. Many loans are repaid in whole or in part, with the result that the government is never called upon to pay under the guarantee, the only disbursements being the administrative expenses of running the program. To require budget authority in the full amount being

guaranteed would artificially inflate the budget. The problem was that the pre-credit reform approach went to the opposite extreme, by reflecting the cost to the government in the year the guarantee was made as zero. Since there was no longer any room for discretion by the time liquidating appropriations became necessary, loan guarantee programs were not forced to compete with other programs for increasingly scarce budgetary resources. No one involved in the budget process–Congress, OMB, GAO—particularly liked this system, and reform became inevitable.

At an absolute minimum, GAO strongly encouraged the imposition of limits, either in the enabling legislation or in appropriation acts, on the total amount of loans to be guaranteed. E.g., Legislation Needed to Establish Specific Loan Guarantee Limits for the Economic Development Administration, FGMSD-78-62 (January 5, 1979). Ceilings of this type may limit the amount of guarantees that can be issued-in a given fiscal year, or the total amount of guarantees that can be outstanding at any one time. An example of the former is discussed in 60 Comp. Gen. 700 (1981).

A device that became common in the 1980s was the granting of loan guarantee authority only to the extent provided in advance in appropriation acts. The device was reinforced in 1985 when Congress (1) added to the Congressional Budget Act a definition of "credit authority" ("authority to incur direct loan obligations or to incur primary loan guarantee commitments"), and (2) subjected to a point of order any bill providing new credit authority unless it also limited that authority to the extent or amounts provided in appropriation acts. 2 U.S.C. §§ 622(10), 652(a).

While this device provided a measure of congressional control, it still did not require the advance provision of actual budget authority. For example, the Chrysler Corporation Loan Guarantee Act, which predated the 1985 legislation noted above, limited the authority to guarantee loans to the amounts provided in advance in appropriation acts. The Comptroller General and the Attorney General both concluded that this provision did not require advance budget authority, but was satisfied by an appropriation act provision placing a ceiling on the total amount of loans that could be guaranteed, i.e., on contingent liability. B-197380, April 10, 1980; Loan Guarantees-Authority of Chrysler Corporation Loan Guarantee Board to issue Guarantees, 43 Op. Att'y Gen. No. 27 (April 23, 1980).

Both opinions also concluded that the appropriation act ceiling related only to outstanding loan principal, with contingent liability for loan interest being in addition to the stated amount.

Where loan guarantee authority is limited to amounts provided in appropriation acts-and we emphasize that we are addressing situations not governed by the Federal Credit Reform Act—those "amounts," as noted, are not actual budget authority but ceilings on contingent liability. Therefore, while exceeding the ceiling may be illegal for other reasons,[7] it does not violate the Antideficiency Act. 64 Comp. Gen. 282, 288–90 (1985). Analogous to budget authority, loan guarantee authority must generally be used (i.e., commitments made) in the fiscal year or years for which it is provided unless the appropriation act provides otherwise. B-212857, November 8, 1983. Also, where advance authority in appropriation acts is statutorily required and Congress does not provide it, the agency's authority to carry out the program may be effectively suspended for the fiscal year in question. B-230951, March 10, 1989.*

Congress may set a minimum program level as well as a ceiling. Again for programs not governed by the Credit Reform Act, failure to achieve the minimum commitment level would not constitute an impoundment since the commitment amount is not budget authority. B-195437.2, September 17, 1986. However, under a loan insurance program where the loan itself is made by the agency, failure to achieve a mandated minimum program level would be an impoundment unless the failure results from programmatic factors. Id.; B-195437.3, February 5, 1988.

2. Federal Credit Reform Act of 1990

Consideration of various reform proposals during the 1980s centered on the recognition that there is a "subsidy element" to a government loan guarantee program. If all loans were repaid, there would be no cost to the government apart from administrative expenses. Were this the case, however, there would probably have been no need for the program to begin with. Since the objective of a loan guarantee

[7] An "unusual" case where exceeding a ceiling was not illegal, because of rather explicit legislative history, is 53 Comp. Gen. 560 (1974).

[8] Standing alone, 2 U.S.C. s 652(a) is not a statutory requirement for advance appropriation authority. A point of order may not be raised or maybe defeated, in which event the validity of any ensuing legislation is not affected. As in the situation discussed in B-230951, many program statutes independently impose the requirement.

program is to enhance the availability of credit which the private lending market alone cannot or will not provide, it is reasonable to expect that there will be defaults, most likely at a higher rate than the private lending market experiences. It became apparent that credit reform had to do two things. First, it had to devise a meaningful way of measuring the true cost to the government; and second, it had to bring those costs fully within the budget and appropriations process. See, e.g., Budget Issues: Budgetary Treatment of Federal Credit Programs, GAO/AFMD-89-42 (April 1989).

The culmination of these reform efforts was the Federal Credit Reform Act of 1990, enacted by section 13201(a) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, 1388-609, and codified at 2 U.S.C. §§ 661–661f (Supp. III 1991). The approach of the FCRA is to require the advance provision of budget authority to cover the subsidy portion of a loan guarantee program, with the non-subsidy portion (i.e., the portion expected to be repaid) financed through borrowings from the Treasury. The Office of Management and Budget has issued detailed implementing instructions in OMB Circular No. A-34, Part VI, transmitted by OMB Bulletin No. 92-01, October 1, 1991. The FCRA applies to loan guarantee commitments made on or after October 1, 1991, with exceptions to be noted later.

a. Post-1991 Guarantee Commitments

One of the major purposes of the FCRA is to "measure more accurately the costs [the subsidy element, in essence] of Federal credit programs." 2 U.S.C. § 661(1). Before the budgetary and appropriations aspects of FCRA can come into play, the administering agency, working with OMB, must determine the cost of its programs. The law defines "cost" as the "estimated long-term cost to the Government. . . calculated on a net present value basis, excluding administrative costs." Id. § 661a(5)(A). More specifically for purposes of this chapter, the cost of a loan guarantee is the—

"net present value when a guaranteed loan is disbursed of the cash flow from-

"(i) estimated payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments, and

"(ii) the estimated payments to the Government including origination and other fees, penalties and recoveries." Id. § 661a(5)(C).

Historical experience is obviously a relevant factor in determining cost. Risk assessment is also very important, and OMB requires agencies to develop risk categories for their credit programs. OMB Circular No. A-34, § 62.3. Agencies should not blindly rely on historical experience when the risk factor has changed. See Loan Guarantees: Export Credit Guarantee Programs' Long-Run Costs Are High, GAO/NSIAD-91-180 (April 1991) at 3. For example, it is not unreasonable to expect the default rate under a guaranteed student loan program to increase during a recession, resulting in a higher cost. Established secondary market experience is also relevant in assessing risk. NSIAD-91-180 at 15.

The second major purpose of FCRA is to "place the cost of credit programs on a budgetary basis equivalent to other Federal spending." 2 U.S.C. § 661(2). To accomplish this, 2 U.S.C. § 661c(b), perhaps the key provision of FCRA, provides:

"Notwithstanding any other provision of law, . . . new loan guarantee commitments may be made for fiscal year 1992 and thereafter only to the extent that–

"(l) appropriations of budget authority to cover their costs are made in advance;

"(2) a limitation on the use of funds otherwise available for the cost of a. . . loan guarantee program is enacted; or

"(3) authority is otherwise provided in appropriation Acts."

Thus, unless Congress specifically provides otherwise, loan guarantees may be made only if budget authority to cover their cost has been provided in advance. The cost of a loan guarantee is regarded as new budget authority for the fiscal year "in which definite authority becomes available or indefinite authority is used." 2 U.S.C. § 661c(d)(1).

To implement these new concepts, the law defines two new accounts for credit programs, a "credit program account" and a "financing account." The program account is the budget account into which appropriations of budget authority are made. The financing account is a revolving, non-budget account from which the guarantees are actually administered. It receives cost payments from the program account and includes all other cash flows resulting from the guarantee commitment. 2 U.S.C. §§ 661a(6) and (7). Administrative expenses are

shown as a separate and distinct line item within the program account. Id. § 661c(g).

A review of 1992 appropriation acts disclosed several variations in the way Congress made the appropriations contemplated by 2 U.S.C. § 661c.

- The Federal Housing Administration General and Special Risk Program Account received an appropriation of costs and a ceiling on the total loan principal to be guaranteed ($55 million to support a program level of $8.6 billion).[9]
- The program account for Economic Development Administration guaranteed loans received an appropriation of costs with no program ceiling specified. *0
- The Small Business Administration Business Loans Program Account received separate cost appropriations for direct and guaranteed loans with a total loan ceiling for direct, but not guaranteed, loans.[11]

Each of these appropriations also includes a separate specific appropriation for administrative expenses.[12]

From a chronological perspective, the first step is to determine the cost of a guaranteed loan program in accordance with 2 U.S.C. § 661a(5). The President's annual budget is to reflect these costs and

[9]Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992, Pub. L. No. 102-139,105 Stat. 736,749 (1991).

[10]Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 782,806 (1991).

[11]Pub L No. 102-140, supra n.10, 105 Stat. at 815.

[12]A very general definition of "administrative expenses" maybe found in B-24341, March 12, 1942, at 5:

"The term 'administrative expenses' would appear to relate, generally, to those expenses necessarily incurred in administering, executing, or carrying out the primary purposes of legislative enactments. Whether a particular expense should be classified as an 'administrative expense' would appear to be governed by the particular program involved, the provisions of the act in which the term appears or to which it relates, and the intention of the legislative body in using the expression, and what might be regarded as an item of 'administrative expense' within the meaning of one statute might not be so regarded under another statute enacted for entirely different purposes."

For FCRA purposes, see also OMB Circular No. A-34, § 62.5.

the planned level of new guarantee commitments. 2 U.S.C. § 661c(a). Congress then makes the appropriation of costs and administrative expenses to the program account.

The appropriation of costs "shall constitute an obligation of the credit program account to pay to the financing account." Id. § 661c(d)(1). When a loan for which a guarantee commitment has been made is disbursed by the lender, the cost of the guarantee is obligated against the program account and paid into the financing account. Id. § 661c(d)(2). If the loan is disbursed in a single payment, the cost is paid into the financing account in a single payment. If the loan is disbursed in more than one payment, costs are paid into the financing account in the same proportion. OMB Circular No. A-34, § 62.7(e). The cost payments are carried in the financing account as unobligated balances until obligations are incurred to make payments under the terms of the guarantee, at which time they become obligated balances until disbursed. Id.

The law recognizes that estimating costs is not an exact science and that cost estimates are subject to change over time. Accordingly, costs are to be reestimated annually as long as the loans are outstanding. OMB Circular No. A-34, $62.8. If a reestimation results in an increase to the cost estimate, the law provides permanent indefinite budget authority for the program account. 2 U.S.C. § 661c(f). The agency requests an apportionment of this indefinite authority from OMB, and then immediately records an obligation against the program account and pays the funds into the financing account. OMB Circular No. A-34, 562.8.

The law also provides for the treatment of "modifications." For purposes of FCRA, a modification is any government action that alters the cost of an outstanding loan guarantee from the most recent estimate or reestimated, except actions permitted under the terms of existing contracts. 2 U.S.C. § 661a(5)(D); OMB Circular No. A-34, § 62.9(a). The law prohibits the modification of a loan guarantee commitment "in a manner that increases its cost unless budget authority for the additional cost is appropriated, or is available out of existing appropriations or from other budgetary resources." 2 U.S.C. § 661c(e). Modifications include such things as forgiveness, forbearance, reductions in interest rate, prepayments without penalty, and extensions of maturity, except where permitted under an existing contract. OMB Circular No. A-34, § 62.9(a). They also include the sale

of loan assets and actions resulting from new legislation, such as a statutory restriction on debt collection. Id. As with reestimates, at the time a modification is made, the agency records an obligation of the estimated cost increase against the program account and pays the amount into the financing account. Id. § 62.9(c).

If an agency's original cost estimates, reestimates, and modification estimates have been accurate, the balances of financing accounts for loan guarantees should always be sufficient to make any required payments. However, if a balance is not sufficient, the "Secretary of the Treasury shall. . . lend to, or pay to the financing accounts such amounts as maybe appropriate." 2 U.S.C. § 661d(c). The Secretary is also authorized to borrow or receive amounts from the financing accounts. Id. All of these transactions between the Treasury and financing accounts are subject to the apportionment requirements of the Antideficiency Act. Id.

Under the FCRA structure as outlined above, there are two separate sets of "obligations"—obligations against the program account when budget authority is paid over to the financing account, and obligations against the financing account when claims are made for payment under a guarantee.

OMB Circular A-34, $63.2, identifies four actions that will result in Antideficiency Act violations:

(1) Overobligation or overexpenditure of the amounts appropriated for costs. This includes a modification resulting in an overobligation.

(2) Overobligation or overexpenditure of the credit level supported by the enacted cost appropriation.

(3) Overobligation or overexpenditure of the amount appropriated for administrative expenses.

(4) Obligation or expenditure of the lapsed unobligated balance of the cost appropriation, except to correct mathematical or data input errors in calculating subsidy amounts. However, error correction will be considered a violation if it exceeds the amount of the lapsed unobligated balance.

Finally, the law emphasizes that the provisions of the FCRA are not to be construed as changing or overriding the administering agency's authority to determine the terms and conditions of eligibility for, or amount of, a loan or loan guarantee. 2 U.S.C. § 661d(g).

As a result of FCRA, guarantee programs should no longer be unrestricted. Even if the applicable appropriation act does not explicitly set a maximum program level, the program level that can be supported by the enacted cost appropriation, reinforced by the Antideficiency Act, constitutes an effective ceiling. Programs not governed by FCRA may have their own ceilings. Although a loan or guarantee may not. exceed a statutory ceiling, it may nevertheless be possible to extend assistance if the borrower qualifies under another program. For example, in 35 Comp. Gen. 219 (1955), the Small Business Administration could not make a disaster loan to a small business concern which had suffered damage in a flood because SBA had already used up the applicable ceiling on disaster loans. However, it could make a business loan to the same borrower if the transaction otherwise met the criteria under SBA's business loan program.

b. Pre-1992 Commitments

The treatment described above applies to loan guarantee commitments made on or after October 1, 1991. Commitments made prior to fiscal year 1992 were made under the rules summarized in Section B. 1. Given the varying maturities under different credit programs, pre-1992 guarantees are likely to be around for many years, Since pre-1992 guarantees were not subject to any requirement to determine subsidy costs or to obtain advance appropriations of budget authority, they require different treatment and are addressed in separate provisions of the FCRA.

Three provisions are particularly relevant. First, the law establishes "liquidating accounts," defined as budget accounts which include all cash flows to and from the government resulting from pre- 1992 commitments. 2 U.S.C. § 661a(8). Second, all collections resulting from pre-1992 guarantee commitments are to be credited to the liquidating account and are available to liquidate obligations to the same extent they were under the applicable program legislation prior to enactment of FCRA. Id. § 661 f(b). At least once a year, unobligated balances in the liquidating account which are in excess of current needs are to be transferred to the general fund of the Treasury. Id.

Third, 2 U.S.C. § 661d(d) provides:

"If funds in liquidating accounts are insufficient to satisfy the obligations and commitments of said accounts, there is hereby provided permanent, indefinite authority to make any payments required to be made on such obligations and commitments."

Thus, for pre-1992 guarantees which are liquidated in accordance with the terms of the original commitment, payment will still be made from liquidating appropriations. The main change under FCRA is the provision of these liquidating appropriations on a permanent, indefinite basis.

A "modification" to a pre-1992 loan guarantee-the term having the same meaning as described in Section B.2.a for post-1991 guarantees-is treated differently. See OMB Circular No. A-34, §§ 62. l(c) and 62.9 for applicable procedures.

c. Entitlement Programs

A partial exemption from FCRA is found in 2 U.S.C. § 661c(c), which provides that the requirement for the advance appropriation of budget authority to cover estimated costs does not apply to (1) a loan guarantee program which constitutes an entitlement, or (2) programs of the Commodity Credit Corporation existing on FCRA's date of enactment (November 5, 1990). An entitlement program is one in which the provision of assistance is mandatory with respect to borrowers and lenders who meet applicable statutory and regulatory eligibility requirements. The statute gives two examples-the guaranteed student loan program and the veterans' home loan guarantee program. Since the exemption is from the appropriation requirement of 2 U.S.C. § 661c(b) and not the entire act, other provisions of FCRA and OMB Circular A-34 presumably apply to the extent not inconsistent with the exemption.

The pre-FCRA rules summarized in Section B.1 form the starting point with respect to obligational treatment and the application of the Antideficiency Act. A 1985 decision, 65 Comp. Gen. 4, reiterated these rules in the context of the Guaranteed Student Loan Program. GAO advised the Department of Education that (1) a guarantee itself is only a contingent liability and is not recordable as an obligation; (2) an obligation must be recorded upon occurrence of one of the contingencies specified in the program legislation which will require the government to honor the guarantee (in this case, loan default or the death, disability or bankruptcy of the borrower); and (3) the Antideficiency Act does not require that sufficient budget authority be

available at the time the obligation is recorded because, by virtue of the requirements of the program legislation, incurring the obligation is "authorized by law" for Antideficiency Act purposes.

For fiscal year 1992, Congress appropriated to the program accounts for both the guaranteed student loan and the veterans' home loan programs, for costs as defined in FCRA, "such sums as may be necessary to carry out the purposes of the program," together with a definite (specific dollar amount) appropriation for administrative expenses. [13]

d. Certain Insurance Programs Another provision Of FCRA, 2 U.S.C. § 661e(a)(1), exempts from the entire act—

"the credit or insurance activities of the Federal Deposit Insurance Corporation, National Credit Union Administration, Resolution Trust Corporation, Pension Benefit Guaranty Corporation, National Flood Insurance, National Insurance Development Fund, Crop Insurance, or Tennessee Valley Authority."

Thus, to the extent the rules in Section B.1 would apply to any of the programs conducted by these entities to begin with, they continue to apply unaffected by FCRA.

C. Extension of Guarantees

1. Coverage of Lenders (Initial and Subsequent)

a. Eligibility of Lender/Debt Instrument

Program legislation may prescribe eligibility criteria for lending institutions, or may otherwise limit the types of lending institutions to which guarantees may be extended, either as the initial lender or as a subsequent transferee, or may address the manner in which the debt instrument covered by the guarantee maybe treated. The safest generalization in this area, and the common strain throughout the

[13] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-170, 105 Stat. 1107, 1132 (1991) (guaranteed student loans); Pub. L. No. 102-139, supra n.9, 105 Stat. at 737 (veterans' home loans).

cases, is that any proposed action must be consistent with the terms and intent of the agency's statutory authority.

For example, in B-194153, September 6, 1979, GAO considered a proposed pilot program in which the Economic Development Administration, an agency within the Department of Commerce, would guarantee loans made to private borrowers by participating lending institutions, with the guaranteed portion of the loan to be subsequently assigned to the city of Chicago and financed through the issuance of bonds. The statutory basis for the proposal, 42 U.S.C. $3142, authorizes the Secretary of Commerce to guarantee up to 90 percent of the outstanding balance of loans for certain specified purposes "made to private borrowers by private lending institutions." GAO concluded that allowing the guarantee to be assigned to an entity that was neither private nor a lending institution and could not have qualified for a guarantee initially, would exceed EDA's statutory authority since EDA would be doing something indirectly-guaranteeing a loan by a non-private lender-that the statute would not permit it to do directly.

GAO revisited the issue a few years later, and reaffirmed the ineligibility of public lenders to participate as secondary market purchasers under the "private lending institution" requirement of 42 U.S.C. 53142. Since a secondary market purchaser effectively becomes the lender, it makes no difference whether sale to the public lender is contemplated from the loan's inception or merely occurs in the ordinary course of secondary market operations. 61 Comp. Gen. 517 (1982).

Another issue in B-194153 was whether EDA could legally allow a guaranteed loan to be evidenced by two notes, one to be fully guaranteed and the second with no guarantee. The Comptroller General found the proposed arrangement within EDA's administrative discretion under the statute since the two-note arrangement would still conform to the statutory requirement that no more than 90 percent of a loan be guaranteed, and furthermore was apparently intended to effectuate the basic legislative purpose. The decision pointed out, however, that since the two notes represented one loan, their substantive terms such as maturity dates and interest rates must be the same, and the two-note mechanism must not increase the government's potential liability. This portion of the decision was later modified in 60 Comp. Gen. 464 (1981), to the extent that GAO

approved use of a "split interest rate" in which the interest on the EDA-guaranteed note was lower than the interest rate on the unguaranteed note. The split-interest scheme was consistent with programs by other agencies under similar legislation and would be more favorable to the government.

A related type of question arose under the now defunct New Community Development Program authorized by the Urban Growth and New Community Development Act of 1970. The legislation authorized various forms of financial assistance to stimulate the development of new communities, including the guarantee of obligations of private new community developers and state development agencies. A question arose as to whether the Department of Housing and Urban Development was authorized or required to guarantee the indebtedness of a private developer to contractors and subcontractors who had supplied goods and services to the developer. Finding that the intent of the program legislation was that HUD guarantee only obligations issued to private investors, the Comptroller General concluded that HUD was neither required nor authorized to issue guarantees that would run to a developer's contractors and subcontractors. B-170971, August 22, 1975; B-170971, July 22, 1975.

b. Substitution of Lender

As a general proposition, substitution of lenders is permissible as long as it is not prohibited by the program legislation or regulations and the "replacement lender" meets any applicable eligibility requirements.

In 60 Comp. Gen. 700 (1981), GAO considered the effect of a change in lenders in the Farmers Home Administration's rural development loan guarantee program. The program operated under an annual ceiling, and the specific question was whether a guarantee could continue to be charged against the ceiling for the fiscal year in which it was initially approved, when a change in lenders took place in a subsequent fiscal year. As to the programmatic significance of the change, the decision stated:

"[T]he basic purpose of the FmHA rural development loan guarantee program is to provide assistance to eligible borrowers to enable them to accomplish one or more of the statutory objectives. In other words, although the guarantee is extended to the lender, it is clear that the purpose of doing so is not to provide a Federal benefit to the lending institution but to induce the lender to make the loan to the borrower. In this

sense, the lender is just a conduit or funding mechanism through which FmHA provides assistance to an eligible borrower so that the statutory objectives can be realized. Thus, the particular lender involved is of relatively little consequence."

Id. at 708–09. Therefore, the decision held that where a guarantee is charged against the ceiling for a particular fiscal year, it can continue to be charged against the same ceiling notwithstanding a substitution of lenders in a subsequent fiscal year, provided that the other relevant terms of the agreement (borrower, loan purpose, loan terms) remain substantially the same. Id. at 709. The statement that the particular lender is of little consequence presumes, as was in fact the case, that the program legislation does not contain any specific eligibility requirements for lenders. Any such requirements (for example, the "private lender" requirement in the EDA cases discussed above) would of course have to be followed.

c. Existence of Valid Guarantee

In order for a loan guarantee commitment to be valid and hence binding on the government, the government official making the commitment must be authorized to do so, and the guarantee must be made to an eligible lender extending credit to an eligible borrower for an authorized purpose. Questions as to whether a valid guarantee was ever created often do not arise until the lender calls upon the government to pay under the guarantee. The answer depends on the program statute and regulations, the terms of the guarantee instrument, and the conduct of the parties.

In 54 Comp. Gen. 219 (1974), GAO considered the authority of the Small Business Administration to reimburse three different lenders. In each case, the borrower had applied to SBA for financial assistance, the lender (at the request or with the approval of an SBA official) had provided interim funds to the borrower, but, for various reasons, the financial assistance was ultimately not extended.

In the first case, an SBA official who was authorized to approve loan guarantees advised the bank in writing that the guarantee had been approved. SBA subsequently issued a formal loan authorization, but later canceled it because the bank did not comply with all of the terms and conditions of the guarantee agreement, one of which was that the bank disburse the loan within 3 months. Although the initial written approval created a valid guarantee, the bank's noncompliance caused it to lapse, and SBA was therefore not obligated to purchase the interim note, i.e., to reimburse the bank for the advance.

In the second case, an authorized SBA official had similarly advised the bank in writing that the guarantee had been approved. Here, however, SBA subsequently determined that the borrower was not eligible for the guarantee, and therefore never issued a formal loan authorization. Since the bank relied on the prior approval and was not legally required to comply with the conditions of the guarantee agreement (such as payment of the guarantee fee) until SBA issued the formal authorization, the bank was entitled to reimbursement for the interim loan.

In the third case, SBA had formally approved a direct loan to a borrower and had issued a written loan authorization. Because of its inability to immediately disburse the funds, SBA requested a private lender to disburse the funds on an interim basis, with SBA's assurance of repayment. SBA later refused to disburse the loan funds because the borrower had disappeared and his business had become defunct. Under the circumstances, SBA's written commitment to reimburse the lender did constitute SBA's 'guarantee" of any advances the lender made in reasonable and justified reliance on it. Therefore, even though the direct loan by SBA was never disbursed, SBA was authorized to reimburse the lender.

The decision discussed two earlier cases—B-178250, August 6,1973, and B-164162, September 20, 1968—involving direct rather than guaranteed loans. GAO had concluded in these cases that, under the specific circumstances involved, SBA could not reimburse a lender for losses suffered on interim disbursements made after SBA had authorized loans to the borrower. In both cases, the claimant bank was unable to adequately establish that any SBA official had made a promise or commitment on which the bank could justifiably rely.

Essentially, the primary theory of recovery in all of these cases, although not specifically identified as such, is estoppel—conduct by the government sufficient to later preclude it from denying the existence of a valid guarantee. Several similar cases have specifically raised the estoppel theory.[14] For example, the issue in B-187445, January 27, 1977, was whether SBA was legally obligated for a $10,000 loss suffered by a bank on a loan made to a small business

[14]Estoppel claims against the government can rarely succeed, and even those few cases in which GAO has sanctioned them would, in light of the Supreme Court's decision in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), have to be reassessed before being used as precedent. Estoppel claims arise in many contexts and are discussed further in Chapter 12.

contractor under section 8(a) of the Small Business Act. The bank alleged that the loan was made on the basis of assurances from an SBA official that the loan would be guaranteed. GAO found, however, that the loan was not in fact guaranteed since it was never approved in writing as required by the applicable provision in the guarantee agreement between SBA and the bank. Also, SBA had no liability to the bank under an estoppel theory since the bank was aware that the SBA official involved lacked authority to approve a loan guarantee or otherwise assure the bank of repayment. Further, the bank could not demonstrate that it had made the loan primarily in reliance on the alleged misrepresentations.

In another 1977 case, a bank argued that SBA was liable under an estoppel theory to reimburse the bank for a loss suffered as a result of SBA's approval of a direct disaster loan to the borrower. However, the facts did not support an estoppel since SBA made no misrepresentations to the bank, and the bank did not make the loan in reliance on the representations that SBA did make. B-181432, February 4, 1977. A somewhat similar case involving the Farmers Home Administration denied the claim of a creditor who alleged that he had advanced supplies and services to a borrower on the basis of assurances from a Farmers Home employee that the borrower's obligation would be guaranteed by the government. Since FmHA regulations then expressly prohibited employees from guaranteeing repayment of non-FmHA loans, either personally or on behalf of the government, the creditor was necessarily on notice of the employee's lack of authority to make such assurances. B-168300, December 4, 1969; B-168300, December 3, 1969.

Another estoppel case is B-198310, April 23, 1981. SBA had sent a letter to a borrower confirming approval of a direct handicapped assistance loan. Allegedly in reliance on this letter, the claimant bank advanced funds to the borrower. SBA then issued its formal loan authorization, but canceled it shortly thereafter based on the borrower's failure to disclose all pertinent information on its loan application. The bank sought reimbursement on a theory of "promissory estoppel." The Comptroller General held that SBA was under no obligation to reimburse the bank for two reasons. First, SBA's letter had been to the borrower, not the bank. Thus, SBA had made no representations to the bank. Second, the bank's reliance on the letter was not reasonable because the letter contained no mention of the possibility that the loan might be used to obtain interim

financing, nor did the bank attempt to obtain any assurance from SBA that the borrower would be required to use the proceeds of the SBA loan to repay the interim loan.

The existence of a valid guarantee also was an issue in 60 Comp. Gen. 700 (1981) in a different context. Farmers Home Administration regulations required written notification to the lender of the approval or disapproval of a guarantee application. Based on these regulations, and citing B-187445, January 27, 1977, discussed above, GAO concluded that oral notification of a loan guarantee approval was not sufficient to create a valid guarantee for purposes of charging that guarantee against the FmHA's annual ceiling. 60 Comp. Gen. at 709–10.

d. Small Business Investment Companies

A "small business investment company" (SBIC) is a private company organized under the Small Business Investment Act of 1958, as amended (15 U.S.C. §§ 661-697 c), and licensed by the Small Business Administration. Its purpose is to provide financial assistance to small business concerns.

A series of decisions in the 1960s upheld SBA's authority to provide various forms of financial assistance to SBICs. First, SBA may guarantee loans made to SBICs by private financial institutions. 42 Comp. Gen. 146 (1962). While the guarantee authority was not explicit at the time of the 1962 decision, it was later added and is now found at 15 U.S.C. § 683. SBA also has "secondary guarantee" authority, authority to sell to private investors, with recourse (SBA's guarantee), debt instruments representing loans SBA had made to SBICs. 44 Comp. Gen. 549 (1965). The proposal considered in 44 Comp. Gen. 549 involved loans with a maturity of 5 or 6 years. Later that same year, SBA proposed extending its program to loans with 15-year maturities. GAO again approved, noting that the difference in maturity did not affect the basic authority. 45 Comp. Gen. 253 (1965). The 15-year period also is now specified in 15 U.S.C. § 683. See also 45 Comp. Gen. 370 (1965) (same holding for similar program under different provision of Small Business Investment Act).

The Comptroller General concluded further in 45 Comp. Gen. 253 that SBA could make the sales through an agent or broker with reasonable compensation if administratively determined to be necessary or more economical. However, the broker's compensation

may not be paid from the proceeds of the loan sales but must be charged to SBA's appropriation for administrative expenses.

A small business investment company maybe either a corporation or a limited partnership. 15 U.S.C. § 681(a). The scope of authorized SBA assistance includes non-recourse loans to a limited partnership SBIC (by purchasing or guaranteeing its debentures). B-149685, January 12, 1978. Non-recourse in this context means that SBA would "waive" its right to recover, provided under the laws of most states, against the separate assets of the general partner.

In B-149685, March 25, 1971, GAO considered SBA's authority to sell guaranteed SBIC debentures to a group of underwriters for resale to private investors. Under this program, SBA would first purchase $30 million of newly issued debentures from SBICs and then immediately sell them to private investors, with SBA's guarantee of payment of principal and interest according to the terms of the instrument. SBA would act as servicing agent for the holders, receiving payment on the debentures from the SBICs and then paying the holders in accordance with the terms of the debentures. The Comptroller General concluded that the proposed sale and guarantee of debentures in this manner was within the scope of SBA's statutory authority, provided SBA did not exceed any existing statutory program level limitations. See also B-149685, June 3, 1969.

Another issue is whether a small business investment company is eligible to participate, as a lending institution, in a government guaranteed loan program. In 49 Comp. Gem 32 (1969), the Comptroller General held that SBICs were not eligible lenders for purposes of SBA's guaranteed loan program under section 7(a) of the Small Business Act, 15 U.S.C. § 636(a). The decision relied heavily on the legislative history of the Small Business Investment Act.

Some years later, GAO again considered the eligibility of SBICs to be guaranteed lenders in SBA's section 7(a) guaranteed loan program as well as the Farmers Home Administration's business and industrial loan program (7 U.S.C. § 1932). SBA's new proposal was somewhat different from the arrangement considered in 49 Comp. Gen. 32, because after originating the loan, the SBIC would then immediately sell the guaranteed portion to another lending institution and remain the servicing agent. GAO's conclusion remained the same, again based on the legislative history of the Small Business Investment Act which

indicated that Congress intended SBICs to operate independently of other federal loan programs. With respect to the Farmers Home Administration program, nothing in either the Small Business Investment Act or the Consolidated Farm and Rural Development Act or their legislative histories supported a different conclusion. 56 Comp. Gen. 323 (1977).

One type of small business investment company is the "minority enterprise small business investment company," or "MESBIC." As the name implies, a MESBIC is a small business investment company formed to aid minority-owned small businesses. In 59 Comp. Gen. 635 (1980), aff'd on reconsideration, B-197439, November 26, 1980, GAO considered SBA's authority to "leverage" against federal funds invested in MESBICs. "Leveraging" means investing on a partial matching basis through the purchase or guarantee of debentures or the purchase of preferred securities. The specific issue was whether SBA could leverage against Federal Railroad Administration investments in MESBICs. Since the Small Business Investment Act authorizes SBA to leverage only against private money, the decision concluded that, absent specific statutory authority, SBA could not leverage against federal funds invested in MESBICs. The MESBICs took the case to court, arguing that "private" meant simply "non-SBA." Based on the plain meaning of the statutory language, the court agreed with GAO. Inner City Broadcasting Corp. v. Sanders, 733 F.2d 154 (D.C. Cir. 1984). "[P]rivate means private and not governmental." Id. at 157.[15]

GAO and the court had both recognized that leveraging against other federal funds would be permissible if authorized by the statute under which those other funds were provided. One such example is community development block grant funds provided under the Housing and Community Development Act of 1974.60 Comp. Gen. 210 (1981).

e. The Federal Financing Bank The Federal Financing Bank was created by the Federal Financing Bank Act of 1973, 12 U.S.C. §§ 2281–2296. Its purpose is to

[15]A 1989 amendment added 15 U.S.C. § 683(e), providing that federal, state, or local government funds received by a small business investment company from non-SBA sources shall be included in determining private capital "solely for regulatory purposes, and not for the purpose of obtaining financial assistance from or licensing by [SBA], providing such funds were invested prior to November 21, 1989."

coordinate federal credit programs with overall government economic and fiscal policies. It is a corporate instrumentality of the United States Government, subject to the general direction and supervision of the Secretary of the Treasury. Id. $2283. The Bank acts essentially as an intermediary. Its powers include purchasing agency debt securities and federally guaranteed borrowings. Specifically, it is authorized by 12 U.S.C. § 2285 to-

"purchase and sell on terms and conditions determined by the Bank, any obligation which is issued, sold, or guaranteed by a Federal agency. Any Federal agency which is authorized to issue, sell, or guarantee any obligation is authorized to issue or sell such obligations directly to the Bank."

The Bank obtains funds by issuing its own securities, almost entirely to the Treasury. Id. §§ 2288(b), (c). The decisions summarized below illustrate the varying roles the Bank plays in the credit financing arena.

In 58 Comp. Gen. 138 (1978), GAO considered the SBA's authority to issue certificates to the Federal Financing Bank evidencing transfer of title of a number of individual loans and setting forth SBA's guaranteed assurance of payment, either in cash or by loan substitution. Even though this arrangement contemplated the sale of certificates evidencing ownership of a group of SBA loans rather than individual loans, it was sufficiently similar to the arrangement upheld in B-149685, March 25, 1971, discussed above in connection with SBICs, and was therefore permissible. Since the certificate did refer to specific loans and, when transferred to the Bank, would represent a transfer of ownership of the loans to the Bank, the plan would not constitute borrowing by SBA, which would have required specific statutory authority .[16]

The same decision, while noting that SBA's authority to sell loans to the Federal Financing Bank with its guarantee was "neither greater nor less" than its authority to sell loans to other purchasers (58 Comp. Gen. at 139), nevertheless concluded that SBA lacked the authority to sell direct disaster loans (15 U.S.C. § 636(b)) to the Federal Financing Bank on a guaranteed basis. Although SBA does have authority to guarantee disaster loans made to eligible borrowers by participating lending institutions, it is not authorized, in the

[16] SBA now has such borrowing authority in 15 U. SC. § 633(c)(5).

absence of specific statutory authority or a clear expression of congressional intent, to sell and guarantee disaster loans that it had originally made directly. Since there was at the time no statutory ceiling on the type of loans in question, the proposal would enable SBA to "replenish its disaster loan revolving fund so as to enable it to make new disaster loans and repeat the process indefinitely," potentially resulting in an unlimited contingent liability against the United States with no congressional restraint. Id. at 146. In addition, the proposal contemplated a 100 percent guarantee which would have violated the statutory 90 percent maximum guarantee of disaster loans.

Another case involving the Bank as 'guaranteed lender" is B-162373-O. M., July 31, 1979, finding that an agreement between the Rural Electrification Administration and the Bank by which the Bank made loans to borrowers that REA guaranteed under the authority of section 306 of the Rural Electrification Act of 1936 (7 U.S.C. § 936), was within the statutory authority of both agencies. The legality of the arrangement was considered from the perspectives both of REA's authority to guarantee loans made by a non-private entity such as the Bank and of the Bank's authority to act as the initial lender, making loans directly to a private nongovernmental borrower with REA's guarantee. Since REA has authority to guarantee loans made by "any legally organized lending agency," it could guarantee loans made by the Federal Financing Bank. At the same time, the Bank was acting within its statutory authority to purchase obligations guaranteed by a federal agency, since the transaction was in the form of its purchasing the borrower's note from the borrower with payment being guaranteed by REA. Although the arrangement was legal, GAO was critical because it did not involve the private credit sector in the REA program as contemplated by the Rural Electrification Act. See GAO report, Financing Rural Electric Generating Facilities: A Large and Growing Activity, CED-81-14 (November 28, 1980), pages 16–17.

Congress subsequently confirmed the REA-FFB arrangement by amending 7 U.S.C. § 936 to provide that the loans, upon request of the borrower, "shall be made by the Federal Financing Bank." Under the statute, loan servicing is the responsibility of the lender. Thus, REA's funds are available to perform the loan servicing function as the Bank's agent only on a reimbursable basis. 62 Comp. Gen. 309 (1983).

Two 1987 opinions discussed the Federal Financing Bank's role in the foreign military sales program. The Bank finances credit sales under the Arms Export Control Act, with the loans being guaranteed by the Defense Security Assistance Agency. If the debtor nation defaults, DSAA pays the Bank. One opinion concluded that the Bank is not authorized to deliberately delay making demand on DSAA for payment upon default. B-226718.2, August 19, 1987. The second advised that two refinancing options under consideration, one involving prepayment without penalty and one involving the partial capitalization of interest, would result in a financial loss to the United States or the substantial risk of one, and should not be implemented without clear evidence of congressional approval. 66 Comp. Gen. 577 (1987). Congress subsequently approved a prepayment option. See Security Assistance: Foreign Military Sales Debt Refinancing, GAO/NSIAD-89-175 (August 1989); Federal Financing Bank: The Government Incurred a Cost of $2 Billion on Loan Prepayments, GAO/AFMD-89-59 (August 1989).

A 1985 transaction illustrates a very different role for the Bank. In October 1985, the Treasury Department had reached its statutory public debt ceiling and was in danger of defaulting on its obligations pending congressional action to raise the ceiling. The Bank effectively borrowed $5 billion from the Civil Service Retirement and Disability Fund by issuing securities to the Fund and accepting Treasury obligations in payment. The Bank then used these securities to prepay part of its outstanding debt to Treasury. This in turn reduced Treasury's outstanding debt, enabling it to borrow an additional $5 billion from the public to meet its obligations. Based on the Bank's statutory authority and the conclusion that its obligations do not count against the public debt limit set by 31 U.S.C. § 3101(73), the Comptroller General found the transaction legally unobjectionable. B-138524, October 30, 1985.

When the Federal Financing Bank was first created, its transactions were entirely off-budget. 12 U.S.C. § 2290(c) ("receipts and disbursements of the Bank. . . shall not be included in the totals of the budget of the United States Government"). With the budget reforms of the Congressional Budget Act and subsequent legislation, this treatment came under increasing criticism and GAO, among others, recommended that Bank transactions involving other government entities be reflected in the budget. E.g., Government Agency Transactions With the Federal Financing Bank Should Be Included on

the Budget, PAD-77-70 (August 3, 1977) (detailed analysis); 58 Comp. Gen. 138, 142–44 (1978); B-178726, September 16, 1976 (pointing out that purchase by the Bank of a loan guaranteed by another agency amounts to a direct loan).

While the Federal Financing Bank Act itself has not been amended, Congress in 1985 added 2 U.S.C. § 655(b) to the Congressional Budget Act:

"AU receipts and disbursements of the Federal Financing Bank with respect to any obligations which are issued, sold, or guaranteed by a Federal agency shall be treated as a means of financing such agency for purposes of section 1105 of Title 31 [submission of President's budget] and for purposes of [the Congressional Budget] Act."

Under this provision, direct loans of the Bank are accounted for as loans of the guaranteeing agency. See B-226718.2, August 19, 1987.

2. Coverage of Borrowers

a. Eligibility of Borrowers

Loan guarantee program legislation may or may not establish criteria for lender eligibility; it will almost invariably address borrower eligibility. This is because the primary purpose of a guarantee program is to enhance credit availability to a particular class of borrowers (farmers, veterans, small businesses, etc.). The significance of any such eligibility requirements is that an agency is not authorized to issue a guarantee or reimburse a lender on behalf of an ineligible borrower.

For example, one portion of the National Housing Act, 12 U.S.C. $1703, authorizes the insurance of loans made to finance repairs or improvements to real property by owners or lessees. Under this statute, it is the lending institution's responsibility to determine borrower eligibility. Thus, a lending institution making a loan to someone who is neither the owner nor the lessee of the property involved is not entitled to be reimbursed for losses resulting from borrower default. B-180015, November 28, 1973; B-174739, January 19, 1972.

While most eligibility requirements are found in the program statute itself, they may appear in other legislation. For example, the Military Selective Service Act provides that any person who is required to

register for the draft and knowingly and willfully fails to do so shall be ineligible for guaranteed student loan assistance. 50 U.S.C. App. § 462(f). The Department of Education is authorized to issue implementing regulations, discussed in B-210733, February 25, 1983.

b. Substitution of Borrowers

Generally, the substitution of borrowers within the same fiscal year will not present problems. However, as with contracts and grants, the substitution may or may not be proper when made in a subsequent fiscal year. Loan guarantee authority-whether it is an advance appropriation of budget authority under the Federal Credit Reform Act or a program level ceiling in a situation not governed by the Credit Reform Act–is granted on an annual, multiple-year, or no-year basis. It thus has a period of availability analogous to a regular appropriation. Where the period of availability is a freed time period, the authority ceases to be available when that period expires.

The issue in B-164031(5), June 25, 1976, was the transferability of a loan guarantee and interest subsidy originally approved under a program of federal assistance for the construction and modernization of hospitals. The question was whether the guarantee could be transferred from one hospital to another in the following fiscal year, when the original hospital became unable to take advantage of the guarantee due to apparent financial difficulties. The Comptroller General found that, since the period of availability of the guarantee authority had expired, the transfer would be authorized only if it could be viewed as a "replacement." Since the second hospital did not serve the same community as the first, the transfer of the loan guarantee to the new "borrower" was not merely a "replacement" and therefore could not be approved.

A few years later, the Farmers Home Administration asked whether it could continue to charge a guarantee to the annual ceiling for the fiscal year in which it was originally approved when a new borrower was substituted in a later fiscal year. As a general rule, the answer is no, and the substitution would have to be treated as a new undertaking. This is different from the substitution of lenders discussed previously in this chapter because the approval of a guaranteed loan to a particular borrower requires a specific eligibility determination. Thus, while the identity of the particular lender maybe of relatively little consequence, the identity and eligibility of the borrower are essential to the transaction. However, the substitution may be treated as a continuation of the original guarantee where the

substituted borrower bears a "close and genuine relationship" to the originally approved borrower (for example, a corporation and partnership controlled by the same individuals), provided of course that the loan purpose remains substantially unchanged. 60 Comp. Gen. 700 (1981).[17]

c. Loan Purpose

The authority to make a loan guarantee commitment depends not only on the eligibility of the particular borrower, but also on whether the purpose for which the guaranteed loan is to be made is consistent with the applicable program statute and regulations. The analysis is essentially an application of the "necessary expense" doctrine used in other purpose availability contexts.

A number of illustrative cases have arisen under section 301 of the Defense Production Act of 1950,50 U.S.C. App. § 2091, which authorizes loan guarantees to finance the performance of contracts where deemed "necessary to expedite production and deliveries or services under Government contracts for the procurement of materials or the performance of services for the national defense." Id. § 2091(a)(1). For example, B-115791-O.M., September 3, 1953, concluded that section 301, ordinarily used to provide short-term working capital, could also be used to guarantee loans for the expansion of plant facilities if determined necessary to expedite production and deliveries or services under defense contracts.

Contracts to purchase equipment for civil defense stockpiling purposes may be regarded as contracts for the national defense and therefore eligible for loan guarantees under section 301.37 Comp. Gen. 417 (1957). The issue in that case was whether a 1953 amendment to the act, which narrowed the definition of "national defense," had the effect of excluding civil defense which clearly would have been covered before the amendment. GAO found no evidence of congressional intent to exclude civil defense, and concluded therefore that the loans could be guaranteed.

While section 301 was intended primarily to assist small and medium-size defense contractors, its language is not so limited and is

[17] Both 60 Comp. Gen. 700 and B-164031(5) applied the basic principles of decisions on the substitution of grantees discussed in Chapter 10.

sufficiently broad to permit guarantees to large-size defense contractors as well. B-170109, July 21, 1970 (large railroad carrier).

GAO considered a different loan guarantee program in 38 Comp. Gen. 640 (1959). The question in that case was whether the Civil Aeronautics Board, under a statute authorizing the guarantee of aircraft purchase loans, could guarantee the indebtedness of an air carrier for the conversion of an existing aircraft. The case involved the conversion of piston engine aircraft to turbo-powered aircraft. GAO found that the conversion was such an extensive modification as to amount to a new type of aircraft for all practical purposes. Also, it was clear that if the manufacturer had performed the conversion and then sold the converted aircraft to the carrier, the purchase would have been eligible for the guarantee. The conversion was therefore within the statutory purpose and the guarantee was authorized.

An analogous situation occurred in 34 Comp. Gen. 392 (1955), involving the Maritime Administration's ship mortgage insurance authority under the Merchant Marine Act. Noting that purchase plus reconstruction was the equivalent of new construction for purposes of the program, the Comptroller General held that the insurance could extend to the purchase money mortgage and reconstruction costs for a vessel acquired by purchase (in this case from the government) instead of under a construction contract. This decision was amplified in 35 Comp. Gen. 18 (1955), which held that the Maritime Administration could insure a second-lien reconstruction mortgage to a private lending institution where the first-lien (purchase money) mortgage was held by the United States. There was nothing in the statute limiting the insurance authority to first-lien mortgages.

The Rural Electrification Administration's financial assistance programs have generated a number of purpose-related cases. Generally, REA may make direct loans and loan guarantees to finance rural electrification facilities for persons not already receiving central station service.

Several cases have established the proposition that REA can include elements in a project that are arguably beyond a literal reading of the statutory language, where those elements are merely incidental to accomplishing the statutory purpose. Thus, early cases on REA's direct loan program held that REA cannot make a loan where the only persons to be benefitted are already receiving central service, but it

can finance the acquisition of existing facilities which are to be incorporated into a larger system, where the acquisition is necessary for the effective operation of the overall system. B-48590, April 3, 1945; B-32920, March 12, 1943; B-29463, December 1, 1942. This principle applies whether the acquisition is by direct purchase or the purchase of securities to be exchanged for the physical property. B-42486, July 25, 1944.

REA loans are not intended to parallel existing facilities, Thus, where Plant A and Plant B are located less than 200 feet apart, and Plant A is receiving central service from a power supplier who has offered to provide adequate service to Plant B, Plant B cannot properly be considered a person not receiving central service for purposes of qualifying for REA financial assistance. B-134138, October 15, 1958.

In B-195437, February 15, 1980, GAO applied the principles of the above direct loan cases to REA's loan guarantee program. The issue was REA's authority to approve a loan guarantee to finance certain expenditures associated with the construction of a coal-freed electric generating plant, including cancellation charges if two contracts for components of the plant were terminated. The decision held that, since the contractors would not begin to build the components without a commitment that the cancellation costs would be paid, approval of a loan guarantee to assure funding to pay such charges was consistent with the basic statutory purpose of providing electricity to persons in rural areas and therefore authorized.

Finally, loans and loan guarantees to provide housing for the elderly may include the purchase of related necessary equipment such as refrigerators and laundry equipment. 42 Comp. Gen. 528 (1963).

d. Change in Loan Purpose

A decision previously cited in the discussion of changes in lenders and borrowers, 60 Comp. Gen. 700 (1981) also addressed changes in loan purpose under the Farmers Home Administration rural development loan guarantee program. Again the issue was when changes could be deemed a continuation of the original transaction, so that the guarantee would remain chargeable to the annual ceiling for the fiscal year in which it was originally approved.

Similar questions had arisen frequently in the grant context, and the Comptroller General applied the grant principles to loan guarantees, stating:

"Applying these grant decisions to the area of loan guarantees, when a major change to the 'character' of the project supported by the guarantee is made, the revised loan guarantee must be charged against the ceiling in effect when the revision is made. We believe that just as a significant change in the terms and conditions under which a grant was made would be viewed as creating anew grant, a significant change in the terms and conditions under which a loan guarantee was approved would create a new loan."

Id. at 707. Thus, major changes will result in the treatment of the transaction as a new guarantee. However, less substantial changes where the purpose and scope of the revised agreement are consistent with the purpose and scope of the original agreement maybe treated as a continuation as long as the need for the project continues to exist. This test must be applied on a case-by-case basis.

3. Terms and Conditions of Guarantees

a. Introduction

Just as with any other contractual obligation, a loan guarantee has terms and conditions which the parties must follow. If a valid guarantee has been created, the borrower defaults, and the lender has complied with all applicable terms and conditions, the government is obligated to pay on the guarantee. Conversely, if the lender does not comply with applicable requirements, it may find that it has lost the benefit of the guarantee. The applicable terms and conditions are found in the program statute, agency regulations, and the guarantee agreement.

This section will discuss the effect of noncompliance, especially by the lender. The cases fall into two broad categories. In one group, the loan may not have been eligible for the guarantee from its inception based on a failure to satisfy applicable requirements such as a statutory limitation on the maximum amount or maturity of the loan. The result will usually be that the guarantee itself was never valid. In the second group, the loan to be guaranteed complies with all pertinent statutory or regulatory requirements, but the guarantee never takes effect or is nullified as a result of the lender's failure to comply with one or more of the terms and conditions upon which the government's guarantee is contingent.

To illustrate these concepts, we have selected two areas-property insurance programs under the National Housing Act and loan

guarantee programs of the Small Business Administration. The specific requirements discussed are the more common ones and apply of course only to the particular program. Nevertheless, our selection is intended to illustrate types of issues, approaches to problem-solving, and the crucial role of agency regulations, and from this perspective is of more general relevance. Also, program details such as maximum loan amount, whether prescribed by statute or regulation, are subject to change from time to time. Accordingly, individual cases do not necessarily reflect current program requirements, but are intended to illustrate or support propositions of continuing validity with respect to requirements of that type.

b. Property Insurance Programs Under the National Housing Act

The National Housing Act, 12 U.S.C. ch. 13, authorizes a number of housing assistance programs. Several of the programs were formerly administered by the Federal Housing Administration (FHA) and were transferred to the Department of Housing and Urban Development (HUD) upon its creation in 1965. Although the programs are now administered by HUD's Office of Housing, they are still popularly known as "FHA programs."

(1) Maximum amount of loan

Under 12 U.S.C. 51703, the Secretary of HUD is authorized to insure lenders against losses sustained in extending loans to borrowers for various purposes, including home construction, repair, and improvement, and the purchase of manufactured (mobile) homes. The statute establishes the maximum amount of loans that maybe insured for the various authorized purposes, for example, $25,000 for repairs and improvements to an existing single-family structure. Id. §1703(b)(1) (1988 and Supp. III 1991). While the specific dollar amounts have changed several times, the basic maximum loan amount requirement has existed in one form or another since the program was established in 1934.

Where a single loan is involved, its face amount cannot exceed the statutory limitation. If a loan which is reported by the lender to HUD for insurance exceeds the statutory limitation in effect when the loan was made, the lender cannot be reimbursed for any of its losses since the loan was ineligible for insurance from its inception. E.g., B-127167, July 15, 1970; B-127243, May 21, 1956.

In applying this limitation where more than *one loan is* involved, the approach of HUD's program regulations is to consider whether the total amount of all outstanding insured loans made to a borrower under Title I of the Housing Act with respect to the same property or structure exceeds the maximum permissible amount. In this situation, the ceiling applies to the outstanding aggregate loan balance rather than the sum of the face amounts. 24 C.F.R. $201.10 (1991). Thus, for a second loan, the ceiling is compared with the face amount of the second loan (which represents the outstanding balance of that loan at the time the determination is made) plus the outstanding balance of the first loan. B-148894, June 29, 1962; B-137493, November 20, 1958. The method used to compute the outstanding balance is within HUD's discretion. In considering claims, GAO will apply the method prescribed in the regulations. The fact that other reasonable methods may exist is irrelevant. B-162961, January 19, 1968.

The ceiling applies only to loans for the same property. In B-148804, June 7, 1962, the Comptroller General advised that a lender could be reimbursed for a loss it suffered when the borrower defaulted, even though the original loan of $4,000 exceeded the then-existing $3,500 limitation. Although only one application for a $4,000 loan had been made, the record revealed that two separate properties were involved, with $3,000 of the loan funds intended for the improvement of one property, and $1,000 for the other. Therefore, the limitation which applied only to loans for the same property was not violated.

This decision points out another important provision of 12 U.S.C. $1703. The secretary Of HUD is authorized to waive a requirement in the regulations if in the Secretary's judgment enforcement would impose an injustice on an insured lender, provided that the lender has substantially complied with the regulations in good faith and waiver would not increase the government's obligation beyond what it would have been under full compliance. Id. §1703(e). Thus, in B-148804, the regulations required separate applications for separate properties, but GAO advised that FHA could waive the requirement. Prior to enactment of the waiver authority, GAO had applied the general rule that agencies have no authority to waive statutory regulations. 15 Comp. Gen. 869 (1936). The waiver provision was enacted three weeks after the decision. The authority has been applied in a variety of contexts. E.g., B-127026, March 27, 1956 (bank disbursed loan after a change in regulations under which loan would have been ineligible, but had approved loan in good faith before receiving notice of the

change). The Secretary of HUD may delegate the waiver authority to a "substantial compliance committee." B-127167, December 17, 1968.

Several decisions have emphasized that the waiver authority applies only to regulations. It does not apply to a requirement imposed by statute, such as the maximum loan amount. A purported waiver of a statutory requirement is ineffective. E.g., B-127243, May 21, 1956. A waiver inconsistent with the statutory authority, for example, lack of good faith by the lender, is also unauthorized, B-127167, December 5, 1957.

Exercise of the waiver authority is up to HUD, not GAO. While GAO may, in settling a claim or rendering a decision, find a waiver invalid if it violates one of the above principles, GAO cannot positively exercise the authority where HUD has chosen not to do so. As in B-148804, June 7, 1962, GAO can only advise HUD that in its opinion waiver is authorized.

(2) Maximum loan maturity

The Housing Act also prescribes, by category, the maximurn maturity term of loans which maybe insured under 12 U.S.C. $1703. For example, the maturity of a loan for repairs and improvements to an existing single-family structure may not exceed 20 years and 32 days. Id. § 1703(b)(3). As with the maximum loan amount, maturity limitations have existed since the program's inception.

The maturity date is computed based on the payment due date indicated on the note. If the period exceeds the statutory maximum, the loan is not insurable. It is the responsibility of the lender rather than the government to make certain that notes do not have maturities in excess of the statutory maximum. 55 Comp. Gen. 126 (1975); B-172121, April 12, 1971. Thus, in 55 Comp. Gen. 126, a bank's claim for reimbursement was denied where a note submitted and accepted for insurance had a projected maturity date 17 days in excess of the maximum in effect when the loan was made.

The decision at 55 Comp. Gen. 126 also held that, since the statutory limitation applies to the maturity of the obligation or note underlying the loan, the date on the note is controlling, and not the date on which the note was assigned or the funds disbursed. However, this is not an absolute and there are certain circumstances in which the date on the

note has been found not controlling. For example, in B-162542, October 24, 1967, GAO approved a lender's claim even though the note stated a final payment due date after the existing statutory limitation. The holding was based on a letter from the lender to the borrower which agreed to move up the date of the first payment and, by implication, all of the others as well, including the final payment. As a result, the maturity date fell within the statutory period.

Somewhat similarly, B-166521, April 25, 1969, involved a 60-month note which, as written, would have exceeded the statutory maximum. The note was dated June 20, 1963, but provided that the first payment was not due until July 1, 1968. Based on the borrower's actual payment record, it was obvious that the maturity date had been inadvertently entered on the note as the first payment due date. Thus, the maturity date was within the then-existing statutory maximum and the lender could be paid.

Again in B-191660, March 5, 1979, GAO upheld a bank's claim where the note had a projected maturity date two days in excess of the then-existing statutory limitation. The borrower's payment record and other evidence supported the bank's allegation that, due to inadvertence, the note as written did not reflect the intention of the parties at the time the loan was made. The decision emphasized that, where extraneous evidence is to be used to correct an alleged error on a note, merely changing the due date after default and after HUD has refused insurance is legally irrelevant. The extraneous evidence must establish that the allegedly correct due date is what the parties intended at the time the note was executed.

Problems may also arise when the term of the initial insured loan is within the statutory maximum but a subsequent extension agreement results in exceeding the maximum maturity period. For example, in B-131963, July 17, 1957, FHA could not reimburse a bank for a loss suffered on a defaulted loan where the bank had agreed in writing to extend the maturity date of the note beyond the statutory maximum.

As pointed out in that decision, 12 U.S.C. §1703(b)(6) permits a loan to be refinanced, but the authority does not include a mere extension of payment. Thus, a lender may extend the time for paying a note beyond the maximum time limitation and still retain insurability only by actually refinancing the loan, that is, by executing anew note. Short of an actual refinancing, a mere extension of payment beyond

the maximum will result in the loss of insurability. See also B-164118, November 19, 1969; B-149800, September 28, 1962; B-148816, May 21, 1962. Several cases have rejected arguments by the lender either that it had not intended to extend the final maturity date beyond the permissible maximum, or that it should have been allowed to subsequently rescind or reform the extension agreement to conform with the statutory limitation. E.g., B-188240, August 10, 1977; B-164118, December 30, 1969; B-164118, August 14, 1968.

Insurability may be retained if the extension is merely a temporary deferral of certain payments, with the deferred payments to be made up prior to the original maturity date. However, if this is the case, it must be spelled out in the extension agreement. B-164118, December 30, 1969.

In 51 Comp. Gen. 222 (1971), the extension agreement was not merely an extension of time but also changed other terms such as the period of payment and the amount of the monthly installment. In these circumstances, the Comptroller General found that the terms of the extension agreement differed so substantially from those of the original note that it was "tantamount to a new note" and could be considered as a refinancing. Although the "refinancing" had not been accomplished in accordance with applicable regulations, GAO advised HUD that it could consider waiving those particular regulatory requirements under 12 U.S.C. § 1703(e).

(3) Owner/lessee requirement

Another requirement of the Housing Act is that property improvement loans can be made only to borrowers who are owners of the property, or who are lessees under a lease expiring not less than six months after the maturity of the loan or other advance of credit. 12 U.S.C. § 1703(a). A loan made to a borrower who is neither the owner nor the lessee of the property involved is not insurable. For example, where the property was owned by a corporation and the loan application and note were signed by two individuals who were officers of the corporation, but with no indication that they were signing as representatives of the corporation, the loan was not made to the owner of the property and was ineligible for insurance, B-180015, November 28, 1973. Similarly, where the same person was president of two different corporations and signed the note as president of corporation "A" but had signed the lease on the property involved as

president of corporation "B", the loan was not made to the lessee and was not insurable. B-174739, January 19, 1972.

The lease must expire "not less than six months after the maturity of the loan." A loan to a lessee is not insurable where the lease expires before the maturity date (B-194145, December 12, 1980), or on the maturity date (B-172965, July 16, 1971). Time "after" an event is traditionally computed by excluding the date of the happening. Thus, a loan with a maturity date of July 1, 1956, to a lessee whose lease was due to expire on December 31, 1956, was not insurable. "Not less than six months after" the maturity date would have been on or after January 1, 1957. B-129898, December 28, 1956.

In B-194145, December 12, 1980, a loan was refinanced after the borrower, under a lease with option to purchase, had exercised the option. The bank argued that the loan should be insurable since the refinancing note had been executed to the owner. However, the Comptroller General held that a refinancing loan is insurable only where the prior loan being refinanced was itself validly insured. Since the original loans in that case were ineligible, the refinancing loan was equally ineligible. Also, the refinancing loan could not be considered an entirely new loan for purposes of insurability, since the statute authorizes insurance to finance improvements, not to repay outstanding uninsured loans.

In B-124410, July 25, 1955, GAO allowed a bank's claim on a loan to a borrower who was not the owner of the property. The decision was based on FHA regulations which provided that a lender, acting in good faith, may in the absence of any information to the contrary, rely on statements of fact in a credit application, and the credit application in that case had been misleading. Compare, however, 17 Comp. Gen. 604 (1937), in which a claim was denied for a loss suffered when a lender advanced funds to an individual other than the borrower upon a forged authorization, where a simple comparison with the signature on the note would have disclosed the forgery.

While a bank is generally entitled to rely on statements of fact in a credit application, it is nevertheless required to exercise good credit judgment. Thus, payment was denied in A-88143, August 21, 1937, where the borrower had previously defaulted on a different loan with the same bank The result applies equally to a bank with several branches where the contract of insurance is with the home office.

19 Comp. Gen. 92 (1939). An apparent exception occurred in B-124438, July 26, 1955, where a borrower listed on his credit application a prior loan with a branch of the same bank located 110 miles away, but failed to note that it was in default. The bank checked several local credit references and received favorable reports, but did not check with its branch. Since the bank had diligently checked the local references, the borrower cured the default on the prior loan, and FHA waived the bank's violation of regulations which prohibited accepting a loan when a prior loan was in default, GAO concluded that the bank could be reimbursed for its losses on the second note.[18] For cases on the requirement to approve the credit statement, see 16 Comp. Gen. 958 (1937); A-71945, June 16,1937.

(4) Execution of the note

Another requirement of the regulations is that the note evidencing the indebtedness bear the genuine signature of the borrower, be valid and enforceable against the borrower, and be complete and regular on its face. 24 C.F.R. § 201,12 (1991). In a number of cases where either signatures were forged or terms of the note were altered-potentially making the note ineligible for insurance under the regulations—GAO has allowed claims by a lender for reimbursement based on the lender's apparent good faith and the previously discussed authority to waive regulatory requirements. B-127167, December 17, 1968 (forged signature); B-127167, December 5,1957 (false representation as to age); B-130955, May 2, 1957 (alteration of amount); B-127167, April 10, 1956 (forged signature). Where HUD declines to exercise its waiver authority, it may treat the note as ineligible for insurance. United States v. deVallet, 152 F. Supp. 313 (D. Mass. 1957). "The government had the right to make such limitations on its insurance undertaking as it saw fit," Id. at 315.

One court has held that the validity/regularity requirement applies "not at the point at which a bank submits its claim, but at the point at which the loan itself is being arranged." Guardian Federal Savings and Loan Association v. Harris, 441 F. Supp. 789,791 (D.D.C. 1977). While this seems clear enough with respect to items such as the validity of the signature and the "regularity" of the note, subsequent events may affect the enforceability of a note, a situation implicitly

[18]The same facts in today's computerized environment could well produce a different result.

recognized in the Harris case. In B-127483, April 26, 1956, it was held that the enforceability requirement was not affected by a mistrial in a suit brought by the lender resulting in a dismissal without prejudice. In 37 Comp. Gen. 857 (1958), GAO held that a lender could be reimbursed where the note had become unenforceable due to the passage of time notwithstanding the lender's diligent collection efforts. The result would at least arguably be different if a note became unenforceable through the fault or neglect of the lender.

(5) Reporting requirement

The four requirements discussed thus far relate to the eligibility of a loan for insurance from its inception. This one is different because the loan itself is eligible but the lender's failure to comply may result in the loss of insurability. Program regulations require lenders to report loans to HUD on a prescribed form within 31 days from the date of the note or the date the note was purchased. 24 C.F.R. § 201.30(a) (1991). HUD then accepts the loan for insurance or rejects it. The reporting requirement also applies to refinancing loans. Id.

Under present regulations, HUD has discretion to accept a late report as long as the loan is not in default. Id. § 201.30(b). Once the loan has gone into default, that discretion-no longer exists and it is too late to establish coverage. An illustrative case is B-194822, September 24, 1980. A bank inadvertently failed to report a property improvement loan to HUD. More than a year later, after the loan was in default, the bank submitted its report along with its claim for indemnification. Concluding that the loan was never insured, HUD denied the claim, and GAO agreed. The fact that HUD had inadvertently billed the bank for the required premiums, which the bank paid, was not enough to establish coverage. Of course, refund of the premiums was appropriate.

Prior to 1968, the regulations did not limit HUD's discretion, and a late report could be accepted even after default. Cases addressing the exercise of discretion under this version of the regulations are B-165239, October 4, 1968, and B-153971, June 17, 1964.

(6) Payment of premiums

The statute requires that HUD charge the financial institution a premium for the insurance. 12 U.S.C. s 1703(f). The premium is a prerequisite to insurability. Id. § 1703(b)(5). This is closely related to

the reporting requirement discussed above in that it is the report that triggers HUD's billing of the bank. The sequence is: (1) bank reports loan to HUD on manifest form; (2) HUD includes the loan on its monthly statement to the bank; (3) upon receipt of monthly statement, bank pays premium to HUD; (4) when HUD receives the premium, loan achieves insured status,

Subsection 1703(f) further requires that the premium charge "shall be payable in advance by the financial institution." Thus, advance payment of the premium is necessary for the loan to be eligible for insurance, at least where nonpayment is solely the fault of the bank. B-172965, July 16, 1971 (loan not covered where bank failed to report the loan and was thus never billed by HUD). See also B-194822, September 24, 1980 (no authority to accept premiums after default). For loans with a maturity in excess of 25 months, the insurance charge is payable in annual installments. 24 C.F.R. § 201.31(b)(2) (1991).

In 55 Comp. Gen. 891 (1976), the bank claimed that it had reported the loan to HUD. HUD, however, had no record of the report and consequently had neither requested nor received any premium payments from the bank prior to default. Apart from the fact that the advance payment requirement appears in a federal statute, the bank had actual notice that a loan is not insured until it appears on the monthly statement and the premium is paid. Adequate review of the monthly statements would have revealed that the particular loan was not listed and that therefore either HUD never received the report or failed to acknowledge it, Since it is the bank's responsibility to assure payment of premiums in advance, its claim was denied. The decision once again reiterated that HUD's waiver authority does not apply to statutory requirements.

A related case, 55 Comp. Gen. 658 (1976), reaffirmed the proposition that timely payment of the insurance premiums is a prerequisite to continued insurance coverage. The decision also held that claims by a lending institution which is currently delinquent in its premium payments may be allowed if the borrower's default occurred prior to the delinquency. However, if the lending institution was delinquent before the default occurred or became imminent, its claim may not be allowed.

The decision in 55 Comp. Gen. 658 was expanded (and modified with respect to matters not relevant here) in 56 Comp. Gen. 279 (1977), holding that timely payment of insurance premiums under 12 U.S.C. § 1703 is a continuing obligation of the lender and cannot be voluntarily terminated by the lender before the end of the term of the underlying loan. Unpaid insurance premiums constitute a debt presently due and payable by the lender to the United States. Therefore, HUD may offset delinquent premiums against insurance claims otherwise payable to the lender. However, estimated future premiums may not be offset against currently payable claims because they are not certain in amount. (Under the program regulations, the premium may be abated after an insurance claim has been filed or if the loan is paid in full prior to maturity. 24 C.F.R. § 201.31(e).)

c. Small Business Administration Business Loan Program

(1) Payment of guarantee fee

Like the National Housing Act insurance programs, a loan guarantee under section 7(a) of the Small Business Act is not free to the lender. The Small Business Administration is required to charge a guarantee fee, based on a percentage of the amount guaranteed, on most loans guaranteed under 15 U.S.C. § 636(a). Id. § 636(a) (18). The fee is payable by the participating lending institution, but maybe passed through to the borrower. Id. SBA's implementing regulations are found at 13 C.F.R. § 120.104-1 (1991).

For many years prior to the enactment of 15 U.S.C. § 636(a)(18) in 1986 (Pub. L. No. 99-272, $18007, 100 Stat. 82, 366), SBA charged a guarantee fee under the authority of its program regulations and guarantee agreement. Thus, pre-1986 GAO decisions dealing with section 7(a) fees must be regarded as modified to the extent they were addressing a nonstatutory requirement. They, however, along with elements of the program regulations which pre-date the 1986 legislation, establish the proposition that an agency may charge a guarantee fee without specific statutory authority as long as it is not prohibited, and outline the general parameters of a nonstatutory fee requirement.

As with the Housing Act fees, a fundamental issue is the effect of nonpayment or late payment. Unlike the Housing Act, the SBA provision does not require that the fees be paid in advance. Thus, by itself, 15 U.S.C. § 636(a)(18) neither makes payment of the fee an essential condition of guarantee eligibility, nor does it prohibit such

treatment. Under SBA's regulations, the fee is payable when the lender applies for a guarantee for loans with maturities of 12 months or less, and within 90 days after SBA's approval for loans with maturities greater than 12 months. 13 C.F.R. § 120.104-1(b). Absent statutory direction one way or the other, the effect of missing these deadlines is a matter within SEA's discretion to establish by regulation or terms of the guarantee agreement.

At onetime, SBA's guarantee agreement expressly provided that a loan is not guaranteed until the fee has been paid. Under this provision, payment of the fee was a condition precedent to coverage. SBA had the discretion to accept late payment provided the loan was not in default, but the loan was not protected by the guarantee until the fee was paid. B-181432, November 12, 1975; B-181432, March 13, 1975. In cases where the fee remained unpaid at the time the borrower defaulted, claims by lenders were consistently denied in the face of arguments such as estoppel (B-181432, May 21, 1979, and B-181432, October 20, 1978), "constructive payment" (B-181432, July 7, 1978), or inexperience on the part of bank personnel (B-181432, August 15, 1977). Since the requirement was explicitly stated in the guarantee agreement, virtually all of these cases reiterated the proposition that no government official may give away the government's contractual rights without either statutory authority or adequate legal consideration. The courts reached the same result. See Union Nat'l Bank of Chicago v. Weaver, 604 F.2d 543 (7th Cir. 1979); Union State Bank v. Weaver, 526 F. Supp. 29 (S. D.N.Y. 1981).

Under SBA's current regulations, if the fee is not paid within the specified time period, SBA will send the lender a written notice. "The guarantee shall be subject to termination if SBA does not receive the fee within the time period stated in the notice." 13 C.F.R. § 120.104-1(b). Implicit in this language is the premise that the guarantee will be regarded as in effect until SBA terminates it.

A 19$3 decision considered similar issues under a different SBA program, the Surety Bond Guarantee Program established by 15 U.S.C. § 694a. Since nothing in the legislation or implementing regulations made payment of the guarantee fee a condition precedent to the existence of the guarantee, and since the surety bond guarantee agreement contained no provision comparable to the provision then being used in the business loan guarantee agreement, the decision concluded that nonpayment of the fee prior to default would not void

SBA's obligation to honor the guarantee, although SBA should deduct the unpaid fee from the surety's claim. B-206893, March 18, 1983.

SBA has the discretion to reinstate a guarantee which has been terminated for nonpayment of the fee. However, SBA will not reinstate a guarantee once the loan goes into default unless the borrower "cures" the default-by bringing the loan into a fully paid and current status-within 60 days. 13 C.F.R. § 120.104-1(d); B-181432, April 5, 1979.

A 1979 case considered the effect of another provision in the guarantee agreement. A bank, conceding that it had not paid the guarantee fee prior to default on the loan as originally written, argued that it had effectively modified the agreement by granting the borrower additional time to begin repayment. However, the guarantee agreement explicitly required SBA's prior written approval of any change in the terms of the loan, which the bank had neither requested nor received. The modification was therefore not legally effective as against SBA. B-193134, July 27, 1979.

The issue in 58 Comp. Gen. 693 (1979) was the effect of a refinancing loan. In view of SBA's discretion to accept refinancing, GAO concluded that the effect of a bank's failure to timely pay the fee on the original loan was terminated when the original loan was repaid by the refinancing loan. Thus, the fact that the guarantee on the original loan may have been extinguished will not necessarily defeat an otherwise valid guarantee on a subsequent refinancing loan.

Cases involving late payment or nonpayment of the guarantee fee may be useful in analyzing the treatment and consequences of other terms and conditions of the guarantee agreement, but should not be blindly applied. For example, the court in Eastern Illinois Trust& Savings Bank v. Sanders, 826 F.2d 615 (7th Cir. 1987), drew a distinction between provisions expressly declared to be conditions precedent to SBA's obligation, such as the fee provision, and those which are not so declared. If a lender violates a provision in the latter category, the issue becomes "whether the violation was a material breach of the agreement, or rather whether [the lender] substantially complied with the agreement." Id. at 616. The lender's violation in the cited case, making "side loans" to a borrower, was found not to constitute a material breach and therefore did not justify repudiation of SBA's guarantee. Byway of contrast, a lender who violates a provision in the

"condition precedent" category cannot enforce the guarantee, and you never get to the material breach vs. substantial compliance analysis. See, e.g., First Nat'l Bank of Louisa, Kentucky v. United States, 6 Cl. Ct. 241 (1984).

(2) Notice of default

Another type of provision an agency may include in its program regulations is a requirement that the lender notify the agency in writing within a specified time period after a default occurs. SBA's regulations included such a requirement for many years. See 13 C.F.R. §122.10(a) (1980). The provision was dropped in a 1985 revision of the regulations. Under current regulations, SBA's obligation under a guarantee is extinguished if the lender fails to demand purchase of the unpaid guaranteed portion within one year after maturity of the note. 13 C.F.R. §120.202-5(e) (1991).

Pre-1985 decisions on the notice requirement are no longer applicable to SBA under the current regulations. Nevertheless, we briefly note a few of them because they illustrate the scope of an agency's authority to implement a guarantee program by regulation and may have relevance by analogy to similar requirements in other programs, Since the requirement itself is a creature of agency regulations, the agency has discretion to determine the consequences of noncompliance, ranging from an interest penalty (B-181432, September 4, 1979) to termination of the guarantee commitment (B-201388, September 23, 1981). The agency may also make the consequences contingent upon the extent to which noncompliance prejudices the interests of the government. See B-187945, March 22, 1977. While the basic requirement may not be waived except to the extent permissible under the regulations (see B-18 1432, February 19, 1976), the particular form of notice, a matter of procedure, is subject to waiver. B-188741, January 25, 1978 (oral notice accepted and acknowledged by agency held to be substantial compliance). See also B-181432 -O. M., February 19, 1976 (agency may waive requirement in guarantee agreement that lender provide it with a copy of the executed note and settlement sheet).[19]

[19]For a detailed discussion of waiver of agency regulations in the Context Of Commodity Credit Corporation export assistance guarantees, see B-208610, September 1, 1983.

D. Rights and Obligations of Government Upon Default

1. Nature of the Government's Obligation

When a government agency guarantees a loan, it is promising to indemnify someone in case of default. The "someone" includes both the lending institution that originated the loan and subsequent purchasers of the guaranteed portion of the loan. The default results from the borrower's failure to make payment when due or other breach of a material covenant of the loan. In the simple situation, a borrower borrows money from a lender. The government guarantees the loan, with the commitments of the lender and the government usually reduced to writing in the form of a guarantee agreement. If the borrower defaults on his or her payments, the lender looks to the government to pay on the guarantee.

In some instances, Congress has explicitly provided in the program legislation that the guarantee will be backed by the "full faith and credit" of the United States. Examples are 12 U.S.C. § 635k (guarantees and insurance issued by the Export-Import Bank), 15 U.S.C. § 683(c) (Small Business Investment Act of 1958), and 20 U.S.C. §1075(b)(4) (Robert T. Stafford Student Loan Program) .[20] Language of this type has been held to be "the highest assurance the Government can give, its plighted faith." Perry v. United States, 294 Us. 330,351 (1935).

There is a long line of opinions of the Attorney General addressing the effect of statutory language pledging the "faith" or "credit" of the United States, or the absence of such language. While the opinions are not limited to loan guarantee commitments, almost all of the cases arose under loan guarantee programs. This is understandable because (1) lenders are being asked to extend credit to a somewhat riskier universe of borrowers which they most likely would not accommodate without the guarantee; and (2) at least prior to the Federal Credit

[20] This and similar language has, and is intended to have, connotations of constitutional significance, although the words "full faith and credit" appear in the Constitution only once, in the requirement that each state recognize the laws, records, and judicial proceedings of other states (Art. IV, sec. 1). In addition, Art. I, sec. 8, cl. 2 empowers the Congress to borrow money "on the credit of the United States."

Reform Act, the government's commitment was not backed by enacted budget authority. To encourage lender participation in a variety of programs, the Attorney General was asked, in effect, "Does the government really mean it?"

Perhaps the leading case is 41 Op. Att'y Gen. 363 (1958), dealing with ship mortgage and loan insurance under the Merchant Marine Act of 1936. The opinion makes several important points. First, what does the language mean? It means that the government's obligation is to be considered on the same footing as the interest-bearing obligations of the United States such as Treasury bills, notes, and bonds. Id. at 366 (citing 41 Op. Att'y Gen. 138 (1953)).

Second and more important, what is the language's practical significance? None, answered the Attorney General. Although recognizing that Congress can establish such distinctions, the Attorney General stated that, in the absence of such congressional action, there is no "order of solemnity of valid general obligations of the United States," nor does an obligation with the statutory faith and/or credit language have any legal priority over a valid general obligation of the United States without the language. 41 Op. Att'y Gen. at 369.

Finally, the Attorney General addressed the lack of advance budget authority:

> "If ., . the existence of an appropriation is not a condition of or limitation on the authority of an officer to contract on behalf of the United States, the need for appropriations to meet an obligation incurred under the contract does not affect the existence or validity of the obligation."

Id. at 370. The following year, the Attorney General made the same points with respect to Interstate Commerce Commission loan guarantees to rail carriers. 41 Op. Att'y Gen. 403 (1959). After emphasizing that the validity of the guarantee "is not affected by the absence from the act of any language expressly pledging the faith or credit of the United States," the opinion states that "It is enough to create an obligation of the United States if an agency or officer is

validly authorized to incur such an obligation on its behalf and validly exercises that power. " Id. at 405.[21]

Thus, reading all of the opinions together, we may state that a loan guarantee is a valid obligation of the United States the same as any other valid obligation, regardless of the presence or absence of full faith and credit language and regardless of the presence or absence of advance budget authority, provided (1) the program statute is constitutional; (2) Congress has not disclaimed liability at the time or before the commitment is made; (3) the guarantee is made by a federal agency or official with the legal authority to do so; and (4) the guarantee complies with applicable statutory and regulatory requirements.

In an opinion concerning guarantees issued by the former Federal Savings and Loan Insurance Corporation incident to its resolution of failed or failing savings and loan institutions, the Comptroller General expressly adopted the criteria and analysis of the Attorney General opinions. 68 Comp. Gen. 14 (1988).

2. Scope of the Government's Guarantee

As noted earlier, a loan guarantee statute will typically specify the permissible purpose(s) of the loans to be guaranteed, establish eligibility requirements, and give the administering agency considerable discretion to determine the terms and conditions of the guarantee. Subject to the terms of the program legislation, there is also an element of discretion in determining the permissible scope of a guarantee, that is, the types and degree of risk to which the agency may expose itself. This section presents a few issues GAO has considered regarding the limits of that discretion.

As with any other payment situation, the government is not expected to close its eyes to indications of fraud or misrepresentation. For example, an agency should not make payment to a lender where it has knowledge of the possibility of fraud, negligence, or misrepresentation on the part of the lender. Making payment in the

[21] Other opinions in this family are 42 Op. Att'y Gen. 327 (1966); 42 Op. Att'y Gen. 323 (1966); 42 OP. Att'y Gen. 21 (1961); 41 Op. Att'y Gen. 424 (1959); 6 Op. Off. Legal Counsel 262 (1982). Since the opinions all said basically the same thing and seemed to arise under every program in sight, the Attorney General stopped issuing formal opinions on routine full faith and credit questions in this context in 1973. 6 Op. Off. Legal Counsel 262, 262 n.2.

face of such knowledge exposes the certifying officer to potential liability. 51 Comp. Gen. 474 (1972); B-174861, February 23, 1972. In these two cases, however, GAO advised that the Small Business Administration could, upon default of the borrower, purchase the guaranteed portion of the loan from an innocent holder who had purchased it in the secondary market and who had no knowledge of the possible misconduct by the originating lender. Payment to the innocent holder in these circumstances would not waive any of SBA's rights against the original lender, and, as a practical matter, would avoid a result adverse to the holder that could seriously jeopardize the secondary market. Thus, paying the innocent holder is an acceptable level of risk whereas paying the suspected wrongdoer is not.

It follows that there is no objection to honoring the claim of an innocent lender who is the victim of fraud by the borrower. B-167329, October 6, 1969.

Similarly, GAO held in 17 Comp. Gen. 604 (1938) that the Federal Housing Administration was not liable to reimburse a lender bank for a loss sustained as a result of a payment made, on the basis of a forged authorization, to an individual other than a bona fide borrower. This situation was distinguished from a case where a lender bank, in the exercise of due care, suffered a loss as a result of a forged note. A-94717-O. M., August 12, 1938. The bank in 17 Comp. Gen. 604 already possessed a validly signed note but suffered the loss by accepting a forged authorization for payment. Comparison of the authorization with the note would have disclosed the forgery.

A 1974 decision expanded somewhat on 51 Comp. Gen. 474. GAO determined in B-140673, December 3, 1974, that the SBA has sufficiently broad statutory authority to repurchase the guaranteed portion of a loan from an innocent secondary-market holder where the borrower is not in default but the primary lender negligently or unlawfully withholds payments. (Under the arrangement in question, the primary lender was to continue servicing the loan and remit payments, minus a servicing fee, to the holder.) This decision clearly enlarged the scope of SBA's guarantee since the "triggering event" could be something other than a default by the borrower in repaying the loan. However, the holding in that case was for the relatively limited purpose of allowing SBA to avoid the security registration requirements of the Securities Act of 1933. The Securities and Exchange Commission had determined that these requirements would

apply to SBA-guaranteed loans that were resold in the secondary market, unless SBA's guarantee was absolute and fully protected the purchaser of the guaranteed portion in all circumstances, including instances where the lender did not forward all payments received from the borrower.

A few years later, B-181432, August 11, 1978, explored what are perhaps the outer limits of the "risk discretion" recognized in B-140673. SBA proposed to contract with a private entity to serve as the centralized fiscal agent in the secondary market for SBA guaranteed loans. The fiscal agent would have responsibility for receiving payments from borrowers, remitting these payments to the holders, and certifying the amount of the outstanding balance each time a guaranteed loan was transferred. SBA further proposed to unconditionally guarantee all such actions and representations of the fiscal agent to the holder of the guaranteed portion of a loan. GAO agreed that SBA could contract with a fiscal agent and, consistent with B-1 40673, guarantee a holder against the agent's failure to properly forward the borrower's loan payments. However, to unconditionally guarantee holders against certification errors by the fiscal agent would significantly enlarge SBA's existing guarantee responsibility, would subject SBA to substantially new risks, and would therefore require additional legislative authority. The increased risk would include new types of events that could trigger SBA's obligation to purchase a guaranteed loan, as well as the maximum amount of SBA's liability (should the fiscal agent erroneously certify the outstanding balance of a loan to be larger than it actually was).

3. Amount of Government's Liability

A program statute mayor may not provide guidance on determining the amount the government is obligated to pay under a guarantee or the manner in which a loss is to be computed. If it does not, the agency's discretion again comes into play. As long as they are consistent with whatever statutory guidance does exist, the agency's regulations will generally be controlling.

For example, the computation of claims under Title I of the National Housing Act is prescribed by regulation. See 24 C.F.R. $201.55 (1991). In very simplified form, the claim is a specified percentage of the sum of several elements: the unpaid amount of the loan (subject to certain reductions), plus accrued interest, plus uncollected court costs, plus attorney's fees actually paid, plus certain recording

expenses. Claims by lenders using unauthorized computations have been disallowed. E.g., B-133924, December 4, 1957,

In another case involving the Title I loan program, a lender claimed an amount representing partial reimbursement of attorney's fees incurred in collecting on a defaulted note. Although the borrower's obligation on the note was discharged and the note did not contain a stipulation for attorney's fees in the event of default (which would have been ineffective under state law), payment of the claim was proper since it was specifically provided for in the regulations. B-163029, February 16, 1968.

Validly issued program regulations are controlling even though applying them in a particular case may produce an anomalous result to the lender's advantage, at least where the lender has fully complied. For example, regulations governing defaulted Title I mobile home loans provide that reimbursement is computed by deducting from the unpaid amount of the loan either the actual sales price upon repossession or the appraised value of the mobile home, whichever is greater. GAO has found this formula to be within HUD's statutory authority. 71 Comp. Gen. — (B-245138, July 7, 1992). At one time, the regulations also prohibited the filing of a claim until after default, repossession, and sale of the mobile home. These regulations occasionally produced a situation in which a particular model could not be found in current rating publications (such as the so-called "blue book") and the mobile home was no longer available for appraisal by HUD because, in compliance with the regulations, it had already been sold. Since the impossibility of appraisal was due to the regulations and was through no fault of the lender, the Comptroller General held that the actual sales price could be used in computing the reimbursement, as long as it was administratively determined to be reasonable. 55 Comp. Gen. 151 (1975); B-184016, September 16, 1975. The solution, of course, was to amend the regulations.

Several early decisions involved the language in 12 U.S.C. §1703(a) which authorizes HUD to insure lending institutions against "losses which they may sustain" in making Title I home improvement loans or other advances of credit, If the loan does not either provide for the automatic acceleration of maturity upon default or give the lender the option to accelerate which the lender in fact exercises, the government cannot pay the lender the full unpaid balance of an unmatured loan because payments not yet due do not represent a loss

actually sustained by the lending institution. A-74701, May 22, 1936. While this result was consistent with the statutory language, it was not practical from an administrative standpoint. It meant that HUD was limited to paying the lender the monthly installments as they became due, with what was termed "a corresponding annoyance and dissatisfaction to the insured institution with the program." Two later decisions effectively modified A-74701 and established that, if there is no acceleration provision (an event which would be unlikely today), or if exercising an acceleration option would be undesirable because of state law, HUD can nevertheless reimburse a lending institution for the entire unpaid balance of the loan if it is clear that the entire unpaid balance will be a claim of the lending institution against the government and if the lender assigns the note or other evidence of indebtedness to the government. 16 Comp. Gen. 723 (1937); 16 Comp. Gen. 336 (1936).

4. Liability of the Borrower

When the government guarantees a loan and the borrower defaults, the lender is not required to make special efforts toward collection. Rather, the lender may fall back on the government's guarantee and leave the entire responsibility for collection to the government. See, e.g., 16 Comp. Gen. 336 (1936); B-134628, January 15,1958. Naturally, it is invariably to the lender's advantage to do just that. Payment by the government, however, does not mean that the borrower is off the hook. Unless the program legislation provides otherwise, the government becomes subrogated to the rights of the lender, and the borrower is indebted to the government for the amount it has paid out. The government is not required to collect more than the amount it has actually paid out to the lender, plus interest and collection costs to the extent authorized. See 15 Comp. Gen. 256 (1935). A variety of issues relating to borrower liability can be illustrated by an examination of the Veterans' Home Loan Guarantee Program.

a. Veterans' Home Loan Guarantee Program

Title III of the Servicemen's Readjustment Act of 1944, as amended and codified, 38 U.S.C. §§ 3701—3751 (Supp. III 1991),[22] authorizes the Department of Veterans Affairs (the former Veterans Administration) to guarantee loans to enable veterans to purchase or

[22] Section numbers for 38 U.S.C. ch. 37 were redesignated by Pub. L. No. 102-83>$ 5, 105 Stat. 378,406 (1991).

construct homes and for other specified purposes. This is the well-known "G.I. loan, " The guarantee is an entitlement in the sense that a loan meeting the statutory requirements and made for one of the statutory purposes is "automatically guaranteed." Id. § 3710(a). For certain loans closed after January 1, 1990, the liability of the veteran-borrower to the government was considerably restricted by the Veterans Home Loan Indemnity and Restructuring Act of 1989, Pub. L. No. 101-237, Title III, 103 Stat. 2062,2069 (1989). A description of the "old" rules is nevertheless useful to understand what has and has not been changed, and because loans under the old and new programs will exist side-by-side for many years into the future.[23]

(1) Loans closed prior to 1990

Upon proper payment of a guarantee, the VA acquires both the right of subrogation and an independent right of indemnity against the defaulting veteran. United States v. Shimer, 367 U.S. 374 (1961); Vail v. Derwinski, 946 F.2d 589 (8th Cir. 1991); McKnight v. United States, 259 F.2d 540 (9th Cir. 1958). As the Supreme Court noted in Shimer, a contrary result would convert the guarantee into a grant. 367 U.S. at 387. The right of indemnity is reinforced by the guarantee agreement and by a regulation in effect since the early days of the program which provides that any amount paid out by the VA under a guarantee by reason of default "shall constitute a debt owing to the United States by such veteran." 38 C.F.R. § 36.4323(e) (1991).

In the simple situation, the veteran defaults, the bank forecloses, the VA pays the bank under the guarantee and then proceeds to attempt recovery from the defaulting veteran. E.g., McKnight; B-104273, August 20, 1951.

Sale of the property by the veteran does not automatically exonerate the veteran from liability. Where a veteran who bought a home under a VA-guaranteed loan sells the property to a purchaser who assumes the mortgage and subsequently defaults, the veteran may still be liable to the government for the amount VA is required to pay under the guarantee. B-155317, October 21, 1964; B-131120, July 26, 1957; B-131210, April 9, 1957. This result applies unless the transaction

[23]For a comprehensive discussion of the program, see Ingold, The Department of Veterans' Affairs Home Loan Guaranty Program: Friend or Foe?, 132 Mil. L. Rev. 231 (1991).

amounts to a novation, that is, unless the mortgagee releases the original mortgagor and extinguishes the old debt. B-108528, December 3, 1952. Breach by the lender of an agreement to notify the veteran (original borrower) if the subsequent purchaser defaults does not affect the veteran's liability to the United States. B-154496, July 9, 1964.

The potential harshness of the result in many of these cases is largely mitigated through statutory release and waiver provisions. When a veteran disposes of residential property securing a guaranteed loan, the veteran may be released at the time of the sale from all further liability to the VA resulting from the loan, including default by the transferee or subsequent purchaser, if (1) the loan is current, (2) the purchaser is obligated by contract to assume the full liability and responsibility of the veteran under the loan, and (3) the purchaser qualifies from a credit standpoint, that is, if the purchaser would qualify for a guarantee if he or she were an eligible veteran. For loan commitments made before March 1, 1988, the veteran must apply to the VA for the release, but issuance of the release is mandatory if the statutory conditions are met. 38 U.S.C. § 3713(a). If the veteran fails to obtain a release at the time of the sale and a default subsequently occurs, the VA may issue the release retroactively upon determining that it would have issued the release had it been timely requested. Id. § 3713(b). For loan commitments on or after March 1,1988, the release is issued by the holder of the loan upon receipt of written notification by the veteran, subject to the same conditions and subject to the veteran's right to appeal an adverse determination to the VA. Sale of the property without notifying the holder may result in acceleration of the loan. Id. $3714.

In addition, the VA is required to waive a veteran's indebtedness upon determining that collection would be against equity and good conscience, and that there is no indication of fraud, misrepresentation, or bad faith on the part of any interested person. Waiver must be requested within one year from receipt of the notification of indebtedness. 38 U.S.C. § 5302(b) and (c), as amended by Pub. L. No. 102-54, § 5, 105 Stat. 267, 268 (1991).[24] This is a "mandatory" waiver statute, imposing upon the VA a duty to actually exercise its discretion once waiver has been requested. See

[24] Section numbers for 38 U.S.C. ch. 53 were redesignated by Pub. L. No. 102-40, § 402(b), 105 Stat. 187,238 (1991).

Beauchesne v. Nimmo, 562 F. Supp. 250 (D. Corm. 1983) (discussing mandatory nature of 38 U.S.C. § 5302(a) dealing with waiver of benefit overpayments).

As with many waiver statutes, 38 U.S.C. § 5302 eliminates the potential liability of certifying and disbursing officers with respect to any amounts waived. "Certifying officer" in this context means the authorized certifying officer of the VA who certified the payment in question, and has no reference to any official of any private institution involved in the transaction. Colorado v. Veterans Administration, 430 F. Supp. 551,561 (D. Colo. 1977), aff'd, 602 F.2d 926 (10th Cir. 1979), cert. denied, 444 U.S. 1014.

Adverse waiver determinations may be appealed to the Board of Veterans Appeals established by 38 U.S.C. $7101.38 C.F.R. $19.2. If waiver is granted, amounts previously paid maybe refunded. Id. $1.967. GAO reviewed these regulations when they were first issued and agreed that they were within the VA's authority. B-1 58337, March 11, 1966.

Absent either release or waiver, the VA may pursue recovery against the veteran. See, e.g., Davis v. National Homes Acceptance-Co-w., 523 F. Supp. 477 (N.D. Ala. 1981); B-188814, March 8, 1978; B-172672, June 22, 1971. In B-188814, for example, the veteran had failed to obtain a release, would not have been eligible for it anyway, and VA refused to waive the indebtedness. Therefore, the veteran was held liable even though the purchaser who subsequently defaulted had assured him that he would no longer be liable to VA.

Most of the cases cited thus far concern the liability of the original borrower where a subsequent purchaser defaults. The purchaser of property for which VA has guaranteed a loan, whether or not the purchaser is a veteran, may also become liable to VA for amounts VA is required to pay out upon default. For example, in B-141888, July 21, 1960, a veteran purchased a home, obtained a VA guarantee, and later sold the home to a non-veteran who assumed the mortgage. The non-veteran purchaser defaulted. The lender foreclosed and obtained a deficiency judgment against both the veteran and the non-veteran, which VA paid. VA waived the veteran's indebtedness, but was still entitled to collect from the defaulting purchaser. See also B-155932, February 23, 1971; B-155932, October 13, 1970 (same case).

One of the most contested issues under the program has been the availability of state law as a defense to a VA claim. For example, it is not uncommon for states to prohibit, or impose various restrictions on, lenders' obtaining deficiency judgments against defaulting purchasers after a foreclosure sale. Since VA's rights under subrogation are limited to the rights of lenders, these statutes would limit VA'S right to obtain deficiency judgments under a subrogation theory. However, VA'S regulations have been held to "create a uniform system" for administering the guarantee program, a system which displaces state law. United States v. Shimer, 367 U.S. at 377. These regulations, as noted earlier, include a provision giving the VA an independent right of indemnity. Thus, to avoid the possibility of being hampered by state law, VA has generally proceeded under its independent right of indemnity rather than under a subrogation theory. E.g., B-126500, February 3, 1956; B-124724, December 21, 1955.

In one group of cases, the right of indemnity was held to prevail over state laws which flatly prohibited VA from obtaining deficiency judgments through subrogation. Jones v. Turnage, 699 F. Supp. 795 (N.D. Cal. 1988), aff'd mem., 914 F.2d 1496 (9th Cir. 1990); cert. denied, 111 S. Ct. 1309; United States v. Rossi, 342 F.2d 505 (9th Cir. 1965); B-174343, November 17, 1971; B-143844, November 15, 1960; B-124724, October 3, 1955. Other cases applied the same approach to dismiss other aspects of state deficiency laws. E.g., B-173007, June 29, 1971; B-162193, September 1, 1967; B-122929, June 24, 1955.

Several more recent cases have dealt with state statutes that do not flatly prohibit VA from obtaining a deficiency judgment through subrogation, and have reached differing results. In Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir. 1990), a Washington state statute would have allowed the lender to obtain a deficiency judgment if judicial foreclosure procedures were used. However, VA had instructed the lender to use a faster and less expensive nonjudicial foreclosure procedure. The statute authorizing the nonjudicial procedure prohibited obtaining a deficiency judgment against the borrower. Id. at 1363. The court acknowledged that cases like McKnight, Jones (which the same court affirmed 3 months after it decided Whitehead), and Rossi correctly held that VA has an independent right of indemnity when state law flatly prohibits deficiency judgments. Id. at 1368–69.

However, the court distinguished the Washington statute because it did not flatly prohibit deficiency judgments; they were prohibited only when the nonjudicial foreclosure procedures were used. The court quoted language from Shimer to the effect that the VA regulatory scheme did not displace all state law but only inconsistent state law. Id. at 1367. The court then held that since the Washington statute allowed VA a means to obtain a deficiency judgment, it was not inconsistent with the regulatory scheme and therefore not displaced. Id. at 1369. Thus, according to the court, the state law in question could prohibit VA from seeking a deficiency judgment through its indemnity rights, and did so in this case because VA's inability to obtain a deficiency judgment resulted from its own choice of remedy under that state law. A case following Whitehead is Carter v. Derwinski, 758 F. Supp. 603 (D. Idaho 1991).

The analysis in Whitehead was criticized in Vail v. Derwinski, 946 F.2d 589 (8th Cir. 1991), involving similar facts under a similar Minnesota statute. Disagreeing with Whitehead, the court held that VA did not forfeit its independent right of indemnity merely because it declined to exercise a means to obtain a deficiency judgment through subrogation. The VA's right of indemnity, said the court, derives from its direct relationship with the borrower of a guaranteed loan. Id. at 592. As such, it is not defeated by a state statute which limits the lender's ability to pursue the borrower. A case that also disagrees with some of the reasoning in Whitehead, but which reached the same result, is United States v. Davis, 756 F. Supp. 1162 (E.D. Wis. 1991).

The defense of minority has also been raised on occasion. State law generally provides that a contract entered into by a minor is voidable at the minor's option. Several states have statutes which expressly make the defense of infancy inapplicable to contracts under the Servicemen's Readjustment Act, and the few cases GAO has considered have involved statutes of this type. See B-126500, February 3, 1956; B-124750, October 3, 1955; B-105429, December 11, 1951. In addition, the United States has sovereign immunity from defenses arising under state statutes of limitations unless expressly waived. United States v. Summerlin, 310 U.S. 414 (1940) (FHA claim under National Housing Act); B-134523, March 19, 1958 (Summerlin applied to VA claim).

Another provision of the program legislation makes the "financial transactions" of the VA "incident to, or arising out of" the guarantee

program "final and conclusive upon all officers of the Government." 38 U.S.C. § 3720(c). Thus, GAO will not review the amount of indebtedness determined by the VA. B-105655, October 10, 1951; B-105551, September 25, 1951. Similarly, apart from advising persons that the options exist, GAO will not review the VA'S exercise of its waiver and release authorities. B-216270, September 25, 1984; B-108528, October 6, 1952.

(2) Loans closed after January 1,1990

Under 38 U.S.C. 33729, the VA will charge the veteran a loan fee based on a percentage of the loan amount. The fee maybe included in the loan and paid from its proceeds. Payment of the loan fee is a prerequisite to the guarantee. Disabled veterans receiving compensation or their surviving spouses are exempt. Subsequent transferees assuming a loan are also charged a loan fee.

A veteran who pays the loan fee or is exempt from paying it—

> "shall have no liability to the Secretary with respect to the loan for any loss resulting from any default of such individual except in the case of fraud, misrepresentation, or bad faith by such individual in obtaining the loan or in connection with the loan default."

Id. § 3703(e)(1). This provision was added by the Veterans Home Loan Indemnity and Restructuring Act of 1989. An explanatory statement on the final House-Senate compromise (there was no conference report) emphasizes that "bad faith" is intended to include abandonment of a mortgage by one with the financial ability to make the payments. 135 Cong. Rec. H 9113 (daily ed. November 20, 1989). The limited liability of 38 U.S.C. § 3703(e)(1) does not apply to persons assuming a loan, or to veterans who receive mobile home loans. Id. § 3703(e)(2). Apart from the limited liability of 38 U.S.C. § 3703(e), the VA'S right of subrogation is preserved. Id. § 3732(a)(1).

b. Debt Collection Procedures

Debt collection is governed by the Federal Claims Collection Act of 1966, the Debt Collection Act of 1982, and the Federal Claims Collection Standards. Authorities available to federal agencies in varying degrees include assessment of interest and penalties, offset, collection in installments, compromise, use of commercial collection agencies, and, if none of this works, referral to the Department of

Justice for suit. These authorities are all explored in detail in Chapter 13 and, as a general proposition, are the same for a debt arising from a loan guarantee as for any other debt. We note the topic here to emphasize one point–the governmentwide authorities do not apply to the extent an agency has its own debt collection authority, either agency-specific or program-specific. This maybe in the form of positive authority or restrictions. We turn again to the Department of Veterans Affairs for several illustrations.

The VA has the authority to compromise any claim arising from its guarantee or insurance programs, independent of the governmentwide compromise authority under the Federal Claims Collection Act. 38 U.S.C. §§ 3720(a)(3), (a)(4). Exercise of this authority is entirely up to the VA. See B-153726, May 4, 1964. See also 71 Comp. Gen. ___ (B-245138, July 7, 1992) (HUD); B-228857, February 22, 1988 (SBA). The HUD decision, B-245138, upheld HUD's policy of charging interest at the lower of the note rate or the Treasury "current value of funds" rate as an authorized exercise of HUD's compromise authority.

Subject to its own implementing regulations and procedures specified in the statute, the VA may offset debts arising from veterans' benefit programs against future payments under any law administered by the VA. 38 U.S.C. $5314. However, offset against a veteran or his or her surviving spouse by any other agency to collect a debt owed to the VA under a guarantee program is prohibited except with the written consent of the debtor or under a judicial determination. Id. § 3726. Under this legislation, for example, the Defense Department may not deduct the amount of indebtedness to VA from the pay of active duty or retired military personnel absent either consent or a court determination. (The statutory definition of veteran includes certain active duty personnel.) B-167880, January 28, 1970. This protection against setoff applies only where the veteran (debtor) has incurred the debt through use of his or her VA loan entitlement. Thus, setoff is not prohibited where a veteran, upon purchasing a home, assumes a VA loan in the ordinary course of the real estate transaction without involving his or her own loan entitlement. B-167880, December 2, 1969.

The VA also has independent statutory authority to assess interest and reasonable administrative costs on debts arising from its benefit programs, including debts arising from guarantee programs to the

extent not precluded by the terms of the loan instrument. 38 U.S.C. $5315. For debts within the scope of the statute, 38 U.S.C. § 5315, rather than 31 U.S.C. § 3717 (Federal Claims Collection Act), is the controlling provision. 66 Comp. Gen. 512 (1987).

If reasonable administrative collection efforts fail, the VA may use its own attorneys to sue the debtor, subject to the direction and supervision of the Attorney General. 38 U.S.C. $5316.

The VA legislation cited above deals with specific debt collection tools. An example of more general authority is 7 U.S.C. § 1981(b)(4) (Supp. III 1991), which authorizes the Farmers Home Administration to "compromise, adjust, reduce, or charge-off debts or claims," and, within certain limits, to release debtors, other than Housing Act debtors, "from personal liability with or without payment of any consideration at the time of the compromise, adjustment, reduction, or charge-off." Under this law, for example, the Farmers Home Administration is authorized to terminate the accrual of interest on the guaranteed portion of defaulted loans. 67 Comp. Gen. 471 (1988) (noting, however, that the agency had restricted its statutory discretion by its own regulations).

5. Collateral Protection

In administering a loan guarantee program, it may become desirable for an agency to make expenditures other than merely paying out on the guarantee. From a program or even economical standpoint, it may be desirable, for example, to make expenditures to protect and preserve the government's interest in the collateral, such as custodial care, insurance costs, or the purchase of prior liens. For purposes of this discussion, we use the term "collateral protection" to cover two types of expenditure–preservation of the collateral itself and protection of the government's interest in the collateral.

Whether or not such expenditures are proper is essentially a question of "purpose availability." The first step is to analyze the terms and intent of the agency's program authority to determine whether the agency's funds are available for the contemplated expenditure either expressly or by necessary implication. If this does not provide the answer, the next step is to apply the "necessary expense" doctrine.

An example of specific authority is 38 U.S.C. 53727, which authorizes the Department of Veterans Affairs to make expenditures to correct

structural defects in certain homes encumbered by a VA-guaranteed mortgage. The Department of Housing and Urban Development has similar authority to use funds available under Title I of the National Housing Act to correct structural defects in FHA-insured housing. 12 U.S.C. §1735b; B-114860-O. M., January 15, 1974. An example of somewhat less specific authority is another provision of the Housing Act, 12 U.S.C. §1713(k), which authorizes HUD "to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage." In 54 Comp. Gen. 1061 (1975), GAO agreed that this provision authorizes HUD to advance money from its insurance fund to make repairs to multifamily projects covered by insured mortgages assigned to HUD upon default., until either the default is cured or HUD acquires title to the property.

Absent specific authority, collateral protection expenditures may still be permissible under a "necessary expense" theory. As a general proposition, the authority to require collateral implies the authority to make reasonable expenditures to care for and preserve the collateral where administratively determined, to be necessary. 54 Comp. Gen. 1093 (1975).

The limits of the necessary expense approach are illustrated by B-1 70971, January 22, 1976, a case involving the now-defunct New Community Development Program. The Department of Housing and Urban Development questioned whether it could use the revolving fund established by the Urban Growth and New Community Development Act of 1970 to make two types of collateral protection expenditures: (1) expenditures to repair, maintain, and operate the security and (2) payments to senior lienholders. The expenditures were intended to advance program objectives by preventing deterioration of the security pending possible acquisition by HUD, or perhaps in some cases enable a developer to regain financial health and successfully continue with the project.

The Comptroller General reviewed the program legislation and legislative history and concluded that the proposed expenditures would constitute a new and major type of financial assistance entirely beyond the intended scope of the statute, and were not authorized except in cases where HUD had made a bona fide determination to acquire the security. A later decision, B-170971, July 9, 1976, discussed HUD's specific authority under the program legislation to

make collateral protection expenditures after it had acquired the security.

Where an agency acquires property through a loan or loan guarantee program it administers, it may not transfer the management and disposition of that property to another federal agency without specific statutory authority, nor may it effect such a transfer under the Economy Act, 31 U.S.C. $1535. B-156010-O.M., March 16, 1965 (concluding that VA could not transfer the management and disposition of acquired property to HUD without specific authority).

A similar type of payment is one designed to protect the government's interest in the transaction as opposed to maintaining the particular piece of property. Again, the question is one of purpose availability in light of the agency's statutory authority. Thus, where FHA had acquired a second mortgage on real property through payment of a loss to an insured financial institution under Title I of the National Housing Act, it could use Title I funds to redeem the property to protect its junior lien, under a right of redemption conferred by state law, if it determined that redemption was in the best interests of the government and necessary to carry out the provisions of Title I. 36 Comp. Gen. 697 (1957). See also 34 Comp. Gen. 47 (1954).

Collateral protection may take forms other than direct expenditures. For example, the Small Business Administration could subordinate a senior lien to enable a borrower to obtain necessary surety bonds upon an administrative determination that the action would be consistent with the statutory purposes and would improve the prospects for repayment of the loan. 42 Comp. Gen. 451 (1963). (Under the governing legislation, SBA had the discretion not to require security at all on loans sufficiently sound as to reasonably assure repayment.) Another 1963 case held that a statute authorizing the Maritime Administration to take necessary steps to protect or preserve collateral securing indebtedness authorized it to agree to reschedule payments under an insured ship mortgage to avert impending default. 43 Comp. Gen. 98 (1963).

In 63 Comp. Gen. 465 (1984), a borrower defaulted on a loan guaranteed by the SBA. SBA purchased the guaranteed portion of the loan from the lending bank and proceeded to place the loan in liquidation. However, a prior lienholder scheduled a foreclosure sale. SBA was unable to get a Treasury check in time to submit a protective

bid, and asked the lending bank to advance funds to purchase the property at the foreclosure sale, promising to reimburse the bank with interest. Obviously, a government agency does not normally have the authority to borrow money from a commercial bank to carry out its programs. Under the particular circumstances involved, however, GAO found that the transaction, including the commitment to pay interest, could be justified under SBA's broad authority[25] in 15 U.S.C. § 634(b)(7) to "take any and all actions" deemed necessary in liquidating or otherwise dealing with authorized loans or guarantees. The decision emphasized that it was nothing more than an interpretation of SBA's legal authority under the "unique circumstances of this case," and should not be regarded as establishing a "broad legal precedent." Id. at 469.

[25]The supreme Court has noted in another context that Congress has given the SBA "extraordinarily broad powers" to accomplish the objectives of the Small Business Act. SBA v. McClellan, 364 U.S. 446,447 (1960).

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