Date: February 21, 1997.....VAOPGCPREC 10-97

From: General Counsel (022)

Subj: Treatment of Alaska Native Corporation Distributions for Improved-Pension Purposes --XXXXXX, XXXXX XXXXX, XX. (XXXXX X.) X XX XXX XXX

Acting Under Secretary for Benefits (20)

## QUESTION PRESENTED:

Does a \$1,100 cash distribution from an Alaska Native Corporation and a \$16,338 dividend distribution by the corporation to a settlement trust under the Alaska Native Claims Settlement Act, both of which were made in 1993, constitute income to a veteran for improved-pension purposes?

## COMMENTS:

1. We understand that the veteran in question received a gross dividend of \$17,438 from Shee Atika, Inc., an Alaska Native Corporation, in 1993. Of that sum, \$16,338 represented an interest in the Shee Atika Endowment Fund, a settlement trust. The remainder, \$1,100, consisted of a cash dividend, \$755.70 of which was taxable. The taxable portion of the dividend may have represented earnings of Shee Atika, Inc. The source of the \$344.30 non-taxable cash payment is unclear, although this payment may have been a distribution of funds derived from the Alaska Native Fund.

2. In VAOPGCPREC 12-89 (O.G.C. Prec. 12-89) and VAOPGCPREC 4-93 (O.G.C. Prec. 4-93), we found that Alaska Native Corporation distributions representing distributions from the Alaska Native Fund may be considered compensation for relinquishment of land claims. As such, the distributions qualify under 38 U.S.C. § 1503(a) (6) (formerly § 503(a) (6)) for exclusion from income determinations for improved-pension purposes as profit realized from the disposition of property other than in the course of business. We also concluded that taxable distributions (those from revenues earned by Alaska Native Corporations) by Native Corporations do not represent compensation for <Page 2> relinquishment of land claims and cannot be excluded from income under what is now section 1503(a)(6). We then considered whether such taxable distributions could be excluded from income under section 15 of the Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, 101 Stat. 1788, 1812 (1988).

3. Section 15 of Pub. L. No. 100-241 provided that cash distributions not exceeding \$2,000, stock, partnership interests, land or an interest in land, and interests in a settlement trust received from an Alaska Native Corporation could not "be considered or taken into account as an asset or resource" in determining eligibility for need-based Federal benefits. See 43 U.S.C. § 1626(c). In VAOPGCPREC 12-89 and VAOPGCPREC 4-93, we interpreted this provision as excluding such distributions from determinations of net worth but not income for improved-pension purposes.

In section 506 of Pub. L. No. 103-446, 108 Stat. 4645, 4. 4664 (1994), Congress provided that any receipt by an individual from a Native Corporation of cash not exceeding \$2,000, stock, land, or certain other interests shall not be countable as income for purposes of laws administered by the Secretary of Veterans Affairs. See 38 U.S.C.A. § 1101 note (Supp. 1996); see also 38 C.F.R. §§ 3.262(x), 3.272(t) (implementing regulations). The legislative history of this provision indicates that it was intended to overturn the conclusion reached in VAOPGCPREC 12-89 and VAOPGCPREC 4-93 that section 15 of Pub. L. No. 100-241 did not apply to income determinations. See S. Rep. No. 267, 103d Cong., 2d Sess. 8-9 (1994). Since Congress did not specify an effective date for section 506, the provision took effect on November 2, 1994, the date of its enactment. See 2 Norman J. Singer, Sutherland Statutory Construction § 33.06 (4th ed. 1986); 73 Am. Jur. 2d Statutes § 361 (1974) (unless otherwise specified, a statute takes effect from the date of its enactment).

5. Under the analysis of VAOPGCPREC 12-89 and VAOPGCPREC 4-93, if the nontaxable portion of the veteran's 1993 gross dividend in fact consists of a nontaxable cash distribution

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of \$344.30 from the Alaska Native Fund and a \$16,338 interest in a settlement trust, this portion of the dividend would appear to have been derived from sums made available to Alaska Natives in return for relinquishment of land claims and could be excluded from income for improvedpension purposes under 38 U.S.C. § 1503(a)(6) as profit realized from the disposition of property. If in fact the taxable cash distribution of \$755.70 derived from revenues earned by Shee Atika, Inc., an Alaska Native Corporation, that distribution could not, per the referenced opinions, be considered compensation for relinquishment of land claims and could not be excluded from income on that basis. However, if section 506 of Pub. L. No. 103-446 applies retroactively to the distributions that the veteran received in 1993, the taxable cash distribution could be excluded from income for improved-pension purposes under that statute.

6. Recent Supreme Court cases have emphasized "the wellsettled presumption" against retroactive application of new statutes. See Landgraf v. USI Film Products, 114 S. Ct. 1483, 1503 (1994); see also Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1518 (1994) (Court will require clear evidence of congressional intent to retroactively restore rights lost through judicial interpretation). Retroactivity should not be presumed even when Congress legislatively "overrules" an interpretation of statute:

> A legislative response does not necessarily indicate that Congress viewed [a] . . . decision as "wrongly decided" as an interpretive matter. Congress may view the . . . decision as an entirely correct reading of prior law--or it may be altogether indifferent to the decision's technical merits--but may nevertheless decide that the old law should be amended, but only for the future.

*Rivers*, 114 S. Ct. at 1515.

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7. A statute should not be given retroactive effect unless Congress clearly expresses an intention that the law apply retroactively. See Landgraf, 114 S. Ct. at 1498, 1501, 1505; Rivers, 114 S. Ct. at 1518-19. In Landgraf, the Supreme Court stated its analytical framework for determining the temporal scope of legislation:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

114 S. Ct. at 1505. The United States Court of Appeals for the Federal Circuit recently applied the Landgraf analysis in Caddell v. Department of Justice, 96 F.3d 1367 (Fed. Cir. 1996). In that case, the court determined that a liberaliz-ing statute enacted during the pendency of administrative proceedings, which statute would have benefited the appellant, was not applicable because the law imposed new duties on the Government and nothing in the statute or its legislative history suggested a congressional intent to apply the statute retroactively. 96 F.3d at 1371; see also Avila v. Office of Personnel Management, 79 F.3d 128, 131 (Fed. Cir. 1996) (In declining to apply a more liberal civil service retirement statute to an individual who left

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Government prior to its enactment, the court observed that the principle that a civil statute is not applied retroactively absent clear congressional intent favoring such result applies not only to statutes regulating the duties and rights of private parties, but also to statutes involving new monetary obligations that fall only on the Government.).

In Karnas v. Derwinski, 1 Vet. App. 308 (1991), the 8. United States Court of Veterans Appeals (Veterans Court) held that the law most favorable to the private-party appellant applies if the law changes during the administrative or judicial pendency of his or her veterans' benefit claim. In so holding, the Veterans Court minimized the importance of the Government's interest in retroactivity cases. Noting Supreme Court precedents that involved litigation between private-party appellants and Federal or other governmental entities, 1 Vet. App. at 311-13, the Veterans Court observed that the Supreme Court "applied the law that was most favorable to the private party appellant." Id. at 312. The Veterans Court reasoned that applying the law most favorable to the private party would never result in "`manifest injustice'" to the Government because Congress can protect the Government's interest through legislation. Id. at 313. That reasoning is, however, inconsistent with the Federal Circuit's subsequent decisions in Caddell and Avila, and with dicta in the Supreme Court's subsequent decision in Landgraf, all of which recognized that a statute which imposes new duties or obligations only on the Govern-ment is nonetheless subject to the presumption against retroactivity. See Caddell, 96 F.3d at 1371; Avila, 79 F.3d at 131; Landgraf, 114 S. Ct. at 1500 n.25 ("While the great majority of our decisions relying upon the anti-retroactivi-ty presumption have involved intervening statutes burdening private parties, we have applied the presumption in cases involving new monetary obligations that fell only on the government.").

9. Although the recent Supreme Court and Federal Circuit case law providing clarification of the principles governing retroactivity does not deal specifically with veterans' benefit claims, we believe that *Karnas*, which was decided

<Page 6> before that case law was available, must be viewed in the context of the more recent decisions. Moreover, we note that *Karnas* primarily involved determination of entitlement to future benefits, while the present situation pertains only to benefits payable for a period which ended before the subject change of law took place. When the only rights and obligations at issue in a proceeding are those pertaining to a period preceeding a change in law, the significance of the change in law would seem more attenuated than in the case of a pending claim seeking determination of rights and obliga-tions for future as well as past periods.

10. Within the framework established by Landgraf and more recent cases, application of section 506 of Pub. L. No. 103-446 to income determinations involving the distributions received by the veteran in 1993 would give that statute retroactive effect because such application of "the new provision [would] attach[] new legal consequences to events completed before its enactment." See Landgraf, 114 S. Ct. at 1499. Since the new law would reduce the amount that could be considered income to the veteran for the past period in which the divided distributions were received, its application would potentially increase the veteran's entitlement to improved pension for that period. In this way, it would impose new legal consequences to events completed before its enactment.

Application of section 506 of Pub. L. No. 103-446 in 11. this case would affect the Government's monetary obligations for a period prior to its enactment, and Congress did not express an intention to apply the provision retroactively. Based on the foregoing analysis, we conclude that section 506 should not be applied to determination of the veteran's income based on distributions received by the veteran in 1993. Accordingly, the law in effect prior to the enactment of section 506 of Pub. L. No. 103-446 on November 2, 1994, as interpreted in VAOPGCPREC 12-89 and VAOPGCPREC 4-93, governs determination of improved-pension entitlement for periods prior to that date. Thus, based on the information available, it appears that the taxable distribution of \$755.70 received by the veteran in the instant case must be considered income for improved-pension

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purposes. However, the remainder of the gross dividend appears to be excludable in determining the veteran's

income because that sum represents compensation for relinquishment of an interest in property.

## HELD:

Pursuant to VAOPGCPREC 12-89 and VAOPGCPREC 4-93, if the nontaxable portion of a cash distribution received by a veteran from an Alaska Native Corporation represents a distribution from the Alaska Native Fund, that portion of the distribution and an interest in a settlement trust received by the veteran from the Native Corporation may be excluded from computation of income for improved-pension purposes under 38 U.S.C. § 1503(a)(6) as compensation for relinquishment of an interest in property. If the taxable portion of the cash distribution received by the veteran was derived from revenues earned by a Native Corporation, that distribution constitutes income for improved-pension purposes. Section 506 of Pub. L. No. 103-446, 108 Stat. 4645, 4664 (1994), which excludes from income computation for improved-pension purposes cash distributions not exceeding \$2,000 per annum received by an individual from an Alaska Native Corporation, does not apply to computation of income for improved-pension purposes for periods prior to November 2, 1994, the date of its enactment.

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