

NLWJC - Kagan

Counsel - Box 024- Folder 011

**Securities - Fields Bill - Religion
Issues**

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

04-Oct-1996 02:44pm

TO: Elena Kagan

FROM: Ellen S. Seidman
 National Economic Council

CC: Ingrid M. Schroeder

SUBJECT: Securities bill

OMB is calling to find out where we stand with Justice, i.e., should they expect (i) nothing; (ii) a meek protest; (iii) a demand that the President be told there is a constitutional problem with one minor provision; or (iv) a veto threat, and should they expect it (i) on time or (ii) late.

Can you help? The OMB contact person is Ingrid Schroeder, on 53883.

P.S. Ingrid, I suspect I'll end up writing the signing statement unless OMB wants to. However, I'm going to try to get some input from Treasury and the SEC, as well as the budget side of OMB. And of course, we may have to deal with Justice.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

11-Sep-1996 03:17pm

TO: SCHROEDER_I
FROM: Mark D. Menchik

SUBJECT: LRM 5303/Securities Amendments

Message Creation Date was at 11-SEP-1996 15:17:00

Speaking from a pension perspective, I have no objection to either SEC version of the provision on church pension plans. I prefer the second version because it more clearly states that plans are for workers' exclusive benefit ; this is the major pension protection in any of the new versions.

For the record, I do not share DOJ's concerns with the original language. Its treatment of church plans is not arbitrary. It has the entirely secular purpose of consistency with how ERISA and the tax code treat church plans.

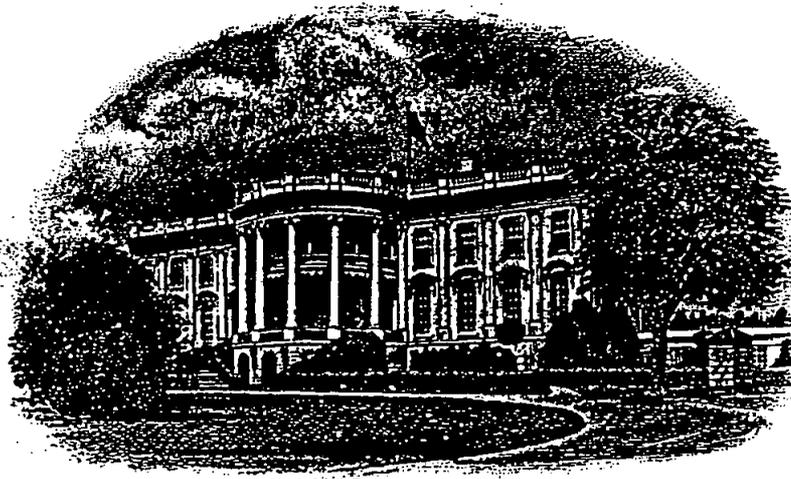
None of the versions is PAYGO.

Version 1] - trashed 457 plan - mit subj to ...

Version 2 exemption for st + locals

that's added to

ident exemp for churches in
current bill



FAX Transmission

**National Economic Council
The White House**

Mark Perry
Stuart Liskin
Penny Boston
Elena Kagan (125)

To: Clayton Schroeder

Phone: _____ FAX: _____

From: ELLEN SEIDMAN

Phone: 202-456-2802 FAX: 202-456-2223

Date: 9/11 Time: 1145

Pages to follow: 6

Comments: The SEC is comfortable with either
one of these, although as a policy matter they'd prefer
the second. However, they recognize that - as to
Church Plans - they've already given away war.
This also doesn't cure DOJ's problem entirely, but
may help. Elena - please let's talk before sending
anything to DOJ. Pension folks - please let me know (if)
these work + 2 which you prefer ASAP. Ellen



Office of
Legislative Affairs

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FAX TRANSMITTAL SHEET

Please deliver the following pages to:

NAME: Ellen Seidman

AGENCY/ORGANIZATION: National Economic Council

LOCATION: The White House

FAX TELEPHONE NUMBER: (202) 456-2223

DIRECT TELEPHONE NUMBER: (202) 456-5359

FROM: Kaye Williams

TOTAL NUMBER OF PAGES (including cover sheet): 6

DATE: 9/10/96

TIME: 5:10

If you do not receive all the pages, please call back as soon as possible:
(202) 942-0010.

Name: _____

REMARKS: Ellen,

Per your request for
technical assistance from the
Div. of Investment Mgt.

To transmit to this office, please dial (202) 942-9650.

Copy sent to Nell Hennessy

MEMORANDUM

September 10, 1996

To: Ellen Seidman
Special Assistant to the President
National Economic Council of the White House

From: Amy R. Doberman
Assistant Chief Counsel,
Division of Investment Management
Securities and Exchange Commission

cc: Kaye F. Williams
Director, Office of Legislative Affairs
Securities and Exchange Commission

Subject: Technical Assistance in Connection with The
Securities Investment Promotion Act of 1996
(S.1815)

As you requested, we are providing you with two options designed to address the concerns raised by the Department of Justice. The first option grants an exemption from regulation under the federal securities laws to certain Section 457 plans. This approach may deflect criticism that S.1815 singles out Church Plans, but does not change the fact that Church Plans would be subject to broader exemptions than other plans, including Section 457 plans. The second option, in addition to adding an exemption for Section 457 Plans, would provide a more limited exemption for Church Plans than is currently contemplated by S.1815. This option may be more effective in addressing the Department of Justice's concerns because it places Church Plans in the same regulatory position as other pension plans.

Please note that the proposed exemption for Section 457 Plans is limited to those plans sponsored by state and local governments, and does not include Section 457 Plans sponsored by nonprofit organizations. The reason for this is that plans sponsored by nonprofit organizations cannot be placed in trust for the exclusive benefit of employees, because the grant of tax-qualified status afforded by new Section 457(g) (added by the Small Business Job Protection Act of 1996) applies only if the plan is sponsored by a state or local government. Assets of Section 457 Plans sponsored by a nonprofit organization still must remain available to the organization's general creditors and therefore cannot be placed in trust for the exclusive benefit of their employees.

We hope this is helpful. Please feel free to call me at 942-0645 with any questions you may have about these options.

Technical Assistance Regarding the Securities
Investment Promotion Act of 1996

Version 1 (Adds exemption for Section 457 plans.)

I. Section 3(a)(2) of the Securities Act of 1933 is amended as follows:

- (1) a new subparagraph (D) is added:
 - (D) an eligible deferred compensation plan as defined in Section 457(b) of the Internal Revenue Code of 1986 that is established by a State, political subdivision of a State, or any agency or instrumentality of a State or political subdivision of a State, the assets of which are held in trust, or in a custodial account or contract, as described in Section 457(g) of such Code; and
- (2) the language "other than any plan described in clause (A), (B), or (C) of this paragraph" will be amended to read "other than any plan described in clause (A), (B), (C), or (D) of this paragraph".

II. Section 3(c)(11) of the Investment Company Act of 1940 is amended as follows:

- (1) the term "governmental plan" will be modified to read "plan" to accommodate the addition of Section 457 Plans to Section 3(a)(2) above; and
- (2) All references to "section 3(a)(2)(C)" will be substituted with a reference to "section 3(a)(2)(C) or (D)".

III. Section 3(a)(12)(A) of the Securities Exchange Act of 1934 is amended as follows:

(note that new clause (vi) was already added by Section 315 of S.1815 to exempt interests in Church Plans)

clause (vii) is changed to clause (viii) and a new clause (vii) is added:

- (vii) solely for purposes of sections 12, 13, 14, and 16 of this title, any security issued by or any interest or participation in an eligible deferred compensation plan as defined in Section 457(b) of the Internal Revenue Code of 1986 that is established by a State, political subdivision of a State, or any agency or instrumentality of a State or political subdivision of a State, the assets of which are held in trust, or in a custodial

account or contract, as described in Section
457(g) of such Code;

Technical Assistance Regarding the Securities
Investment Promotion Act of 1996

Version 2 (Replaces Section 315 of S.1815 in its entirety.)

I. Section 3(a)(2) of the Securities Act of 1933 is amended as follows:

(1) a new subparagraph (D) is added:

(D) an eligible deferred compensation plan as defined in Section 457(b) of the Internal Revenue Code of 1986 that is established by a State, political subdivision of a State, or any agency or instrumentality of a State or political subdivision of a State, the assets of which are held in trust, or in a custodial account or contract, as described in Section 457(g) of such Code; and

(2) a new subparagraph (E) is added:

(E) any church plan as defined in section 414(e) of the Internal Revenue Code of 1986, if, under such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries; and

(3) the language "other than any plan described in clause (A), (B), or (C) of this paragraph" will be amended to read "other than any plan described in clause (A), (B), (C), (D), or (E) of this paragraph".

II. Section 3(c)(11) of the Investment Company Act of 1940 is amended as follows:

(1) the term "governmental plan" will be modified to read "plan" to accommodate the addition of Section 457 Plans and Church Plans to Section 3(a)(2) above; and

(2) All references to "section 3(a)(2)(C)" will be substituted with a reference to "section 3(a)(2)(C), (D), or (E)".

III. Section 3(a)(12)(A) of the Securities Exchange Act of 1934 is amended as follows:

clause (vi) is changed to clause (vii) and a new clause (vi) is added:

(vi) solely for purposes of sections 12, 13, 14, and 16 of this title, any security issued by or any interest or participation in: (1) an eligible

deferred compensation plan as defined in Section 457(b) of the Internal Revenue Code of 1986 that is established by a State, political subdivision of a State, or any agency or instrumentality of a State or political subdivision of a State, the assets of which are held in trust, or in a custodial account or contract, as described in Section 457(g) of such Code; and (2) any church plan as defined in section 414(e) of the Internal Revenue Code of 1986, if, under such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries;

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

LRM NO: 5303

FILE NO: 1582

8/6/96

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): _____

TO: Legislative Liaison Officer - See Distribution below:

FROM: James JUKES

J. Jukes for J. Jukes

(for) Assistant Director for Legislative Reference

OMB CONTACT: Ingrid SCHROEDER 395-3883 Legislative Assistant's Line: 395-3454
C=US, A=TELEMAIL, P=GOV+EOP, O=OMB, OU1=LRD, S=SCHROEDER, G=INGRID, I=M
schroeder_i@a1.eop.gov

SUBJECT: JUSTICE Proposed Report RE: HR3005, Securities Amendments of 1996

DEADLINE: 10am Wednesday, August 14,1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

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- Rodriguez_J
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- Hill_J
- Aitken_S
- Kizer_R

*They -
Check where this
is and whether we
can avoid taking a
position for the
time being, if not,
speak to KW.*

*That is - until I
get back on the
20th.*

Elena

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

LRM NO: **5303**
FILE NO: **1682**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Ingrid SCHROEDER 395-3883
Office of Management and Budget
Fax Number: 395-3109
Branch-Wide Line (to reach legislative assistant): 395-3454

FROM: 8-8-96 (Date)
E Kagan (Name)
WH Council (Agency)
67594 (Telephone)

SUBJECT: JUSTICE Proposed Report RE: HR3005, Securities Amendments of 1996

The following is the response of our agency to your request for views on the above-captioned subject:

- Concur
- No Objection
- No Comment
- See proposed edits on pages _____
- Other: _____
- FAX RETURN of _____ pages, attached to this response sheet



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Draft

Honorable Alfonse D'Amato
Chairman
Committee on Banking, Housing, and
Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This sets forth the views of the Department of Justice on section 315 ("church employee pension plans") of H.R. 3005, the "Securities Investment Promotion Act of 1996," as passed by the Senate on June 27, 1996.

Section 315 of H.R. 3005, as passed by the Senate, would exempt church employee pension plans ("church plans") that meet certain specified criteria¹ from several federal statutes

¹ Section 315 is intended to provide exemptions to:

"Any church plan described in section 414(e) of the Internal Revenue Code of 1986, if, under any such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries, or any company or account that is --

"(A) established by a person that is eligible to establish and maintain such a plan under section 414(e) of the Internal Revenue Code of 1986; and

"(B) substantially all of the activities of which consist of --

"(i) managing or holding assets contributed to such church plans or other assets which are permitted to be commingled with the assets of church plans under the Internal Revenue Code of 1986; or

"(ii) administering or providing benefits pursuant to church plans."

H.R. 3005, § 315(a).

pertaining to the issuance of and investment in securities. Section 315 would also exempt church plans from state laws relating to such activity. Specifically, the Act would exempt church plans from the requirements of the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1-80a-62, the registration and reporting requirements of the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa,² the requirements of the Securities Exchange Act of 1934, 15 U.S.C. § 78a-78kk, the requirements of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1-80b-21, the requirements of the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa-77zzz, and all state laws requiring registration or qualification of securities. See H.R. 3005, § 315. Because it appears that similarly situated, non-religious employee pension plans would not receive a similar benefit under the various regulatory regimes affected, section 315 is unlikely to satisfy the requirements of the Establishment Clause of the United States Constitution.

1. General Standard

As a general matter, the Establishment Clause prohibits the government from singling out religious organizations for especially favorable -- or unfavorable -- treatment. See, e.g., Board of Educ. of Kiryas Joel v. Grumet, 114 S.Ct. 2481, 2487 (1994) (Establishment Clause requires that the government "pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents") (internal quotation omitted). This principle applies not only when the government seeks to confer a direct benefit exclusively on religion, but also when the government creates a religious-specific exemption from a regulatory requirement. For example, in Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), the Court held that the Establishment Clause prohibits a state from singling out for exemption from its sales tax periodicals sold by religious organizations, and no others. See id. (plurality opinion); id. at 26 (Blackmun, J., joined by O'Connor, J., concurring in judgment).³

² Under section 315, church plans would not be exempt from the provisions of the Securities Act pertaining to fraud. See 15 U.S.C. § 77q.

³ The Court's plurality opinion stated that "Texas' sales tax exemption . . . lacks sufficient breadth to pass scrutiny under the Establishment Clause." Id. at 14. In his concurring opinion, Justice Blackmun stated that "[i]n this case, by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages." Id. at 28. Such a "statutory preference for the dissemination of religious ideas," stated Justice Blackmun, "offends our most basic understanding of

The exemptions created by section 315 apply only to employee pension plans that are maintained by churches. Non-religious employee pension plans exhibiting otherwise identical characteristics would not qualify for the exemptions. In this respect, section 315 differs materially from the statute the Court upheld against an Establishment Clause challenge in Walz v. Tax Comm., 397 U.S. 664, 672 (1970). That statute exempted a broad range of non-religious organizations from New York's property tax based on the same criteria used to determine exemptions for religious organizations.⁴ The statutory exemption contained in section 315, by contrast, applies "exclusively to religious organizations," Bullock, 489 U.S. at 15, thereby advantaging church plans over other similarly situated employee pension plans.

Exemptions from the federal regulatory regimes affected by section 315 are available under existing law to a broad range of entities for a large number of activities. See, e.g., 15 U.S.C. § 80a-3(b) (delineating the exemptions under the Investment Company Act); 15 U.S.C. § 77c(a) (delineating the exemptions under the Securities Act); 15 U.S.C. § 78c(a)(12)(A) (delineating the exemptions under the Securities Exchange Act); 15 U.S.C. § 80b-3(b) (delineating the exemptions under the Investment Advisers Act).⁵ Some of the exemptions currently available,

what the Establishment Clause is all about and hence is constitutionally intolerable." Id.

⁴ The property tax exemption upheld in Walz provided:

"Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

Id. at 667, n.1 (quoting § 420, subd. 1, of the New York Real Property Tax Law).

⁵ In fact, exemptions from the federal regulatory statutes affected currently exist for securities issued and investments made by a broad range of charitable and benevolent organizations, including religious organizations, provided that no part of the earnings of such issuances or investments inure to the benefit of any private stockholder or individual. See, e.g., 15 U.S.C.

moreover, expressly pertain to employee pension plans.⁶ We understand from the SEC that, as a result, a large but undetermined number of non-religious, charitable, benevolent or fraternal organization employee pension plans are currently exempt from many of the statutory regimes affected by section 315. It can be argued, therefore, that section 315 represents merely an attempt to place church plans on an equal footing with those entities, and that the requirements of Bullock are satisfied because "the benefits derived by religious organizations [(i.e., exemption from a variety of laws regulating securities and investments)] flow[] to a large number of nonreligious groups as well." Bullock, 489 U.S. at 11.

Indeed, in Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1483 (6th Cir. 1995), cert. denied, 116 S.Ct 1421 (1996), the Sixth Circuit, without citing Bullock, rejected an Establishment Clause challenge to an Ohio statute that exempted all religious organizations, and other charitable organizations meeting certain specified criteria, from the requirement to register with the state prior to soliciting charitable contributions from the public. Although the court suggested that the blanket exemption for religious organizations was an attempt to "lift[] a regulation that burdens the exercise of religion," id., a purpose that is permissible as an accommodation to religion under Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987), it also apparently concluded that it was sufficient for purposes of the Establishment Clause that an exemption from which all religious organizations benefit

§ 80a-3(c)(10) ("Any company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes, no part of net earnings of which inure to the benefit of any private shareholder or individual.") (Investment Company Act); id. § 77c(a)(4) (Securities Act); id. § 80b-3(b)(4) (Investment Advisers Act).

⁶ See, e.g., 15 U.S.C. § 78c(a)(12)(A)(iv) (West Supp. 1996) (exempting from the requirements of the Securities Exchange Act "any interest or participation in a single trust fund, or collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with a qualified plan." The term "qualified plan" includes "a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26" Id. § 78c(a)(12)(C)); id. § 80a-3(c)(11) (exempting from the requirements of the Investment Company Act "[a]ny employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of Title 26 . . . ").

also benefit "various secular groups." Fisher, 70 F.3d at 1483 (emphasis added).

Close scrutiny of the exemptions at issue, however, belies such an argument. Assuming, arguendo, that Fisher was correctly decided, that decision is distinguishable on the grounds that "the vast majority of charitable organizations in Ohio [are] exempt from the registration and annual reporting requirements imposed by the [Ohio Solicitation Act]." Id. (quoting the Ohio Attorney General's synopsis of the bill that eventually became the Ohio Solicitation Act). The exemption at issue in Fisher was crafted in such a way that most similarly situated, nonreligious charitable organizations are, like religious organizations, effectively exempted from the requirements of the affected statute. In contrast, we understand from the SEC that a number of similarly situated, non-religious, non-profit organization employee pension funds will continue to be ineligible for exemption from the statutory regimes affected by section 315. The exemptions at issue would, thus, advantage church plans that are currently covered by the statutes over non-religious employee pension plans in the same category, a distinction that is at odds with the purposes underlying the Establishment Clause.⁷

Moreover, the Court in Bullock held that the existence of other sales tax exemptions "for different purposes [other than the purposes motivating the exemption for periodicals distributed by religious organizations] [did] not rescue the exemption for religious periodicals from invalidation." Bullock 489 U.S. at 900, n.4 (plurality opinion). "What is crucial," noted the Court, "is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups." Id. The fact that other similarly situated employee pension plans are not expressly granted the exemptions afforded church plans under section 315 suggests that no such overarching secular purpose can be shown.

⁷ As the Court stated in invalidating a New York statute creating a special school district for a religious community of Satmar Hasidim, "[b]ecause the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district on its own will receive one." Kiryas Joel, 114 S.Ct. at 2491. This statement reflects the concern animating the Establishment Clause that "the legislature itself may fail to exercise governmental authority in a religiously neutral way." Id.

2. Accommodation

As noted above, the Court has fashioned an exception to the general rule against singling out religious organizations for especially favorable or unfavorable treatment, which allows the government to "accommodate" religion -- and religion only -- in certain circumstances. See Amos, *supra* (upholding exemption regarding secular, nonprofit activities of religious organizations from Title VII's prohibition against employment discrimination based on religion). This accommodation exception, however, allows religion an exclusive exemption from a regulatory regime only when, at a minimum, the exemption "remov[es] a significant state-imposed deterrent to the free exercise of religion." Bullock, 489 U.S. at 15. Unlike the statutory exemption upheld in Amos, section 315 "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Id.*, 489 U.S. at 14 (citing Amos, 483 U.S. at 348). Assuming, arguendo, that issuing participations in and investing the assets of church plans might constitute the kind of religious exercise that can be the subject of accommodation, it does not appear that the requirements of the statutes affected by section 315 rise to the level of "significant" deterrents to such activity. Cf. Bullock, 489 U.S. at 21 (compliance with recordkeeping and reporting requirements "would generally not impede the evangelical activities of religious groups"). But see Fisher, 70 F.3d at 1483 (quoting Amos, 107 S. Ct. at 2869) (suggesting as a basis for its decision that a blanket exemption from the registration requirements of an Ohio statute covering charitable solicitations for religious organizations did not violate the Establishment Clause that the exemption represented an attempt to "'lift[] a regulation that burdens the exercise of religion.'").

3. Entanglement

Nor can the exemptions be justified on the grounds that they prevent the kind of "entanglement" between government and religious organizations against which the Establishment Clause was intended to protect. In Bullock, the Court rejected a similar claim with respect to the sales tax exemption, concluding that the "routine and factual inquiries" in question did not create a risk of entanglement sufficient to justify the exemption. See Bullock, 489 U.S. at 21 (plurality opinion). See also Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 394-96 (1990) (upholding administrative and recordkeeping regulations associated with the collection of sales and use tax, where no inquiry into religious doctrine or motivation was made); Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305 (1985) (holding in response to an Establishment Clause challenge that the commercial activities of a religious organization are subject to the recordkeeping and reporting requirements of the Fair Labor Standards Act). For these

reasons, we believe section 315 is unlikely to satisfy the requirements of the Establishment Clause.

Thank you for the opportunity to comment on this matter. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

Andrew Fois
Assistant Attorney General

cc: The Honorable Paul S. Sarbanes
Ranking Minority Member

EXECUTIVE OFFICE OF THE PRESIDENT

05-Sep-1996 10:16am

TO: Elena Kagan
FROM: Ellen S. Seidman
National Economic Council
SUBJECT: Various

1. The President didn't say anything about any tort or securities law issues in the Money mag interview.
2. If you want to talk to Nell Hennessey about church plans and ERISA, her number is 326-4019.
3. What's happening on securities lit preemption?

Ellen

EXECUTIVE OFFICE OF THE PRESIDENT

04-Sep-1996 03:36pm

TO: Elena Kagan
TO: Ingrid M. Schroeder

FROM: Ellen S. Seidman
National Economic Council

CC: Kathleen M. Wallman

SUBJECT: Conference call on church plans

The conference call tomorrow on the DOJ church plan/securities laws exemption letter will be at 3:30. Call 456-6777, code 5792. Don't call early, and don't hang up once you call. If you want others on the call, please put them on a speaker. We'll have Randy Moss from DOJ, Nell Hennessey from PBGC, and Barry Barbash or some similarly knowledgeable person from the SEC.

The object of the game is to make certain any DOJ letter (i) doesn't call existing law (primarily the ERISA church plan rules) into question and (ii) takes the structure of ERISA and, in particular, the different treatment in that statute of churches, non-profits and businesses, into account.

Ellen

Randy -
Don't have to send to Cong.
OMB signing letter.

when says of why not last issue
then - bill will fly.

Anal in the calls into ERISA rules

<u>ERISA</u>	rules for priv cos	rules for non-profits	st + locals	churches
	have to have assets in trust			not trusted

exception -
putting on
same level
as st + local
plans -
which is what
they've most
treated like under
ERISA - NOT
private non-profits.

Elena -

This is the church plan
stuff (DOT or at tab) that Kathy
may have mentioned. We're
setting up a conf call for 3:30
Thurs w/ DOT, SEC, BODC, OMB,
you + me to try to do something
abt the DOT letter -

Elena

MEMORANDUM

BY FAX

August 29, 1996

To: Nell Hennesy
From: Bob Plaze *BP*
Division of Investment Management
Securities and Exchange Commission
Subject: S. 1815

Attached is a copy of the Church Plan provisions.

Two points in addition to those I made during our telephone conversation:

1. The provision are only in the Senate bill. The House conferees are preparing to accept the provision (and I have been reading a joint draft of the bill, which led to my confusion).
2. Since the letter Michael and Kaye sent to Ellen, there have been changes to the bill that address our most serious concerns.

1 “(vi) solely for purposes of sections 12,
2 13, 14, and 16 of this title, any security is-
3 sued by or any interest or participation in
4 any church plan, company, or account that
5 is excluded from the definition of an invest-
6 ment company under section 3(c)(14) of the
7 Investment Company Act of 1940; and”.

8 (2) EXEMPTION FROM BROKER-DEALER PROVI-
9 SIONS.—Section 3 of the Securities Exchange Act of
10 1934 (15 U.S.C. 78c) is amended by adding at the
11 end the following new subsection:

12 “(f) CHURCH PLANS.—No church plan described in
13 section 414(e) of the Internal Revenue Code of 1986, no per-
14 son or entity eligible to establish and maintain such a plan
15 under the Internal Revenue Code of 1986, no company or
16 account that is excluded from the definition of an invest-
17 ment company under section 3(c)(14) of the Investment
18 Company Act of 1940, and no trustee, director, officer or
19 employee of or volunteer for such plan, company, account
20 person, or entity, acting within the scope of that person's
21 employment or activities with respect to such plan, shall
22 be deemed to be a ‘broker’, ‘dealer’, ‘municipal securities
23 broker’, ‘municipal securities dealer’, ‘government securities
24 broker’, ‘government securities dealer’, ‘clearing agency’, or
25 ‘transfer agent’ for purposes of this title—

114

1 “(1) solely because such plan, company, person,
2 or entity buys, holds, sells, trades in, or transfers se-
3 curities or acts as an intermediary in making pay-
4 ments in connection with transactions in securities
5 for its own account in its capacity as trustee or ad-
6 ministrators of, or otherwise on behalf of, or for the ac-
7 count of, any church plan, company, or account that
8 is excluded from the definition of an investment com-
9 pany under section 3(c)(14) of the Investment Com-
10 pany Act of 1940; and

11 “(2) if no such person or entity receives a com-
12 mission or other transaction-related sales compensa-
13 tion in connection with any activities conducted in
14 reliance on the exemption provided by this sub-
15 section.”.

16 (d) AMENDMENT TO THE INVESTMENT ADVISERS ACT
17 OF 1940.—Section 203(b) of the Investment Advisers Act
18 of 1940 (15 U.S.C. 80b-3(b)) is amended—

19 (1) in paragraph (3), by striking “or” at the
20 end;

21 (2) in paragraph (4), by striking the period at
22 the end and inserting “; or”; and

23 (3) by adding at the end the following new para-
24 graph:

1.15

1 “(5) any plan described in section 414(e) of the
2 *Internal Revenue Code of 1986, any person or entity*
3 *eligible to establish and maintain such a plan under*
4 *the Internal Revenue Code of 1986, or any trustee, di-*
5 *rector, officer, or employee of or volunteer for any*
6 *such plan or person, if such person or entity provides*
7 *investment advice exclusively to any plan, person, or*
8 *entity or any company, account, or fund that is ex-*
9 *cluded from the definition of an investment company*
10 *under section 3(c)(14) of the Investment Company*
11 *Act of 1940.”.*

12 (e) *AMENDMENT TO THE TRUST INDENTURE ACT OF*
13 1939.—*Section 304(a)(4)(A) of the Trust Indenture Act of*
14 1939 (15 U.S.C. 77ddd(4)(A)) is amended by striking “or
15 (11)” and inserting “(11), or (14)”.

16 (f) *PROTECTION OF CHURCH EMPLOYEE BENEFIT*
17 *PLANS UNDER STATE LAW.—*

18 (1) *REGISTRATION REQUIREMENTS.—Any secu-*
19 *urity issued by or any interest or participation in any*
20 *church plan, company, or account that is excluded*
21 *from the definition of an investment company under*
22 *section 3(c)(14) of the Investment Company Act of*
23 1940, as added by subsection (a) of this section, and
24 *any offer, sale, or purchase thereof, shall be exempt*

1 *from any law of a State that requires registration or*
2 *qualification of securities.*

3 (2) *TREATMENT OF CHURCH PLANS.—No church*
4 *plan described in section 414(e) of the Internal Reve-*
5 *nue Code of 1986, no person or entity eligible to es-*
6 *tablish and maintain such a plan under the Internal*
7 *Revenue Code of 1986, no company or account that*
8 *is excluded from the definition of an investment com-*
9 *pany under section 3(c)(14) of the Investment Com-*
10 *pany Act of 1940, as added by subsection (a) of this*
11 *section, and no trustee, director, officer, or employee*
12 *of or volunteer for any such plan, person, entity, com-*
13 *pany, or account shall be required to qualify, register,*
14 *or be subject to regulation as an investment company*
15 *or as a broker, dealer, investment adviser, or agent*
16 *under the laws of any State solely because such plan,*
17 *person, entity, company, or account buys, holds, sells,*
18 *or trades in securities for its own account or in its*
19 *capacity as a trustee or administrator of or otherwise*
20 *on behalf of, or for the account of, or provides invest-*
21 *ment advice to, for, or on behalf of, any such plan,*
22 *person, or entity or any company or account that is*
23 *excluded from the definition of an investment com-*
24 *pany under section 3(c)(14) of the Investment Com-*

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1 *pany Act of 1940, as added by subsection (a) of this*
2 *section.*

3 *(g) AMENDMENT TO THE INVESTMENT COMPANY ACT*
4 *OF 1940.—Section 30 of the Investment Company Act of*
5 *1940 (15 U.S.C. 80a-29) is amended by adding at the end*
6 *the following new subsections:*

7 *“(g) DISCLOSURE TO CHURCH PLAN PARTICIPANTS.—*
8 *A person that maintains a church plan that is excluded*
9 *from the definition of an investment company solely by rea-*
10 *son of section 3(c)(14) shall provide disclosure to plan par-*
11 *ticipants, in writing, and not less frequently than annually,*
12 *and for new participants joining such a plan after May*
13 *31, 1996, prior to joining such plan, that—*

14 *“(1) the plan, or any company or account main-*
15 *tained to manage or hold plan assets and interests in*
16 *such plan, company, or account, are not subject to*
17 *registration, regulation, or reporting under this title,*
18 *the Securities Act of 1933, the Securities Exchange*
19 *Act of 1934, or State securities laws; and*

20 *“(2) plan participants and beneficiaries therefore*
21 *will not be afforded the protections of those provisions.*

22 *“(h) NOTICE TO COMMISSION.—The Commission may*
23 *issue rules and regulations to require any person that*
24 *maintains a church plan that is excluded from the defini-*
25 *tion of an investment company solely by reason of section*

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1 *3(c)(14) to file a notice with the Commission containing*
2 *such information and in such form as the Commission may*
3 *prescribe as necessary or appropriate in the public interest*
4 *or consistent with the protection of investors."*

5 **SEC. 316. PROMOTING GLOBAL PREMINENCE OF AMER-**
6 **ICAN SECURITIES MARKETS.**

7 *It is the sense of the Congress that—*

8 *(1) the United States and foreign securities mar-*
9 *kets are increasingly becoming international*
10 *securities markets, as issuers and investors seek the*
11 *benefits of new capital and secondary market oppor-*
12 *tunities without regard to national borders;*

13 *(2) as issuers seek to raise capital across*
14 *national borders, they confront differing accounting*
15 *requirements in the various regulatory jurisdictions;*

16 *(3) the establishment of a high-quality com-*
17 *prehensive set of generally accepted international ac-*
18 *counting standards in cross-border securities offerings*
19 *would greatly facilitate international financing ac-*
20 *tivities and, most significantly, would enhance the*
21 *ability of foreign corporations to access and list in*
22 *United States markets;*

23 *(4) in addition to the efforts made before the date*
24 *of enactment of this Act by the Commission to re-*
25 *spond to the growing internationalization of securities*



Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Draft

Disletter

Honorable Alfonse D'Amato
Chairman
Committee on Banking, Housing, and
Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This sets forth the views of the Department of Justice on section 315 ("church employee pension plans") of H.R. 3005, the "Securities Investment Promotion Act of 1996," as passed by the Senate on June 27, 1996.

Section 315 of H.R. 3005, as passed by the Senate, would exempt church employee pension plans ("church plans") that meet certain specified criteria¹ from several federal statutes

¹ Section 315 is intended to provide exemptions to:

"Any church plan described in section 414(e) of the Internal Revenue Code of 1986, if, under any such plan, no part of the assets may be used for, or diverted to, purposes other than the exclusive benefit of plan participants or beneficiaries, or any company or account that is --

"(A) established by a person that is eligible to establish and maintain such a plan under section 414(e) of the Internal Revenue Code of 1986; and

"(B) substantially all of the activities of which consist of --

"(i) managing or holding assets contributed to such church plans or other assets which are permitted to be commingled with the assets of church plans under the Internal Revenue Code of 1986; or

"(ii) administering or providing benefits pursuant to church plans."

H.R. 3005, § 315(a).

pertaining to the issuance of and investment in securities. Section 315 would also exempt church plans from state laws relating to such activity. Specifically, the Act would exempt church plans from the requirements of the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1-80a-62, the registration and reporting requirements of the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa,² the requirements of the Securities Exchange Act of 1934, 15 U.S.C. § 78a-78kk, the requirements of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1-80b-21, the requirements of the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa-77zzz, and all state laws requiring registration or qualification of securities. See H.R. 3005, § 315. Because it appears that similarly situated, non-religious employee pension plans would not receive a similar benefit under the various regulatory regimes affected, section 315 is unlikely to satisfy the requirements of the Establishment Clause of the United States Constitution.

1. General Standard

As a general matter, the Establishment Clause prohibits the government from singling out religious organizations for especially favorable -- or unfavorable -- treatment. See, e.g., Board of Educ. of Kiryas Joel v. Grumet, 114 S.Ct. 2481, 2487 (1994) (Establishment Clause requires that the government "pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents") (internal quotation omitted). This principle applies not only when the government seeks to confer a direct benefit exclusively on religion, but also when the government creates a religious-specific exemption from a regulatory requirement. For example, in Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), the Court held that the Establishment Clause prohibits a state from singling out for exemption from its sales tax periodicals sold by religious organizations, and no others. See id. (plurality opinion); id. at 26 (Blackmun, J., joined by O'Connor, J., concurring in judgment).³

² Under section 315, church plans would not be exempt from the provisions of the Securities Act pertaining to fraud. See 15 U.S.C. § 77q.

³ The Court's plurality opinion stated that "Texas' sales tax exemption . . . lacks sufficient breadth to pass scrutiny under the Establishment Clause." Id. at 14. In his concurring opinion, Justice Blackmun stated that "[i]n this case, by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages." Id. at 28. Such a "statutory preference for the dissemination of religious ideas," stated Justice Blackmun, "offends our most basic understanding of

The exemptions created by section 315 apply only to employee pension plans that are maintained by churches. Non-religious employee pension plans exhibiting otherwise identical characteristics would not qualify for the exemptions. In this respect, section 315 differs materially from the statute the Court upheld against an Establishment Clause challenge in Walz v. Tax Comm., 397 U.S. 664, 672 (1970). That statute exempted a broad range of non-religious organizations from New York's property tax based on the same criteria used to determine exemptions for religious organizations.⁴ The statutory exemption contained in section 315, by contrast, applies "exclusively to religious organizations," Bullock, 489 U.S. at 15, thereby advantaging church plans over other similarly situated employee pension plans.

Exemptions from the federal regulatory regimes affected by section 315 are available under existing law to a broad range of entities for a large number of activities. See, e.g., 15 U.S.C. § 80a-3(b) (delineating the exemptions under the Investment Company Act); 15 U.S.C. § 77c(a) (delineating the exemptions under the Securities Act); 15 U.S.C. § 78c(a)(12)(A) (delineating the exemptions under the Securities Exchange Act); 15 U.S.C. § 80b-3(b) (delineating the exemptions under the Investment Advisers Act).⁵ Some of the exemptions currently available,

what the Establishment Clause is all about and hence is constitutionally intolerable." Id.

⁴ The property tax exemption upheld in Walz provided:

"Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section."

Id. at 667, n.1 (quoting § 420, subd. 1, of the New York Real Property Tax Law).

⁵ In fact, exemptions from the federal regulatory statutes affected currently exist for securities issued and investments made by a broad range of charitable and benevolent organizations, including religious organizations, provided that no part of the earnings of such issuances or investments inure to the benefit of any private stockholder or individual. See, e.g., 15 U.S.C.

moreover, expressly pertain to employee pension plans.⁶ We understand from the SEC that, as a result, a large but undetermined number of non-religious, charitable, benevolent or fraternal organization employee pension plans are currently exempt from many of the statutory regimes affected by section 315. It can be argued, therefore, that section 315 represents merely an attempt to place church plans on an equal footing with those entities, and that the requirements of Bullock are satisfied because "the benefits derived by religious organizations [(i.e., exemption from a variety of laws regulating securities and investments)] flow[] to a large number of nonreligious groups as well." Bullock, 489 U.S. at 11.

Indeed, in Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1483 (6th Cir. 1995), cert. denied, 116 S.Ct 1421 (1996), the Sixth Circuit, without citing Bullock, rejected an Establishment Clause challenge to an Ohio statute that exempted all religious organizations, and other charitable organizations meeting certain specified criteria, from the requirement to register with the state prior to soliciting charitable contributions from the public. Although the court suggested that the blanket exemption for religious organizations was an attempt to "lift[] a regulation that burdens the exercise of religion," id., a purpose that is permissible as an accommodation to religion under Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987), it also apparently concluded that it was sufficient for purposes of the Establishment Clause that an exemption from which all religious organizations benefit

§ 80a-3(c)(10) ("Any company organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes, no part of net earnings of which inure to the benefit of any private shareholder or individual.") (Investment Company Act); id. § 77c(a)(4) (Securities Act); id. § 80b-3(b)(4) (Investment Advisers Act).

⁶ See, e.g., 15 U.S.C. § 78c(a)(12)(A)(iv) (West Supp. 1996) (exempting from the requirements of the Securities Exchange Act "any interest or participation in a single trust fund, or collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with a qualified plan." The term "qualified plan" includes "a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26" Id. § 78c(a)(12)(C)); id. § 80a-3(c)(11) (exempting from the requirements of the Investment Company Act "[a]ny employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of Title 26 . . . ").

also benefit "various secular groups." Fisher, 70 F.3d at 1483 (emphasis added).

Close scrutiny of the exemptions at issue, however, belies such an argument. Assuming, arguendo, that Fisher was correctly decided, that decision is distinguishable on the grounds that "the vast majority of charitable organizations in Ohio [are] exempt from the registration and annual reporting requirements imposed by the [Ohio Solicitation Act]." Id. (quoting the Ohio Attorney General's synopsis of the bill that eventually became the Ohio Solicitation Act). The exemption at issue in Fisher was crafted in such a way that most similarly situated, nonreligious charitable organizations are, like religious organizations, effectively exempted from the requirements of the affected statute. In contrast, we understand from the SEC that a number of similarly situated, non-religious, non-profit organization employee pension funds will continue to be ineligible for exemption from the statutory regimes affected by section 315. The exemptions at issue would, thus, advantage church plans that are currently covered by the statutes over non-religious employee pension plans in the same category, a distinction that is at odds with the purposes underlying the Establishment Clause.⁷

Moreover, the Court in Bullock held that the existence of other sales tax exemptions "for different purposes [other than the purposes motivating the exemption for periodicals distributed by religious organizations] [did] not rescue the exemption for religious periodicals from invalidation." Bullock 489 U.S. at 900, n.4 (plurality opinion). "What is crucial," noted the Court, "is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups." Id. The fact that other similarly situated employee pension plans are not expressly granted the exemptions afforded church plans under section 315 suggests that no such overarching secular purpose can be shown.

⁷ As the Court stated in invalidating a New York statute creating a special school district for a religious community of Satmar Hasidim, "[b]ecause the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district on its own will receive one." Kiryas Joel, 114 S.Ct. at 2491. This statement reflects the concern animating the Establishment Clause that "the legislature itself may fail to exercise governmental authority in a religiously neutral way." Id.

2. Accommodation

As noted above, the Court has fashioned an exception to the general rule against singling out religious organizations for especially favorable or unfavorable treatment, which allows the government to "accommodate" religion -- and religion only -- in certain circumstances. See Amos, supra (upholding exemption regarding secular, nonprofit activities of religious organizations from Title VII's prohibition against employment discrimination based on religion). This accommodation exception, however, allows religion an exclusive exemption from a regulatory regime only when, at a minimum, the exemption "remov[es] a significant state-imposed deterrent to the free exercise of religion." Bullock, 489 U.S. at 15. Unlike the statutory exemption upheld in Amos, section 315 "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." Id., 489 U.S. at 14 (citing Amos, 483 U.S. at 348). Assuming, arguendo, that issuing participations in and investing the assets of church plans might constitute the kind of religious exercise that can be the subject of accommodation, it does not appear that the requirements of the statutes affected by section 315 rise to the level of "significant" deterrents to such activity. Cf. Bullock, 489 U.S. at 21 (compliance with recordkeeping and reporting requirements "would generally not impede the evangelical activities of religious groups"). But see Fisher, 70 F.3d at 1483 (quoting Amos, 107 S. Ct. at 2869) (suggesting as a basis for its decision that a blanket exemption from the registration requirements of an Ohio statute covering charitable solicitations for religious organizations did not violate the Establishment Clause that the exemption represented an attempt to "'lift[] a regulation that burdens the exercise of religion.'").

3. Entanglement

Nor can the exemptions be justified on the grounds that they prevent the kind of "entanglement" between government and religious organizations against which the Establishment Clause was intended to protect. In Bullock, the Court rejected a similar claim with respect to the sales tax exemption, concluding that the "routine and factual inquiries" in question did not create a risk of entanglement sufficient to justify the exemption. See Bullock, 489 U.S. at 21 (plurality opinion). See also Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 394-96 (1990) (upholding administrative and recordkeeping regulations associated with the collection of sales and use tax, where no inquiry into religious doctrine or motivation was made); Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305 (1985) (holding in response to an Establishment Clause challenge that the commercial activities of a religious organization are subject to the recordkeeping and reporting requirements of the Fair Labor Standards Act). ¶ For these

reasons, we believe section 315 is unlikely to satisfy the requirements of the Establishment Clause.

Thank you for the opportunity to comment on this matter. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

Andrew Fois
Assistant Attorney General

cc: The Honorable Paul S. Sarbanes
Ranking Minority Member

Church plans conf call 9-4-96

ERISA - exemptions in church plans

much same as exemp in ST/locals

non-profit plans - treated differently

Exempt from securities reg-
in church plans
join layer list -
including most gov't plans.