

Exhibit 1

Cuban v. SEC, No. 1:09-cv-00996 RBW



G A O

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

B-300248

January 15, 2004

The Honorable Christopher S. Bond
Committee on Small Business and Entrepreneurship
United States Senate

Subject: SBA's Imposition of Oversight Review Fees on PLP Lenders

Dear Senator Bond:

This legal opinion is a supplement to *Small Business Administration: Progress Made But Improvements Needed in Lender Oversight*, GAO-03-90, our report to you on the Small Business Administration's (SBA) oversight of lenders who make SBA-guaranteed loans under section 7(a) of the Small Business Act, 15 U.S.C. § 636. As we reported, in implementing the section 7(a) program, SBA has increased its reliance on private lenders to provide small businesses with access to credit, in part through its Preferred Lender Program (PLP). Under the PLP, eligible lenders may make section 7(a) loans without prior SBA approval, but SBA is required by the Small Business Act to evaluate PLP lenders' participation in this program at least annually. We reported that it is essential that this SBA oversight be conducted effectively because of the great autonomy that PLP lenders exercise in making section 7(a) loans.

In the course of evaluating SBA's oversight of PLP lenders, we learned that SBA has contracted with a private firm to assist in conducting these PLP lender oversight reviews. We also learned that the contractor is paid not from SBA's appropriated funds but rather from fees imposed by SBA on the lenders that the lenders pay directly to the contractor. We believed this arrangement raised questions about whether SBA was in compliance with certain appropriations restrictions, but because these legal issues were beyond the scope of our report and required additional factual investigation, we agreed with your staff to issue a separate legal opinion addressing them. We have now obtained the necessary information to analyze these issues and we are issuing this opinion as a supplement to our previous report.¹

As discussed in more detail below, we conclude that SBA is not authorized to fund its PLP oversight reviews by charging a fee to the PLP lenders and that doing so contravenes the Miscellaneous Receipts Statute. Furthermore, we conclude that SBA

¹ We have also discussed these issues with staff of the Senate Small Business and Entrepreneurship Committee in the 107th and 108th Congresses and the House and Senate Appropriations Committees, and we are providing copies of this opinion to those committees.

has improperly augmented its appropriations by not bearing the costs of the PLP oversight reviews itself and instead using the fees collected from PLP lenders to pay for these costs. SBA should cease these practices unless and until Congress authorizes them, and in the meantime, it should identify the review costs paid by lenders to its contractor and pay these costs itself from appropriations accounts available for this purpose.

BACKGROUND

SBA helps small businesses obtain access to credit primarily through loan guarantee programs authorized by section 7(a) and other provisions of the Small Business Act. SBA guarantees up to 85 percent of loans made by lenders participating in the section 7(a) program, and lenders that SBA designates as “preferred” or “certified” have greater autonomy and authority in making SBA-guaranteed loans than other participating lenders. Preferred and certified lenders may process, close, service, and liquidate SBA-guaranteed loans, and preferred lenders have full authority to make loans without prior SBA approval, making their own assessments about borrower eligibility and creditworthiness. PLP lenders tend to be the largest section 7(a) program lenders, and they account for slightly over half of section 7(a) lending.

Although SBA has delegated certain of its loan authority to certified and PLP lenders, SBA remains responsible for the activities of these lenders. SBA carries out this responsibility by periodically reviewing and renewing lenders’ eligibility status.² With respect to PLP lenders in particular, SBA is specifically required by the Small Business Programs Improvement Act of 1996, Pub. L. No. 104-208, §103(h), 110 Stat. 3009, 15 U.S.C. § 634 note, to have a standard program mandating lender assessments at least annually; it has implemented this requirement by regulations calling for PLP lender reviews at least once a year and renewals of PLP lenders’ eligibility status at least every 2 years based on the results of these annual reviews. 13 C.F.R. §§ 120.441(b), 120.451(d), (e). Since 1998, SBA has conducted these annual PLP reviews using a “review team” consisting of an SBA employee and one or more employees of an outside contractor, Thompson, Cobb, Bazilio and Associates, P.C. (Thompson Cobb).³ The annual PLP reviews must include, among other things, an assessment of defaults, loans, and recoveries of loans made by each lender. The objectives of the reviews are to determine: (1) whether the lenders process, service, and liquidate loans according to SBA standards; and (2) whether they should be allowed to continue in the Preferred Lender Program. After a review team analyzes a lender’s policies and reviews documents in a sample of the lender’s loan files, the contractor produces a summary of findings and recommendations and the SBA team member reviews it. The contractor then submits a report to SBA, which prepares a final report. SBA has sole authority and responsibility to issue findings, require lenders to take corrective action, and impose sanctions on lenders for noncompliance with SBA standards.

² All section 7(a) lenders are subject to SBA oversight, and under SBA’s standard operating procedures, regular and certified lenders are reviewed every three years, with certified lenders’ eligibility status being renewed every 2 years.

³ The initial term of the SBA-Thompson Cobb contract, signed in 1997, was for one year with an option for four additional years. The contract has since been renewed.

SBA does not use its congressionally appropriated funds to pay its PLP review contractor. Instead, SBA imposes a fee on lenders pursuant to its contract with Thomson Cobb, and the lenders are instructed to pay the fee directly to the contractor before commencement of the review. Prior to the start of each fiscal year, SBA and the contractor negotiate the amount of the fee based on a sliding scale corresponding to lender categories and reflecting the contractor's employee salaries, travel, and administrative expenses. SBA notifies PLP lenders by letter of the date they will be reviewed and instructs them about payment to the contractor.

ANALYSIS

SBA's practices relating to review of lenders in its Preferred Lender Program raise two basic legal issues: (1) whether SBA has authority to impose fees on PLP lenders for review of the lenders' performance; and (2) whether SBA has authority to retain and use any fees it imposes or instead must deposit them into the U.S. Treasury as monies received "for the Government" under 31 U.S.C. § 3302(b), known as the Miscellaneous Receipts Statute. We conclude that the answer to both of these questions is no, as discussed below.

I. SBA's Imposition of Fees on PLP Lenders for Review of Their Performance

When Congress establishes a new program or activity, it also must decide how to finance it. Typically it does this by appropriating funds from the U.S. Treasury. In addition to providing necessary funds, a congressional appropriation establishes a maximum authorized program level, meaning that an agency cannot, absent statutory authorization, operate beyond the level that can be paid for by its appropriations. *See* 72 Comp. Gen. 164, 165 (1993). An agency may not circumvent these limitations by augmenting its appropriations from sources outside the government. *Id.*; *see also* U.S. General Accounting Office, *Principles of Federal Appropriations Law*, 6-103 (2d ed. 1992). One of the objectives of these limitations is to prevent agencies from avoiding or usurping Congress' "power of the purse."

One of the circumstances in which an agency may fund its operations using monies in addition to its appropriations is where Congress authorizes imposition of so-called user fees. User-fee financing entails having some or all of the government's costs of running a program borne by its participants. User fees are often used to finance new spending by replacing or supplementing agency appropriations. They also serve to foster more business-like practices in the government, by making agencies rely solely on outside fees to finance their operations, as well as to provide revenues for deficit reduction. U.S. General Accounting Office, *Principles of Federal Appropriations Law*, 15-132 (2d ed. 2001); *see generally* *Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues*, GAO/AIMD-98-11 (Washington, D.C.: December 1997).

In general, agencies may impose user fees under the Independent Offices Appropriation Act, 31 U.S.C. § 9701, known as the User Charge Statute, which authorizes agencies to impose fees to offset the government's cost of providing "a service or thing of value." In addition, under other statutes, Congress sometimes authorizes agencies not only to charge user fees but also to retain and use them,

either for limited purposes or without restriction.⁴ Without such a specific authorization, however, agencies may not retain or use fees collected under the User Charge Statute or other laws but must deposit them into the U.S Treasury as required by the Miscellaneous Receipts Statute, 31 U.S.C. § 3302. That act requires “an official or agent of the Government receiving *money for the Government* from any source” to “deposit the money in the Treasury as soon as practicable without deduction for any charge,” except as provided by another law. 31 U.S.C. § 3302(a), (b) (emphasis added); *see also* 31 U.S.C. § 9701 Revision Note.

SBA maintains that its PLP lender review program is operated in compliance with the foregoing appropriations laws restrictions. According to SBA, the review fees paid by PLP lenders to SBA’s contractor do not constitute an improper augmentation of SBA’s appropriations because the contractor, not SBA, receives the fees, and SBA remains solely responsible for making ultimate findings of a PLP lender’s acceptability, requiring corrective action, and imposing sanctions. Nor do the review fees constitute user fees, according to SBA, but rather are payments made to the contractor under a no-cost contract with the government. Moreover, SBA believes, the review fees are not “money for the Government” and so are not required to be deposited into the Treasury under the Miscellaneous Receipts Statute. For the reasons discussed below, we disagree with SBA’s position.

A. SBA’s Authority to Conduct Reviews Funded by Its Appropriations

As noted above, the Small Business Programs Improvement Act of 1996 imposes responsibility on SBA—not on PLP lenders or SBA’s contractor—to conduct the annual reviews of PLP lenders. We agree that SBA may contract with a third party to assist in carrying out this statutory function. The question is whether the contractor is performing services for which SBA must pay compensation and if so, whether such compensation may be paid only from SBA’s appropriations or also from fees imposed on the PLP lenders.

Also as noted above, an agency’s funding is limited to its appropriations accounts absent specific congressional authorization to use monies obtained from outside sources. In the case of SBA, Congress has created several appropriations accounts by which the agency may carry out its programs, including a Salaries and Expenses (S&E) Account and a Business Loans Program Account.⁵ SBA’s S&E Account may be used for “current or running expenses of a miscellaneous character arising out of and directly related to the agency’s work.” *See* B-221536, June 12, 1986; 38 Comp. Gen. 758, 762 (1959). Similarly, line items in SBA’s Business Loans Program Account make these funds available for, among other things, the costs of direct and guaranteed loans and administrative expenses to operate these loan programs.⁶ The Business

⁴ *See, e.g.*, 21 U.S.C. § 379h (fees authorized to be collected by Food and Drug Administration, credited to its salaries and expenses account, and made available in accordance with appropriations acts); 7 U.S.C. § 3125a(f) (Department of Agriculture authorized to sell products and services of National Agricultural Library, with proceeds deposited to its appropriation and available until expended).

⁵ *See, e.g.*, Departments of Commerce, Justice and State, The Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, 115 Stat. 796-97 (“2002 SBA Appropriations Act”).

⁶ These costs, commonly referred to as subsidy costs, are the estimated long-term costs to the government of direct loans or loan guarantees, calculated on a net present value basis after adjusting

Loan Program Account amounts appropriated for administrative expenses are authorized to be transferred to and merged with the S&E Account, and the S&E Account is available for SBA's necessary expenses not otherwise provided for.

SBA has told us that pursuant to these authorizations, it transfers the amount of the administrative expenses line item in its Business Loans Program Account into its S&E Account and then uses this account to pay for the portion of the PLP reviews performed by its own employees. SBA does not use its S&E Account to pay for the portion of the PLP reviews performed by its contractor's employees, but instead constructively "pays" these employees by directing the lenders to pay the SBA-imposed review fees to the contractor. SBA believes, and we agree, that the costs of reviewing PLP lenders' performance and determining whether they should be allowed to continue in the loan program are the types of costs for which SBA's S&E Account and Business Loans Program Account administrative expenses line item are available, and we therefore conclude that SBA's use of these accounts to pay for its own employees' PLP review activities is proper. Use of these accounts for payment of the contractor's employees also would be proper, but SBA has elected not to make payments from these accounts; thus we turn to whether Congress has authorized SBA to fund the reviews through the alternative means of user fees.

B. SBA's Authority to Conduct Reviews Funded By User Fees

Congress has specifically authorized SBA to impose, retain, and spend user fees in certain instances, but these instances do not include SBA's conduct of PLP reviews.⁷ Nor does the User Charge Statute, which generally is available to agencies, authorize SBA to impose user fees on PLP lenders—much less to retain or use them. This is because the User Charge Statute does not supercede any other law "prohibiting the determination and collection of charges and the disposition of those charges," 31 U.S.C. § 9701(c)(1), and such a law exists in SBA's case: section 5(b)(12) of the Small Business Act, 15 U.S.C. § 634(b)(12). Section 5(b)(12) authorizes SBA to "impose, retain and use *only* those fees which are *specifically* authorized by law or which [were] in effect on September 30, 1994, and in the amounts and at the rates in effect on such date, except that the Administrator may, subject to approval in appropriations Acts, impose, retain and utilize additional fees" specified in section 5(b)(12) (emphasis added). SBA's imposition of PLP review fees is not "specifically authorized" by law, nor were such fees in effect on September 30, 1994. We therefore conclude that section 5(b)(12) precludes SBA from imposing PLP review fees.

SBA takes the position that the limitations in section 5(b)(12) do not apply to the PLP lender review fees and that it is not imposing user fees under the User Charge Statute. Although SBA acknowledges that its regulations provide for assessment of fees to cover the costs of PLP lender reviews, *see* 13 C.F.R. § 120.454, SBA states that the PLP fees are not being assessed under that regulation. According to SBA, it is the

for estimated defaults, fees, penalties, and other recoveries but excluding administrative costs. 2 U.S.C. § 661a.

⁷ For example, the 2002 SBA Appropriations Act authorizes SBA "to charge fees to cover the cost of publications developed by [SBA], and certain loan servicing activities: *Provided further*, That, notwithstanding 31 U.S.C. § 3302 [the Miscellaneous Receipts Statute], revenues from all such activities shall be credited to this account, to be available for carrying out these purposes without further appropriations." 115 Stat. 796.

contractor, not SBA, that is assessing the PLP review fees, and thus the fees belong to the contractor, not SBA. SBA further maintains that it is simply using a no-cost contract to obtain the contractor's services and thus the fees paid to the contractor are not user fees.

We disagree. It is SBA, not the contractor, that is the entity legally responsible for conducting the PLP reviews. But for its contract with SBA, the contractor would have no connection to the PLP lenders that would enable it to collect the review fees, and the lenders pay the fees to the contractor only because of SBA's requirement. In *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958 (4th Cir. 1984), the Fourth Circuit Court of Appeals made clear that arrangements similar to SBA's are deemed to involve funds that are public in character and that must be deposited in the Treasury under the Miscellaneous Receipts Statute. In that case, the Federal Aviation Administration (FAA) charged landing and mobile lounge fees under the User Charge Statute to airlines using Dulles Airport for services that the FAA provided. When the FAA wanted to purchase ground transport buses for the airport, rather than requesting an additional appropriation from Congress, the FAA entered into contracts with the airlines by which they would pay amounts into an Air Carrier Trust Fund (Trust) in lieu of paying the user fees.

The court ruled that the amounts deposited into the Trust were public monies that should have been deposited into the Treasury. The court relied on several factors, including that the payments were made to enable the FAA to carry out its statutory mission and that the FAA maintained close control and supervision over the Trust's operations, disbursements, and other details of administration. As the court characterized the arrangement, the Trust was an attempt:

“to bypass normal appropriations channels, . . . [an act which] undermined the integrity of the congressional appropriations process . . . Viewed realistically, the Trust was an attempt by the FAA to divert funds from their intended destination—the United States Treasury. Although the purpose for which the FAA sought the funds was laudable, its methods certainly cannot be praised. Were the contract between the Trust and [one of the airlines] left intact, the agency's end-run around normal appropriation channels would have been successful, enabling it effectively to supplement its budget by \$3 million without congressional action.”

Motor Coach Industries, 725 F.2d at 967-68 (footnote omitted).

As in *Motor Coach Industries*, PLP lenders pay review fees to SBA's contractor to enable SBA to carry out its mission. In addition, SBA maintains close control and supervision over the fees: it determines the amount of the fee, instructs the lenders to pay the fee, and dictates the purposes for which the fee is to be used. Further, it is SBA, not the PLP lenders, that has contracted for conduct of the lender reviews and it is SBA that determines the tasks and information required to carry out the contract. Finally, SBA requires PLP lenders to pay its contractor as a condition of retaining their PLP status. Based on these factors, we conclude that SBA has imposed user fees on the PLP lenders in contravention of section 5(b)(12).

We disagree with SBA's position that the agency's imposition of PLP review fees is

not problematic under section 5(b)(12). According to SBA, the fact that section 5(b)(12) prohibits the agency's "impos[ition], ret[ention] *and* use" of fees except where specifically authorized by law means that it is only barred from engaging in all three activities, but not just one or two. Even assuming that SBA's novel reading of section 5(b)(12) were correct (which we do not concede) and thus SBA could legally impose user fees on PLP lenders, this would not support SBA's arrangement. The fees still would have to be deposited into the Treasury as miscellaneous receipts, which SBA has not done. In any event, as discussed below, we believe SBA also has constructively retained and used the PLP review fees, in addition to imposing them, and therefore has violated the prohibition of section 5(b)(12).

II. SBA's Retention and Use of Its User Fees Imposed on PLP Lenders

Having concluded that SBA has imposed and constructively collected fees from PLP lenders in contravention of section 5(b)(12), we also conclude that it has constructively disposed of these fees in violation of section 5(b)(12), because SBA has effectively retained and used the fees without specific congressional authorization. We believe SBA's constructive disposition of the fees also violates the Miscellaneous Receipts Statute. As noted above, the Act generally requires government officials or agents receiving "money for the Government" from any source to deposit it into the Treasury. SBA reasons that the PLP review fees are not "money for the Government" because they are collected by SBA's contractor solely as compensation for the contractor's work. SBA also asserts that the contractor is not charging the fees under a delegation of authority from SBA, nor does the contractor have any duty to turn the fees over to SBA. Finally, SBA maintains that the Miscellaneous Receipts Statute's requirement does not apply to review fees assessed on PLP lenders because these are imposed under its contract with Thompson Cobb, which is a no-cost contract. According to SBA, GAO and the courts have concluded that such contracts do not necessarily constitute an improper augmentation prohibited by the Miscellaneous Receipts Statute.

We disagree with SBA's position, which is in conflict with our prior decisions and not supported by the courts. A government official or agent is deemed to receive money for the government under the Miscellaneous Receipts Statute if the money is to be used to bear the expenses of the government or pay government obligations. *See* B-205901, May 19, 1982. SBA's functions clearly include conducting oversight of PLP lenders, whether the review is conducted by SBA's own employees or with the assistance of a contractor. These functions are among the purposes for which Congress appropriates funds to SBA, in its S&E Account and as administrative expenses in its Business Loans Program Account. These types of reviews in other lending programs, and the costs incurred by SBA's own employees in the PLP reviews, are in fact paid out of SBA appropriations. Thus the fees paid by PLP lenders represent expenses SBA would have to pay from its appropriations regardless of whether the expenses were for actions performed by SBA employees or by a contractor's employees. SBA has devised an arrangement by which another party incurs these expenses, in effect using the PLP review fees to substitute for appropriated funds in paying the cost of the PLP reviews.

In an analogous case, we concluded that amounts recovered by General Services Administration (GSA) contractors, in connection with audits and certain other

services the contractors performed to collect transportation overcharges, could not be used as compensation for that work and instead had to be deposited into the Treasury. See 64 Comp. Gen. 366 (1985). In that case, GSA sought to conserve its appropriated funds by hiring contractors to carry out GSA's statutory responsibilities to audit amounts paid by government agencies to carriers and freight forwarders for transportation services. The contractors were to collect amounts that had become delinquent and collectible under the Debt Collection Act, as well as performing account servicing activities such as auditing transportation charges, notifying transportation providers of overcharges, and collecting refunds. The contractors were paid by deducting amounts for their services from the collected amounts before forwarding the remaining monies to GSA. We concluded that under the Debt Collection Act, GSA was authorized to pay the contractors from amounts they collected where the amounts constituted indebtedness, but could not pay the contractors from non-"indebtedness" collections such as remittances and other amounts collected in connection with an audit. These latter amounts had to be deposited into the Treasury under the Miscellaneous Receipts Statute.

SBA relies on *Thomas v. Network Solutions, Inc.*, 176 F.3d 500 (D.C. Cir. 1999), in contending that the Miscellaneous Receipts Statute does not apply to money in the hands of a government grantee and, by analogy, a government contractor such as Thompson Cobb. In the *Network Solutions* case, the National Science Foundation (NSF) and Network Solutions entered into a cooperative agreement in which Network Solutions was to maintain the nation's registry of Internet domain names. Network Solutions charged domain name registrants a one-time registration fee and annual fees thereafter, with 70 % of the fees retained by Network Solutions as payment for services provided and 30 % of the fees retained in a custodial account on NSF's behalf. One issue addressed by the D.C. Circuit was whether the 70 % retained by Network Solutions was paid for "a service or thing of value provided by an agency" under the User Charge Statute, and thus were not retainable by the company.⁸ The court ruled that the domain name registry was not a government service or thing of value within the meaning of the User Charge Statute because neither NSF nor any other government agency was required by law to provide the registry.

SBA argues that under *Network Solutions*, fees received by its contractor are not money for the government subject to the Miscellaneous Receipts Statute or the User Charge Statute. SBA contends that as in *Network Solutions*, the fees received by its contractor are for services provided to individuals and are not due to the government. We disagree. While *Network Solutions* involved services that were not provided, supervised, or managed by the government, more importantly, it involved services the government was not required to perform. As the court observed, the fact that NSF could have performed the services did not transform what was a private activity into a government service. The SBA situation is markedly different: SBA is statutorily required to review PLP lenders and does so through its agent, Thompson Cobb. Thus PLP lender review fees paid to Thompson Cobb are for services directly related to and required for SBA's review of the lenders, not for services obtained independent of SBA.

⁸ Congress ratified retention of the other 30 % of the fees in the Supplemental Appropriations and Rescissions Act, FY 1998, Pub. L. No. 105-174. 112 Stat. 58 (1998).

SBA's assertion regarding no-cost contracts also is misplaced. Although we have observed that no-cost contracts do not *per se* violate the prohibition against augmentation, we have neither applied nor endorsed the principle that an agency may avoid the prohibition merely by requiring third parties to pay for an agency's contractual commitment. Under a typical no-cost contract, a vendor provides a service that the agency would otherwise perform, but instead of receiving compensation from the agency, the vendor charges and retains fees for its services. In certain cases, we have concluded that such an arrangement does not violate the Miscellaneous Receipts Statute either because it was authorized by another statute or the money retained by the contractor did not constitute money used to bear the expenses of the government or pay government obligations. SBA relies on our decision in B-283731, Dec. 21, 1999, known as *N&N Travel Tours*, for the proposition that no-cost contracts do not result in augmentation prohibited by the Miscellaneous Receipts Statute. As we found in *N&N Travel Tours*, however, Department of Defense (DOD) agencies have specific statutory authority under 10 U.S.C. § 2646 to enter into contracts for travel-related services that "provide for credits, discounts, or commissions or other fees to accrue to [DOD]," and we relied on this authority in determining that the DOD agencies could avoid expending their appropriated funds through no-cost travel services contracts. SBA has no similar authority, however. Moreover, prior to enactment of 10 U.S.C. § 2646 in 1998, the D.C. Circuit had held that DOD's retention of travel agency contractor concession fees in a "morale fund," rather than depositing them into the Treasury, violated the Miscellaneous Receipts Statute. *Scheduled Airlines Traffic Offices, Inc., v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996).

Finally, SBA's contract with Thompson Cobb also differs substantially from other arrangements that we have determined do not violate the Miscellaneous Receipts Statute. In 61 Comp. Gen. 285 (1982), we determined that the public could obtain microfilm copies of Federal Election Commission reports from FEC contractors rather than from the FEC itself and that the contractors could retain the copy fees. Similarly, in our decision B-166506, Oct. 20, 1975, we determined that the public could obtain information services from Environmental Protection Agency contractors rather than directly from EPA and that the contractors could retain the fees for this service. In both cases, however, we stated that the contractors, not the agencies, were providing the services to the public and, in so doing, were not acting as the government's agent. Rather, the contractors were independent entrepreneurs who provided a service sought by the public, and thus the fees they collected were not for the use of the government required to be deposited into the Treasury. This is not the situation with SBA. PLP lenders are not seeking independent services from the contractor; they are complying with requirements imposed by SBA. PLP lenders receive a benefit from SBA's contractor in the sense that the results of the contractor's review are used to determine whether the lenders PLP status will be renewed. But unlike the FEC and EPA contractors, SBA's contractor is not acting independently of SBA but as SBA's agent, and the review fees paid by the lenders substitute for payment that SBA would otherwise make. Consequently, we conclude that SBA's arrangement constitutes an improper augmentation of its appropriations.

CONCLUSION

In summary, we conclude that SBA is constructively imposing, retaining, and using PLP review fees without statutory authority, in contravention of section 5(b)(12) of the Small Business Act and the Miscellaneous Receipts Statute. In addition, because SBA should pay the costs of PLP oversight from its appropriations, we conclude that its constructive use of the fees to pay for costs that would otherwise be paid from its appropriations constitutes an improper augmentation. SBA should cease these practices unless and until Congress authorizes them, and in the meantime, it should identify the review costs paid by lenders to its contractor and pay these costs itself from appropriations accounts available for this purpose.

If you have any questions concerning these matters, please contact Susan D. Sawtelle, Associate General Counsel, at (202) 512-6417, Edda Emmanuelli-Perez, Assistant General Counsel, at (202) 512-2853, or Paul Thompson, Senior Attorney, at (202) 512-9867. Thomas Armstrong, Assistant General Counsel, also made key contributions to this opinion.

Sincerely yours,

/Signed/

Anthony H. Gamboa
General Counsel