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Although we think that section 505 of the Supplemental Appropriations Act, 1987, was probably intended to be permanent legislation, it is not clear from the wording of the section whether all its parts or only the proviso survive the end of the fiscal year. We recommend that the Congress include a similar provision in the 1988 appropriations, bill with modifications to clarify its intent that the entire section is permanent.

The Honorable Ernest F. Hollings Chairman, Subcommittee on Commerce, Justice, State, the Judiciary Committee on Appropriations United States Senate

Dear Mr. Chairman:

This is in response to your letter, dated August 12, 1987, requesting the opinion of this Office as to Whether section 505 of the Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat 391, 471 (1987), constitutes permanent legislation. As explained below, we think that section 505 was probably intended to be permanent legislation, but because it is not clear from the wording of the Section whether all its parts or only the proviso survive the end of the fiscal year, we recommend that the Congress include a similar provision in the 1988 appropriations bill with modifications to clarify its intent that the entire section is permanent.

Section 505 prohibits the Department of Transportation or the Maritime Administration from spending funds appropriate by " this or any other Act" or otherwise made available to administer the Merchant Maritime Act, 1936, and to propose, promulgate or implement any rule with respect to the repayment of construction differential subsidies by certain shippers to the federal government in exchange for the right to enter the domestic shipping trades. In addition, section 505 prohibits the spending of such funds to conduct any regulatory proceedings , execute or perform any contract or participate in any judicial action with respect to the subsidy repayment made by certain specified vessels Finally,, the section includes a proviso that such funds may be used for the above mentioned expenditures, to the extent that the expenditures relate to a rule promulgated in conformance with statutory standards "hereafter" enacted by the Congress.

There is a statutory presumption that any provision in an appropriation act is effective only for the covered fiscal year. 31 U.S.C. Sec. 1301 (c)" 65 Comp.Gen. 588, 589 (1986), and B-225832.5, May 26, 1987. That presumption, however, can be overcome if the statutory language or the nature of the provision in question makes it clear that the Congress intended the provision to

be permanent legislation.

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." 65 Comp.Gen. at 589, supra; Federal Judges I, 62 Comp.Gen. 54, 56 (l982). We have not, however, construed the words "this or any other Act" as indicating futurity. They merely extend the effect of the provision to other appropriations available in that fiscal year. B-145492 September 21, 1976. See also 65 Comp.Gen. 588, supra.

The major portion of the section which contains the prohibitory language is made applicable to funds "appropriated or made available by this or any other Act." There are none of the usual indicia of permanency in this part of the section. If it stood alone, we would find that the Secretary's 1985 rule (referenced in the section and explained, supra) could be implemented as soon as fiscal year 1985 ended at least until the rule was vacated by the D.C. Circuit Court in January 1987.

The proviso is a different matter. It refers to statutory standards "hereafter enacted by Congress", which would lift the prohibition on implementing "pay back subsidies. for shippers. This part of the section is clearly permanent because it contains a "word of futurity" which we have frequently found sufficient to confer permanent status. (See cases cited, supra.) The problem is that the word "hereafter. appears only in the provided clause, and could be interpreted as limited to that part of the section.

When we compare section 505 with the provision in Federal Judges I, supra, we find that very similar language of futurity was present in both cases since "hereafter" appeared only in an exception clause. Notwithstanding that fact, we held in Federal Judges I that the entire section we. permanent. We found however, that there were other elements present in Federal Judges I that made a finding of permanence compelling. In Federal Judges I, we noted that an interpretation that the section in question was not permanent would strip the section of any legal effect since it would have been enacted to prevent pay increases during a period when no increases were authorized to be made.

With respect to section 505, interpreting at least the first part of the section before the proviso as non-permanent would not necessarily render the entire section legally ineffective, although the effective period might be very short. /2/

Nevertheless, if we had been asked to rule on the validity of transactions with shippers made in compliance with the Secretary's June 22, 1987 regulation and consummated prior to the latest enactment of the prohibition, we might well find that we were required to uphold the transactions.

Accordingly, while we think that section 505 was intended by its sponsors to be permanent legislation in its entirety, we do not think we can reach that conclusion as a matter of law. We recommend that the Congress reenact the prohibition if it so desires, in the 1988 Commerce appropriations bill, with modifications that leave no doubt that it is intended that the provision be permanent. If you so request, we would be happy to work with your staff in providing language to accomplish this.

Sincerely yours,

1. Such a rule had been proposed by the Administration to take effect in fiscal years 1983 and 1984, but both times, the Congress enacted similar prohibitory language. In fiscal year 1985, the Department of Transportation was able to promulgate a "pay back rule" before the Congress could act to overturn it but the rule was vacated by the Court of Appeals for the D.C. Circuit, January 16, 1987. On June 2, 1987, the Maritime Commission issued a final rule, again authorizing the payback.

2. As indicated in footnote 1, the Maritime Commission issued its latest rule authorizing the pay back of construction subsidies on June 22, 1987. The 1987 Supplemental Appropriation Act which contained the language in question was enacted on July 11, 1987.