

APR 26 1977

The Honorable W. Michael Blumenthal
Secretary of the Treasury
Washington, D.C. 20220

Dear Mr. Blumenthal:

Although the Emergency Loan Guarantee Act designates the Chairman of the Securities and Exchange Commission as one of the three members of the Emergency Loan Guarantee Board ("ELGB"), I have not, on the advice of our General Counsel, assumed any responsibilities of the ELGB.

As you know, this Commission currently is considering important and novel issues with respect to the scope and form of appropriate disclosures by American companies of certain foreign payments they have made. Activities of Lockheed Corporation, the sole recipient of ELGB loans, are an integral part of the matters and issues we are studying. Participation on my part in the work of the ELGB, at least at this time, could create the appearance of potential conflicts of interest. Accordingly, I have refrained, and will continue to refrain, from activities of the ELGB while there remains any potential for the appearance of a conflict of interest. For your information, I am enclosing a copy of the memorandum prepared for me by our General Counsel.

While the pendency of a specific investigation against Lockheed is the motivating factor behind my decision, the possibility of other conflicts, noted at the time of the hearings on the Emergency Loan Guarantee Act, suggests that it may be appropriate for us to seek to have my place on the ELGB taken by someone more appropriate for the task. We have drafted legislation to accomplish that, a copy of which is also enclosed, and I should appreciate any comments you may have.

Sincerely,

Harold M. Williams
Chairman

Enclosures

MEMORANDUM

April 26, 1977

TO: Chairman Williams

FROM: Office of the General Counsel

RE: Withdrawal from proceedings before the Emergency Loan Guarantee Board

You have requested this Office's views with respect to the question whether it would be appropriate for you to withdraw from proceedings before the Emergency Loan Guarantee Board ("ELGB") because of the Commission's investigation of Lockheed Aircraft Corporation and related activities and whether such a withdrawal may be considered a justified refusal to assume statutory duties. It is our view that such a withdrawal is advisable and appropriate, based upon authorities that deal with similar concerns.

The legislative history of the Emergency Loan Guarantee Act indicates that many Congressmen were concerned about the impartiality of the ELGB, and the potential conflicts of interest that might result from its creation and proposed operation. Both Senator Proxmire and Representative Patman submitted supplemental remarks about their concerns in this regard, in the committee reports in both houses.¹ Senator Proxmire specifically alluded to this Commission in his general concern over government conflicts of interest.² In addition, Senator Taft and Congressman Rarick made comments during the floor debates on the legislation concerning the independence and impartiality of ELGB members.³ The clear import of the debates referenced in the margin is that partiality in the ELGB was to be avoided even though those debates did not specifically discuss the particular concerns which make your voluntary absence from ELGB matters seem appropriate to us.

In an analogous context, the Administrative Procedure Act, 5 U.S.C. 551, et seq., recognizes the fact that members of agencies may, on occasion, have to disqualify themselves from certain administrative determinations, whether or not there is an independent statutory basis for doing so. Thus, Section 7(b) of the Act, 5 U.S.C. 556(b), provides that a "participating employee may at any time disqualify himself." This section relates specifically to agency "rulemaking" and adjudications, as defined in that act, which may not encompass all the activities of the ELGB, but if a government employee can disqualify himself from any

¹ See S. Rep. No. 92-270, 92d Cong., 1st Sess. At 29; H.R. Rep. No. 92-379, 92d Cong., 1st Sess. 10.

² S. Rep. No. 92-270, supra n.1.

³ See 117 Cong. Rec. S.27170; 117 Cong. Rec. H.28382.

adjudicatory or regulatory action, a fortiori it would seem evident that you may disqualify yourself from the panoply of determinations you are called upon to make as a member of ELGB.

The language of Executive Order No. 11222, to which you are subject as a Presidential appointee,⁴ also supports a decision to withdraw, voluntarily, from ELGB matters, at least for the time being. Section 201(c) of that Order provides, in part:

“It is the intent of this section that employees should avoid any action, whether or not specifically prohibited by subsection (a) [dealing with acceptance of bribes], which might result in, or create the appearance of - -

* * *

(4) losing complete independence or impartiality of action.”

It does not require exhaustive analysis to support the proposition that a government official appropriately disqualifies himself from statutory obligations any time he perceives a potential or actual conflict of interest. The law and relevant conduct regulations seem to require no less. Nevertheless, the situation is somewhat unique when the conflict arises solely because of other statutory duties. None of the authorities cited above, nor any of the cases and principles involving ethical precepts, makes any distinction in such a situation based upon the reason for the potential conflict of interest, but logic suggests that no meaningful distinction exists.

There remains, however, the question whether your disqualification as a member of the ELGB is the appropriate choice, or whether you should disqualify yourself from the activities of the Commission involving Lockheed. In essence, this is a question for which the citation of authority is inappropriate. It essentially involves a balancing test.

Since you are facing a number of critical questions involving foreign payments as a general matter, your disqualification from the ELGB’s matters would seem most appropriate. In any event, your primary responsibilities are to this Commission, and it would seem that, given the nature of the two assignments, your first responsibility should be to the work of this Commission.

Accordingly, it is the opinion of this Office that, under these circumstances, a decision on your part to withdraw from proceedings before the ELGB at least temporarily, should be considered a justified refusal to assume statutory duties.

E.A. Scallet - 51234

⁴ 30 Fed. Reg. 6969 (1965).

The same Executive Order also proscribes any conduct by Presidential appointees which might undermine confidence in our government.

DRAFT LEGISLATION

A bill to amend the Emergency Loan Guarantee Act to provide for a change in the composition of the Emergency Loan Guarantee Board.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 1841 of title 15, United States Code, is amended to read as follows:

“There is created an Emergency Loan Guarantee Board (referred to in this chapter as the ‘Board’) composed of the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, and the Comptroller General of the United States.