U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

*Washington, D.C. 20530*

November 26, 2002

**MEMORANDUM FOR ROSALYN J. RETTMAN**
**ASSOCIATE GENERAL COUNSEL FOR BUDGET**
**OFFICE OF MANAGEMENT AND BUDGET**

*Re: Operations of the Government National Mortgage Association in an Appropriations Lapse*

You have asked for our opinion whether, during a lapse in appropriations, the Government National Mortgage Association ("Ginnie Mae") could continue to incur obligations and so maintain its operations.[1] The Office of Management and Budget ("OMB") takes the view that these obligations would be necessary to meet an "emergenc[y] involving the safety of . . . property," 31 U.S.C. § 1342 (2000), and thus could be incurred under an exception to the Antideficiency Act, which ordinarily requires a government agency to shut down during an appropriations lapse. OMB Letter at 1. Here, the applicability of that exception largely depends on a prediction about what would happen to Ginnie Mae's obligations and, more broadly, to a complex financial market if Ginnie Mae's operations were to be interrupted. We believe that, on the facts as explained to us, OMB reasonably could make the prediction here on which the applicability of the exception would rest and thus could find the emergency exception to apply.

Ginnie Mae is a government corporation, located within the Department of Housing and Urban Development. 12 U.S.C. § 1717(a) (2000). To support a secondary mortgage market, it guarantees the timely payment of principal and interest on certain privately issued securities. These securities are backed by pools of mortgages that, in turn, are insured by the Federal Housing Administration, the Department of Veterans Affairs, and the Rural Housing Service. *See* GPO, Appendix, Budget of the United States Government Fiscal Year 2002 at 520 (2001); OMB Letter at 1. The secondary market supported by Ginnie Mae "enhances liquidity and improves pricing in the primary market for Government-insured mortgages, reducing the costs of home ownership nationwide for lower income homebuyers." *Id.* at 1.

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[1] Letter to Edward Whelan, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Rosalyn J. Rettman, Associate General Counsel for Budget, Office of Management and Budget (Oct. 8, 2002) ("OMB Letter").

As part of its functions, Ginnie Mae assures that payments of interest and principal are passed through to investors in a timely way. *Id.* at 1, 2. For example, it provides information about principal balances so that depositories and paying agents know how much to pay investors. *See* Memorandum for Francis S. Redburn, OMB, from Andrea E. Jacobson, OMB, *Re: Impact of shut-down on GNMA* (Nov. 14, 2002). The OMB Letter states that the interruption of this activity "could result in an immediate and significant market disruption leading to financial losses for investors and increased mortgage rates for Government-insured mortgages" and that "Ginnie Mae's continuous operation is essential for stability in about 10 percent of the overall mortgage market." OMB Letter at 2. Most significantly for our purposes, a delay in the pass-through of payments to investors, according to the OMB Letter, would "caus[e] a default on the full faith and credit guarantee of the Government to those investors." *Id.*

To pay the salaries of its own employees whose work assures the timely pass-through of interest and principal, Ginnie Mae receives an annual appropriation of approximately $9 million. *Id.* at 1. It also enters into contracts under which companies such as ACS Government Services and J.P. Morgan Chase process payments, keep records, and service mortgages. To pay these contractors, Ginnie Mae draws approximately $40 million per year from what it asserts is a permanent indefinite appropriation under 12 U.S.C. § 1702 (2000).[2] OMB is now exploring whether all of these funds should come from annual appropriations. OMB "seek[s] to reassure Ginnie Mae that adoption of the Administration proposal for annual appropriations beginning in fiscal year 2004 will not compromise Ginnie Mae's key functions in the mortgage market in any future lapse of appropriations." OMB Letter at 3. The activities both of Ginnie Mae's own employees and of its contractors are at issue. *Id.* at 2.

This concern arises because a lapse in appropriations may curtail or shut down the operations of a federal agency. In such circumstances, an agency may not spend any money, because the Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Furthermore, the Anti-Deficiency Act, 31 U.S.C. §§ 1341-1342 (2000), not only repeats but also extends this prohibition, so that an agency, in the absence of an appropriation, ordinarily may not even undertake to pay money in the future. Under the Anti-Deficiency Act, an "officer or employee of the United States Government or the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." *Id.* § 1341(a)(1)(B). The Anti-Deficiency Act also provides:

> An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . . As used in this

[2] You have not asked us to address whether Ginnie Mae's interpretation of 12 U.S.C. § 1702 is well-founded. OMB Letter at 1.

> section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

*Id.* § 1342. Thus, during a lapse in appropriations, an "agency may make no contracts and obligate no further funds except as authorized by law." *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1, 2 (1981) (opinion of Attorney General Benjamin R. Civiletti) ("1981 Opinion"); *see also Applicability of the Anti-Deficiency Act Upon a Lapse in an Agency's Appropriation*, 4A Op. O.L.C. 16, 20 (1980) (opinion of Attorney General Benjamin R. Civiletti). And "because no statute generally permits federal agencies to incur obligations without appropriations for the pay of employees, agencies are not, in general, authorized by law to employ the services of their employees upon a lapse in appropriations." 5 Op. O.L.C. at 2.

Despite these general prohibitions, there are a number of circumstances in which agencies may continue to incur obligations during a lapse in appropriations. *See* 1981 Opinion at 3-11; Memorandum for Alice Rivlin, Director, Office of Management and Budget, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Government Operations in the Event of a Lapse in Appropriations* at 3-5 (Aug. 16, 1995) ("1995 Opinion"); *see* Memorandum for Deborah C. Westbrook, General Counsel, United States Marshals Service, from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Continuation of Federal Prisoner Detention Efforts in the Face of a USMS Appropriation Deficiency* (Apr. 5, 2000) ("2000 Opinion"). In particular, the bar against "employ[ing] personal services exceeding that authorized by law" is subject to an exception for "emergencies involving . . . the protection of property." 31 U.S.C. § 1342.

In 1981, the Attorney General outlined the elements required to qualify under this emergency exception:

> First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

1981 Opinion at 8. In 1990, Congress amended the exception, by adding a sentence clarifying that an "emergency" under the provision "does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." Our 1995 Opinion concluded that, "[w]hile we continue to believe that the 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment," the 1990 amendment had

"serve[d] to emphasize and reinforce the requirement that there be a threat to human life or property of such a nature that immediate action is a necessary response to the situation." 1995 Opinion at 8, 9. We accordingly determined that the formulation in the 1981 Opinion requiring that the safety of life or the protection of property be compromised "in some degree" should be modified, so that it would use instead the phrase "in some significant degree." *Id.* at 8.

Understood in the context of the era in which the Anti-Deficiency Act was adopted, the phrase that first appeared in the emergency exception – "destruction of property" (*see* 15 Cong. Rec. 2,143 (1884)), which now has become "protection of property" – most likely contemplated tangible property, such as realty and personalty. Failure to provide fire, police, and public safety services could reasonably be assumed to fall within those functions of government that were necessary to prevent the "destruction of property." 15 Cong. Rec. 2,143 (remarks of Sen. Beck, discussing the operation of "life-saving stations"). Thus, criminal investigations by the FBI, detention of prisoners by the Marshals Service, and operations related to meat inspections by the Department of Agriculture would be within the exception, even understood in this sense. *See* 1981 Opinion at 10.

We recognize that continuing Ginnie Mae's operations in order to protect against defaults involving the full faith and credit of the United States and to prevent instability in the important mortgage market does not fit easily within this traditional conception of protecting tangible property. Although "property" surely includes realty and personalty, we have no indication that Congress intended to limit the definition of "property" to such terms or, what is the same thing, to exclude intangible property from the definition. *Cf.* 12 U.S.C. § 1723a (2000) (Ginnie Mae's authority to accept gifts includes both "tangible" and "intangible" property). We believe that the term "property" is capacious and may extend to intangible property, including guarantees based on the full faith and credit of the government.

Moreover, we have relied heavily on practice when we have applied the emergency exception to particular activities. In 1981, the Attorney General recommended that each agency, with the assistance of its general counsel, arrive at a description of its emergency functions. 1981 Opinion at 11. Although he specified some activities that would meet the emergency exception, his list consisted of activities for which the Bureau of the Budget and OMB had granted "deficiency reapportionments" under an emergency exception in a different section of the Anti-Deficiency Act. *Id.* at 10. We repeated this list in an opinion issued in 1988. Memorandum for the Deputy Attorney General, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Maintaining Essential Services in the District of Columbia in the Event Appropriations Cease* (Dec. 15, 1988). In 2000, we found that our approval of emergency functions was informed and "bolstered by administrative determinations previously made by [OMB] in the context of anticipated or actual appropriations lapses." 2000 Opinion at 9.

Here, the "administrative determinations" support the position that Ginnie Mae's operations qualify under the emergency exception and that, during an appropriations lapse, Ginnie Mae could maintain the work of its employees as necessary to respond to that emergency. In a somewhat

analogous case, OMB found during the 1996 lapse in appropriations that the emergency exception applied to the activities of Treasury Department employees who assure the timely payment of principal and interest on Treasury debt securities. OMB Letter at 2.[3] OMB, moreover, now concludes that Ginnie Mae's operations are necessary to protect property, because "Ginnie Mae's continuous operation is essential for stability in about 10 percent of the overall mortgage market" and a break in operations "could result in an immediate and significant market disruption leading to financial losses for investors and increased mortgage rates for Government-insured mortgages." *Id.*[4]

Especially where the application of the emergency exception depends on predictions about a complex financial market, as it does here, we believe that our role in assessing administrative determinations should be limited. In our view, OMB could find a "reasonable and articulable connection between the function to be performed and . . . the protection of property," 1981 Opinion at 8, and "some reasonable likelihood that . . . the protection of property would be compromised, in some [significant] degree, by delay in the performance of the function in question," *id.* (as modified by 1995 Opinion at 8). On the facts as we understand them, OMB could find that, were Ginnie Mae's operations to be interrupted, "the threat to . . . property . . . [could] be reasonably said to be near at hand and demanding of immediate response." 1995 Opinion at 9. OMB's judgment about the likelihood and extent of the harm to property that would result from a break in Ginnie Mae's operations appears reasonable, and we would not second-guess it.

We also believe that, in responding to an emergency, Ginnie Mae could undertake obligations to pay outside contractors, if the work of those contractors were necessary for carrying out Ginnie Mae's functions. To be sure, incurring those obligations might not directly come under the emergency exception, since the relationship to the contractors – here, large financial enterprises – might well not involve Ginnie Mae's "employ[ing] personal services" at all. 31 U.S.C. § 1342. Nevertheless, the opinions of our Department have established that if an agency's function may continue during an appropriations lapse, the agency may incur the obligations beyond employee's salaries that are necessary for carrying out the function:

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[3] The Department of Justice's plan for operations during an appropriations lapse, which our Office reviewed, allows for the protection of intangible property by providing that the conduct of civil litigation may continue if, for example, a statute of limitations otherwise would run and so bar a claim by the United States. *See* Memorandum for Heads of Department Components, from Stephen R. Colgate, Assistant Attorney General for Administration, *Re: Effects of Continuing Resolutions on Department of Justice Resources* at 1, Appendix at 4 (Apr. 1, 1996).

[4] Ginnie Mae's experience during the 1996 appropriations lapse does not directly bear on this question because Ginnie Mae was able to continue its operations without significantly obligating funds to be appropriated. At that time, Ginnie Mae directed all but a handful of employees to stop work, but because the operations of its contractors continued, Ginnie Mae was able to maintain the timely pass-through of payments as to existing securities.

> Congress has contemplated expressly, in enacting [a predecessor statute], that emergencies will exist that will justify incurring obligations for employee compensation in advance of appropriations; it must be assumed that, when such an emergency arises, Congress would intend those persons so employed to be able to accomplish their emergency functions with success. Congress, for example, having allowed the government to hire firefighters must surely have intended that water and firetrucks would be available to them.

1981 Opinion at 11 (footnote omitted).[5] Consequently, if the emergency exception allows Ginnie Mae's employees to continue the agency's operations during an appropriations lapse, they may incur such other obligations as are necessary for the success of those operations. Incurring the obligations, in these circumstances, is "authorized by law." 31 U.S.C. § 1341(a)(1)(B); 1981 Opinion at 5 n.7; *see also* Memorandum for Janet Reno, Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Participation in Congressional Hearings During an Appropriations Lapse* at 3 (Nov. 16, 1995) (if there is express authority for an official of the Department to testify during an appropriations lapse, support and assistance for the witness is impliedly "authorized by law").

We recognize that, in this case, the implied authorization would account for much larger obligations than under the emergency exception itself. Each year, the salaries and expenses relating to Ginnie Mae's own employees are approximately $9 million, while its costs of paying contractors are approximately $40 million. In our view, however, this point is not legally significant. In 31 U.S.C. § 1342, Congress has provided that the agency's function can continue during an appropriations lapse. Given our longstanding view that Congress by implication has approved the incurring of obligations beyond the salaries and expenses of the agency's own employees, it would make no sense to suppose that the permissibility of these other obligations depends upon Ginnie Mae's adopting what it regards as a less efficient division of responsibility between its own personnel and outside contractors.

Please let us know if we may be of further assistance.

M. Edward Whelan III

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Principal Deputy Assistant Attorney General

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[5] Similarly, because social security benefits come from a permanent trust fund, are not subject to annual appropriations, and may continue to be paid during a general lapse of annual appropriations, the Social Security Administration may incur obligations for the administrative costs of writing and distributing the checks. 1995 Opinion at 4.