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The Honorable Mark O. Hatfield Chairman, Committee on Appropriations United States Senate

Dear Senator Hatfield:

This is in response to your letter dated December 22, 1983, written jointly with Senator Packwood, requesting the opinion of this Office as to whether the last paragraph of Chapter XI of Title I of the Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, 97 Stat. 301, 343-44, constitutes permanent legislation. This provision of the Act prohibits under certain circumstances the retroactive application of section 44C of the Internal Revenue Code, 26 U.S.C. Sec. 44C (1982), relating to energy tax credits. As set forth below, we conclude that this provision does consititute permanent legislation.

The provision in question reads as follows:

"For purposes of applying section 4 4C of the Internal Revenue Code of 1954, paragraph (10) of section 44C(c) of such Code (relating to property financed by subsidized energy financing) shall not apply with respect to any financing for energy conservation or renewable energy source expenditures which was provided

"(1) before January 1, 1983,

"(2) under a State program in existence before 1978,

"(3) with respect to any residence the first mortgage on which is financed by the proceedsof any qualified veterans' mortgage bond within the meaning of section 103A(c)(3) of such Code." 97 Stat. 343-344.

In your letter, you indicate that you and Senator Packwood sponsored this particular provision to assist certain Oregon veterans who were affected by conflicting opinions issued by the Oregon Attorney General and the District Office of the Internal Revenue Service regarding the availability of energy tax credits. For approximately 2 years prior to December 1982, veterans in Oregon had paid taxes based on an understanding, supported by an Oregon Attorney General opinion, that they were eligible for certain energy conservation tax credits authorized by 26 U.S.C.C Sec. 44. However, a December 31, 1982, IRS decision held that they were not eligible for those tax credits. Further, the IRS decision was applied retroactively, making veterans who had innocently relied on the opinion of the Oregon Attorney General responsible for substantial sums in tax deficiencies and interest. You indicate that the provision in

question was intended to preclude the retroactive application of the IRS ruling.

It has been the longstanding position of this Office that a provision contained in an appropriation act may not be construed as permanent legislation unless the language or the nature of the provision makes it clear that such was the intent tent of the Congress. 62 Comp.Gen. 54, 56 (1982); 10 Comp.Gen. 120, 121 (1930). Permanency is indicated most clearly when the provision in question includes words of futurity such as "hereafter" or "after the date of approval of this act." See, e.g., 36 Comp.Gen.434 (1956). However, the use of words of futurity "is not essential if the permanent character of the legislation is otherwise clearly indicated." 9 Comp.Gen. 248, 249 (1929). Where the provision is of a general nature, bearing no relation to the object of the appropriation act, it may also be found to constitute permanent legislation. 62 Comp.Gen. at 56, 208605, September 14, 1982. Here, although the provision in question includes no words of futurity, an analysis of its relationship to the Act leads to the clear conclusion that it constitutes permanent legislation. Further, as set forth below, this conclusion is supported by the legislative history of the provision in question and by the rule of statutory construction against interpreting a statute in a way which renders it ineffective. See 62 Comp.Gen. at 56-57; B-209583, January 18, 1983.

As indicated above, a key consideration in determining whether a provision in an appropriation act constitutes permanent legislation is the relationship of the provision in question to the objects of the appropriation act. If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence. 62 Comp.Gen. at 56; 26 Comp.Gen. 354, 357 (1946). Here, the provision in question clearly bears no direct relationship to the objects of the Supplemental Appropriations Act, 1983. The provision is included under "Administrative Provisions" in Chapter XI of Title I of the Act, which includes appropriations for neither the Internal Revenue Service nor energy conservation. Further, it stands in marked contrast to the other two "Administrative Provisions" included in Chapter XI, both of which refer specifically to funds appropriated under the Act. The provision in question includes no such reference limiting its effect to the life of an appropriation. Thus, we conclude that this provision constitutes permanent legislation.

The legislative history of the provision in question clearly Supports our conclusion that it constitutes permanent legislation. When you introduced the amendment on the floor of the Senate, you observed that it was intended to "strike the retroactivity of that particular [IRS] ruling * * *." 129 Cong. Rec. S8066 (daily ed. June 9, 1983). Your use of the verb "strike" rather than, for example, "suspend" or "delay," implies an intention that the amendment would have a permanent effect. Additionally, the view that Congress intended that the amendment would constitute permanent legislation is further supported by the conference report which explained, "This amendment changes the application of the Internal Revenue Code with regard to a provision of thee Code dealing with federal energy tax credits." H.R. Rep. No. 98-308, 98th Cong,. 1st Sess. 59 (1983) (emphasis added). This statement evidences a clear understanding on the part of Congress that they were enacting a permanent modification of substantive law.

It is a longstanding rule of statutory construction that a statute should not be interpreted in a way which renders it ineffective or futile. Federal Trade Commission v. Manager, Retail Credit Co., 515 F.2d 988, 994 (D.C. Cir. 1975); 62 Comp.Gen. at 57. Here, the plain intent of the provision in question is to

prevent retroactive application of a ruling by the Internal Revenue Service regarding the availability of energy tax credits. Clearly, were the provision held to be temporary, it would be rendered substantially ineffective. Upon its expiration, the Internal Revenue Service would be free to resume retroactive application of the ruling, and proceed against affected taxpayers for amounts due in the tax years preceding the ruling. That is exactly the result which Congress sought to remedy by enacting the provision in question. Therefore, in order to give effect to the provision in accord with clearly stated Congressional intent, it must be interpreted as permanent legislation.

It is, accordingly, the opinion of this Office that the last paragraph of Chapter XI of Title I of the Supplemental Appropriations Act, 1983 constitutes permanent legislation. Unless released earlier by you or Senator Packwood, this opinion will be publicly released after 30 days.

Sincerely yours,

Milton J. Socolar Comptroller General of the United States