



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

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Dear _____ :

I am responding to your letter to Senator Barbara A. Mikulski about the Department of Defense Housing Assistance Program (HAP). You asked if payments made under the HAP, as expanded by the American Recovery and Reinvestment Act of 2009 (ARRA 2009), are taxable. Senator Mikulski asked us to respond directly to you.

The Department of Defense HAP provides payments to certain employees and members of the Armed Forces to offset the adverse effects on housing values that result from military base realignment or closure. The payments are authorized under the provisions of Title 42 United States Code section 3374. Individuals can take an income tax exclusion for payments made under the HAP program as in effect on November 11, 2003 (Section 132(n) of the Internal Revenue Code).

The ARRA 2009 expanded the statute that authorizes the Department of Defense to make HAP payments (Section 1001 of the ARRA 2009). Under the ARRA 2009 amendments, the Department of Defense can make HAP payments to additional categories of eligible individuals, including those adversely affected by the 2005 round of defense base closures and realignments, certain wounded members of the Armed Forces and their spouses, and certain members of the Armed Forces permanently reassigned during the mortgage crisis.

Unless specifically excluded from income under a provision of the Code, gross income for federal income tax purposes includes all income from whatever source derived [Code section 61(a)]. The exclusion from income applies to HAP payments that were in effect on November 11, 2003. It does not apply to the additional categories of HAP payments that the Congress enacted as part of ARRA 2009. When the Congress expanded the categories of payments that the Department of Defense can make under its HAP, it did not make a corresponding amendment to Code section 132(n) to expand the categories of HAP payments that individuals can exclude from income. Because no

other Code provision excludes HAP payments from income, individuals receiving those payments must include them in income to the extent they exceed the fair market value of the property relinquished in exchange for the payments. Moreover, because individuals receive HAP payments with the performance of services, these amounts are includible in income as compensation for services.

While we are sympathetic to the plight of service men and women who receive these benefits, to exclude them from taxation would require legislative action by the Congress. We note that the House of Representatives recently approved legislation addressing this issue and the Senate is considering it under S. 1728. This legislation would amend Code section 132(n) so that individuals could exclude from gross income HAP benefits as expanded by ARRA 2009.

I hope this information is helpful. If we may be of further assistance, please contact
of my staff at .

Sincerely,

Nancy Marks
Division Counsel/Associate Chief Counsel
(Tax Exempt & Government Entities)

cc: The Honorable Barbara A. Mikulski
Attention: