

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

JUN 1 1994

The Honorable Alfonse D'Amato
United States Senate
Washington, D.C. 20510

Dear Senator D'Amato:

I am writing to present the Administration's views on a proposed provision of law related to the prohibited transaction provisions of the Employee Retirement Income Security Act (ERISA), which is included in section 209 of the Community Development, Credit Enhancement, and Regulatory Improvement Act of 1993 (H.R. 3474), as passed by the Senate. This provision was originally contained in the Small Business Loan Securitization and Secondary Market Enhancement Act of 1993 (S. 384), legislation that you introduced to increase the credit available to small businesses by removing regulatory impediments to securitization. It is my understanding that the conference committee on the legislation is about to convene.

The Administration has expressed its support for your proposal to securitize and market small business loans which has the potential to increase the supply and reduce the cost of capital to small business, which would promote job creation and economic growth. I believe this legislation is highly constructive and merits support.

ERISA's prohibited transaction provisions, set forth in section 406, broadly prohibit transactions between ERISA-covered employee benefit plans and parties in interest to such plans, such as fiduciaries and service providers. Section 408(a) of ERISA, however, provides that an administrative exemption may be granted, on an individual or class basis, if the Secretary of Labor makes findings on the record that an exemption is (i) administratively feasible, (ii) in the interest of the plan and of its participants and beneficiaries, and (iii) protective of the rights of the participants and beneficiaries of such plans.

Pursuant to this authority, The Department of Labor has established a procedure for receiving requests for exemptions and for granting exemptions, which is modified in the Federal Register. Since the enactment of ERISA, thousands of such requests have been processed and over 30 class exemptions and more than 700 individual exemptions have been granted.

In light of your interest in creating a secondary market for small business securities similar to the secondary market that exists for mortgages, we would note that the Department of Labor has previously issued class exemptions to facilitate the sale of mortgage backed securities. In addition, the Department has granted dozens of individual exemptions relating to the

origination and operation of certain asset pool investment trusts and the acquisition by plans of asset-backed pass-through certificates representing interests in these trusts. Accordingly, there is no reason an appropriate exemption for transactions involving small business related securities cannot be structured to meet the standards set forth in section 408(a) of ERISA.

I should also note that Olena Berg, the Assistant Secretary for Pension and Welfare Benefits, has used your bill, in speeches, as an example of the kind of investment the Department of Labor would like to encourage pension fund trustees across the nation to make. In fact, we would encourage those with an interest in small business loan securitization to come in to discuss the matter with us even prior to the enactment of this bill.

Given the Administration's support for the creation of a secondary market for small business related securities, the Department's existing authority to grant exemptive relief for such securities, and the fact that the Department has granted similar exemptions in the past, the ERISA provisions contained in section 209 are unnecessary. In addition, section 209 could be seen to establish a precedent for stand-alone provisions of law that purport to affect ERISA without directly amending ERISA. Such laws may lead to confusion over whether Congress intended for the Department of Labor to use different procedures or standards in its consideration of certain prohibited transaction exemptions under ERISA. Experience has shown that ERISA's prohibited transaction exemption procedures can be effective in removing unnecessary impediments to the development of secondary markets for securitized investment products. We recommend that the Conferees delete any provision in H.R. 3474 related to ERISA exemptions.

The Office of Management and Budget advises that there is no objection from the standpoint of the President's program to the submission of this letter to the Congress.

Sincerely,

Robert B. Reich