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Washington, DC 20548

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January 15, 2004

The Honorable Robert C. Byrd
Ranking Minority Member
Committee on Appropriations
United States Senate

Subject: Proposed Rescission by Department of Commerce of Unobligated
Emergency Steel Guarantee Loan Program Appropriation

Dear Senator Byrd:

This responds to your request of December 22, 2003, for our opinion on the Department of Commerce's (Department) plan to rescind \$17.711 million of the unobligated balance of amounts appropriated for the Emergency Steel Guarantee Loan Program (Program).¹ The Department has indicated that it would draw on the unobligated balance of the Program's appropriation to help satisfy a \$100 million rescission that would be required by H.R. 2673, the bill making omnibus appropriations for fiscal year 2004, if enacted. You asked whether the unobligated balance of the Program's appropriation is available to the Department for that purpose. For the reasons provided below, we conclude that the Program's appropriation is not available to the Department for purposes of the \$100 million rescission.

BACKGROUND

In the findings section of the Emergency Steel Loan Guarantee Act of 1999 (Steel Act), Congress noted the loss of jobs and company bankruptcies in the steel industry as a consequence of increases in steel imports. Emergency Steel Loan Guarantee Act of 1999, Pub. L. No. 106-51, §101(b), 113 Stat. 252 (1999). Congress found that "a

¹ Section 101(d) of the Emergency Steel Loan Guarantee Act of 1999, which established the Program, refers to the "Emergency Steel Guarantee Loan Program." Pub. L. No. 106-51, §101(d), 113 Stat. 252 (1999). However, in other places in the same act, such as the caption in Section 101, the Program is referred to as the "Emergency Steel Loan Guarantee Program."

strong steel industry is necessary to the adequate defense preparedness of the United States” and that industry problems were causing a decline in the willingness of private institutions to loan money to U.S. steel companies. *Id.* Congress passed the Steel Act, which established the Emergency Steel Loan Guarantee Program, in order “to provide loan guarantees to qualified steel companies.” *Id.* § 101(d).²

To administer the program, the Steel Act created a three-member Loan Guarantee Board comprised of the Secretary of Commerce, the Chairman of the Securities and Exchange Commission, and the Chairman of the Board of Governors of the Federal Reserve System. Pub. L. No. 106-51, § 101(d), (e). To fund the costs of the loan guarantees, the Steel Act appropriated \$140 million. *Id.* § 101(f)(5) (“For the additional cost of the loans guaranteed under this subsection, including the costs of modifying the loans . . . , there is appropriated \$140,000,000 to remain available until expended.”). Also, the Steel Act provided the Department of Commerce with an administrative support role and appropriated \$5 million to the Department for that purpose. *Id.* § 101(j) (“For necessary expenses to administer the Program, \$5,000,000 is appropriated to the Department of Commerce, to remain available until expended”).³

The Commerce Department’s fiscal year 2004 appropriation, currently before the Senate, would include a rescission of \$100 million.⁴ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004, H.R. 2673, 108th Cong., Div. B, § 215 (2003) (hereinafter Omnibus Bill) (“Of the unobligated balances available to the Department of Commerce from prior year appropriations with the exception of funds provided for coral reef activities, fisheries enforcement, the Ocean Health Initiative, land acquisition, and lab construction, \$100,000,000 are rescinded.”). Subject to the limitation that the rescission come from “unobligated balances available to the Department of Commerce from prior year appropriations,” the law would give the Secretary discretion to identify the sources of the rescission. *Id.* (“Provided, That within 30 days after the date of enactment of this section the Secretary of Commerce shall submit to the Committees on Appropriations

² The Board’s authority to guarantee loans expired on December 31, 2003. Emergency Steel Loan Guarantee Act of 1999, Pub. L. No. 106-51, § 101(k), 113 Stat. 252, *amended by* Act of Nov. 5, 2001, Pub. L. No. 107-63, § 101(k), 115 Stat. 414. H.R. 2673 would extend the Board’s authority to December 31, 2005. Omnibus Bill, Div. B, § 211(a).

³ The pending omnibus appropriations bill would make an additional \$2 million from the Program’s \$140 million appropriation available to the Department of Commerce to pay the Program’s administrative support costs. Omnibus Bill, Div. B, § 211(b) (“In addition to funds made available under section 101(j) of Emergency Steel Loan Guarantee Act of 1999 (15 U.S.C. § 1841 note), up to \$2,000,000 in funds made available under section 101(f) of such Act may be used for salaries and administrative expenses to administer the Emergency Steel Loan Guarantee Program.”).

⁴ Until January 31, 2004, the Department is funded by a continuing resolution. Further Continuing Appropriations for the Fiscal Year 2004, and for Other Purposes, Pub. L. No. 108-135, 117 Stat. 1391 (2003).

of the House of Representatives and the Senate a report specifying the amount of each rescission made pursuant to this section.”).⁵

DISCUSSION

At issue here is whether unobligated Program funds are “unobligated balances available to the Department of Commerce” for rescission. The language of the \$140 million appropriation itself does not identify to whom the appropriation was made, only the purpose of the appropriation. The Steel Act states, “there is appropriated \$140 million” for the costs of the loan guarantees that the Board approves. The issue for us is one of statutory construction: Is the Program’s \$140 million appropriation available to the Board or to the Department? In interpreting statutes, the federal courts have developed a number of well-recognized conventions, which are also known as canons of statutory construction. One important canon is that words should be considered in the context of the entire statute. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217 (2001); *United Savings Ass’n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). We apply that canon of statutory construction in this case.

The provisions in a statute should not be viewed in isolation but in the context of the entire statute. In 2001 in *United States v. Cleveland Indians Baseball Co.*, the Supreme Court stated that “it is, of course, true that statutory construction ‘is a holistic endeavor’ and that the meaning of a provision is ‘clarified by the remainder of the statutory scheme.’” 532 U.S. 200, 217. *See also* 2A Sutherland, Statutes and Statutory Construction § 46:05, at 154 (6th ed. 2000) (“A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.”). In our case law, we apply this canon of construction with equal vigor. *See, e.g., Matter of Jacobs COGEMA, LLC*, B-290125.2, B-290125.3, at 8, Dec. 18, 2002 (“In ascertaining the plain meaning of the statute, we necessarily look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”). *See also* B-286661, Jan. 19, 2001.

When the 1999 Steel Act created the Program, it specified that the Program was “to be administered by the Board.” Pub. L. No. 106-51, § 101(d). The Steel Act gave the Board decision-making powers to “approve or deny each application for a guarantee.” *Id.* § 101(e). At the same time, the Steel Act provided an appropriation to finance the

⁵ We solicited the views of the Department of Commerce in a telephone conversation with Department attorneys. We also engaged in conversations with the General Counsel of the Loan Guarantee Board. However, because of the short timeframe involved, we did not formally solicit the views of the Department or of the Board.

costs of these guarantees; it said that “there is appropriated \$140,000,000 to remain available until expended.” *Id.* § 101(f)(5).

Congress finances federal programs and activities by providing “budget authority.” Budget authority is a general term referring to various forms of authority provided by law to enter into financial obligations that will result in immediate or future outlays of government funds. *See* § 3(2) of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 622(2) and note, as amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 13201(b) and 13211(a), 104 Stat. 1388, 1388-614, and 1388-620 (Nov. 5, 1990). An appropriation, such as the \$140 million one enacted for the Program, is one form of budget authority. Within the context of the 1999 Steel Act, only the Board has authority to incur an obligation against the \$140 million appropriation by committing the federal government to a loan guarantee. It is the Board who can approve applications for loan guarantees, and it is the Board’s approval of an application that financially obligates the United States. For this reason, we view the \$140 million appropriation as available to the Board, not to the Department. While the Secretary of Commerce, as a Board member, has a vote in whether to approve an application for a loan guarantee whose costs are charged to the \$140 million appropriation, the Secretary, by himself, cannot approve an application and cannot incur an obligation against the appropriation.⁶

The Department asserts that the \$140 million is a Commerce Department appropriation because the Steel Act appropriated \$5 million to the Department to cover the costs of administrative support to the Program. Specifically, the Steel Act appropriated \$5 million to the Department “for necessary expenses to administer the Program.” *Id.* § 101(j). The Department notes that historically Commerce, Treasury, and OMB have always treated the \$140 million as a Commerce appropriation. The Department performs all of the Board’s bookkeeping and provides other administrative support. The Department carries the Board’s staff on the Department’s payroll. Treasury, the Department says, has assigned the Program’s appropriation a Commerce Department account symbol, and OMB reports the Program’s activity as part of the Department’s budget.

We agree that the Department has an administrative role with regard to the Program’s appropriation; however, the Department’s argument is not persuasive when considered in the context of the Steel Act. The Department fails to recognize that while the Steel Act appropriated funds to the Department “for necessary expenses to administer the Program,” the word “administer,” when viewed in the context of the entire Steel Act, has a particular and very different meaning than its use earlier in the Steel Act when the Steel Act specifies that the Program “is to be administered by the Board.” In this regard, the Steel Act captioned the \$5 million appropriation, “Salaries

⁶ We informally understand that the Board’s practice has been to have its General Counsel sign the commitment letters to the loan guarantee applicants.

and Administrative Expenses.” When contrasted with the very clear decision-making authority provided the Board to approve loan guarantee applications, it seems equally clear that the Steel Act intended the Department to perform ministerial administrative tasks, such as recording obligations as a bookkeeper, and provided a specific appropriation to cover these expenses, whereas it intended the Board to perform decision-making “administrative” tasks, such as incurring obligations. The Department’s, Treasury’s, and OMB’s historical treatment of the Program’s appropriation that the Department finds relevant is consistent with the Department’s administrative support role.

Furthermore, the words Congress selected in sections 101(f) and 101(j), especially when viewed in the context of the Steel Act, support the conclusion that Congress made the \$140 million appropriation available to the Board and not to the Department of Commerce. In appropriating money for administrative support, Congress expressly appropriated the money to the Department: “\$5,000,000 is appropriated *to the Department of Commerce*, to remain available until expended.” *Id.* at 101(j) (emphasis added). Had the Congress intended the Program’s \$140 million appropriation, enacted in the same Steel Act, to be available to the Department as well, we would have expected the Congress to use the same phrasing as it did in enacting the \$5 million appropriation. The fact that the Congress chose not to use that phrasing for the \$140 million appropriation, especially when the Congress clearly said that the Program funded by that appropriation was to be administered by the Board, belies the Department’s assertion.

The Department makes three other arguments. First, the Department points out that in Division B, Title II of the omnibus bill, section 211 would provide extra funding for administrative support. Omnibus Bill, Div. B, § 211. Section 211 would authorize the Secretary of Commerce to use \$2 million of the unobligated balance of the \$140 million appropriation to supplement the \$5 million previously appropriated for administrative support. The Department argues that Congress would not have made that money available to the Department had Congress not viewed the \$140 million as a Commerce Department appropriation. The Department offered no support for its argument, and we found no support for its argument in our review. As we explain in this letter, all indications are that the \$140 million is not available to the Department. In fact, regardless of whether the appropriation is available to the Department, Congress still would need to act to make any amounts available for administrative support. The \$140 million appropriation, as enacted, is available only for the costs of the loan guarantees and not for administrative support. There is another appropriation, the \$5 million appropriation, that was enacted specifically for administrative support.

Second, the Department notes that last year, Congress enacted a rescission in the fiscal year 2003 omnibus appropriations act of the unobligated balance of the appropriation for the Emergency Oil and Gas Guaranteed Loan Program. This program was created at the same time, in the same public law, for similar purposes, and in a similar manner as the Steel Program. When the Oil and Gas Guaranteed Loan Program expired last year, Congress rescinded the remaining \$920,000

unobligated balance in that program. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2003, Pub. L. No. 108-7, Div. B, 117 Stat. 11, 106 (2003) (“Of the unobligated balances available [in the Emergency Oil and Gas Guaranteed Loan Program account] from prior year appropriations, \$920,000 are rescinded.”). The Department interpreted the 2003 rescission language as a direction to Commerce to rescind the money. The Department argues that the section 215 rescission in the Omnibus Bill is like the oil and gas rescission. In our view, the fact that in both instances it is the Department’s responsibility to take appropriate action to accomplish the rescissions does not mean that the appropriations are available to the Department. Rather, the Department’s responsibility is based on its statutory role to provide administrative support, such as bookkeeping. Also, we note that Congress explicitly rescinded the oil and gas unobligated balance. That is not the case before us here.

Lastly, the Department finds support in the fact that section 215 in the Omnibus Bill specifically exempts from the \$100 million rescission “funds provided for coral reef activities, fisheries enforcement, the Ocean Health Initiative, land acquisition, and lab construction,” but does not exempt the Program’s appropriation. Omnibus Bill, Div. B, § 215. Commerce asserts that this implies that the Program’s noninclusion in this list means that the Program’s funds are not exempt from, and thus subject to, the rescission. We are not persuaded. The \$140 million is not listed in the bill because it is not a Commerce appropriation, as are funds provided for coral reef activities, fisheries enforcement, the Ocean Health Initiative, land acquisition, and lab construction.

CONCLUSION

Accordingly, we conclude that the unobligated balance of the \$140 million appropriation from the 1999 Steel Act is not “available to the Department of Commerce” and thus would not be subject to the section 215 rescission. Thus, the Secretary of Commerce may not legally rescind \$17.711 million as planned from the unobligated balance of appropriated funds in the Emergency Steel Guarantee Loan Program to satisfy the rescission mandate in the fiscal year 2004 omnibus appropriations bill.

If you have any questions, please contact Susan A. Poling, Associate General Counsel, at 202-512-5644.

Sincerely yours,

Anthony H. Gamboa
General Counsel