OPINION NO. 81-029

Syllabus:

When the Small Business Administration guarantees the payment of principal and interest on secondary market certificates, the faith of the United States is pledged for such obligations. A board of county commissioners may, therefore, invest currently inactive funds in such certificates pursuant to R.C. 321.44.

To: Ronald J. Mayle, Sandusky County Pros. Atty., Fremont, Ohio
By: William J. Brown, Attorney General, May 28, 1981

I have before me your request for an opinion regarding the following question:

> If securities are obtained under the [United States Small Business Administration's secondary market program] and if the purchase agreement provides for sale back by the purchaser within three years, would this be a proper investment of surplus funds of the County under Section 321.44 of the Ohio Revised Code?

As an addendum to your request, you have attached the United States Small Business Administration's publication "Full Faith and Credit," dated June, 1977, which contains copies of the standardized documents and forms that create the foundation of each Small Business Administration (S.B.A.) secondary market security agreement. This publication, descriptively subtitled "Secondary Participation in SBA Guaranteed Loans through SBA Guaranteed Interest Certificates," has been revised and republished under date of September 1979.

As detailed in your request, R.C. 321.44 controls the determination as to whether a county may invest in the securities about which you have inquired. This provision authorizes a board of county commissioners to invest currently inactive county funds in bonds and other obligations of the United States. Specifically, R.C. 321.44 provides in relevant part:

> The board of county commissioners in each county may, by resolution adopted and recorded, invest so much of the funds received by the county as are not required to meet current expenses, in bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, provided the maturity of the bonds is not later than three years after the date of the investment. (Emphasis added.)

The language qualifying potential investments (underlined in the excerpt above) sets out a two-branched inquiry. The first of these tests may be satisfied under any one of three conditions: if the security is (1) a United States' bond, or (2) another United States' "interest bearing obligation," or (3) an obligation "for the payment of principal and interest of which the faith of the United States is pledged."

The security in question resembles a partial assignment of a loan. The S.B.A. guarantees a percentage of qualifying loans made by private lenders to small business borrowers as an incentive for capital production for small business enterprises. 15 U.S.C. 683. In turn, to expand this program by encouraging more investment funds, the guaranteed portion of these loans may be sold to investors pursuant to a tripartite agreement documented by the S.B.A. secondary market certificate forms. 15 U.S.C. 634(b)(2) and (b)(7).

Although the certificate is issued by the S.B.A., given the form of the security, the certificate does not qualify as a direct U.S. bond or obligation under

the first two conditions outlined above. However, eligibility under the third classification (obligations for the payment of principal and interest of which the faith of the United States is pledged) may be inferred from the terms of the security agreement and the statute authorizing sale of these certificates.

The pledge made by the S.B.A. as to the guaranteed portion of the original obligation between lender and small business borrower is expressly secured by the "full faith and credit of the United States." 15 U.S.C. 683. To encourage participation in the secondary market, the S.B.A. similarly guarantees the payment of principal and interest, and conveyance thereof, by all participants to the tripartite agreement of the secondary market certificate. S.B.A. Form 1086, Terms and Conditions, clauses 3, 9, 10, 11, 13 and 14. Thus, the purchaser of this security (hereafter called "investor") is guaranteed performance by all parties to the agreement, including lender and borrower, and is, in turn, guaranteed the receipt of its funds. These secondary market instrument guarantees are not, however, backed by an express statutory pledge of the full faith and credit of the United States.

Culminating a well developed series of United States Attorney General opinions, see, e.g., 41 Op. U.S. Att'y Gen. 138 (1953), 42 Op. U.S. Att'y Gen. 21, 23 (1961) analyzes similar guarantees to private investors of loans made to developing countries by the Development Loan Fund, and states in relevant part:

> [A] guaranty by a Government agency contracted pursuant to a congressional grant of authority for constitutional purposes is an obligation fully binding on the United States despite the absence of statutory language expressly pledging its "faith" or "credit" to the redemption of the guaranty. . . . (Footnote omitted.)

Thus, if the agency, in issuing such guarantees, acts within its congressional authorization, a pledge of faith by the United States government to secure the obligation for payment may be inferred.

The sale of secondary market certificates by the S.B.A. is authorized under two provisions of the Small Business Act. Specifically, 15 U.S.C. 634(b)(2) states in part:

> (b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—
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> . . .
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> (2) under regulations prescribed by him, assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions and for such consideration as the Administrator shall determine to be reasonable, any evidence of debt, contract, claim, personal property, or security assigned to or held by him in connection with the payment of loans granted under this chapter. . . .

Likewise, 15 U.S.C. 634(b)(7) provides in part:

> (b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—
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> . . .
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> (7) in addition to any powers, functions, privileges, and immunities otherwise vested to him, take any and all actions, . . .determined by him to be necessary or desirable in making, servicing, compromising, modifying, liquidating, or otherwise dealing with or realizing on loans made under the provisions of this chapter. . . .

The U.S. Attorney General in an informal opinion addressed to Thomas S. Kleppe, Administrator of the S.B.A., dated April 14, 1971, found the grant of discretionary power authorized by these sections to be so broad as to include within the S.B.A. Administrator's authority the power to grant necessary guarantees for the sale and execution of secondary market certificates.

This interpretation permits the S.B.A. to guarantee obligations and make them fully binding on the United States; however, the interpretation does not require the S.B.A. to guarantee obligations. When the S.B.A. does guarantee payment of principal and and interest on secondary market certificates, the first branch of the qualifying clause under R.C. 321.44 is satisfied, i.e., the faith of the United States is pledged for the payment of interest and principal on S.B.A. secondary market certificates.

The second branch of this qualifying clause under R.C. 321.44 requires that all bonds have maturity dates not later than three years from the date of investment. Under the doctrine of expressio unius est exclusio alterius (the mention of one thing implies the exclusion of another) the limitation in the last portion of the sentence of R.C. 321.44 quoted above, which specifically refers to bonds, does not apply to S.B.A. secondary market certificates. (Compare with the use of the words "bonds or other interest bearing obligations" earlier in R.C. 321.44.) A bond "in its broad sense comprises a negotiable promissory note under seal. . .[it] is made payable to bearer [and] has a long time to run. . . ." Commissioners v. State, 78 Ohio St. 287, 85 N.E. 562 (1908). Bonds, by their very nature, are notes the payment of principal and interest of which is made payable at a designated future time. Id. at 302; Davidson, Handbook of Modern Accounting §12-7 (1970). The restriction upon the longevity of bonds imposed by R.C. 321.44 does not appear to apply to S.B.A. secondary market certificates since from those certificates the county would receive periodic payments comprised of both principal and interest.

Although the requirement in R.C. 321.44 of a three-year term of investment is not applicable in general to S.B.A. secondary market certificates, you have assumed its applicability in your question. The hypothesized situation contemplates an agreement for a sale back by the investor within three years of the date of investment. This sale back provision, as a "side" agreement between investor and lender, in addition to the terms and conditions of S.B.A. Form 1086, is not covered by the S.B.A. guarantees. Specifically, S.B.A. Form 1086, Terms and Conditions, Clause 17 states in part:

> 17 Separate or Side Agreements. No other separate or side agreement between Lender and Registered Holder. . .shall in any way obligate SBA to make any payment except as provided herein, nor shall it modify the nature or extent of SBA's rights or obligations under the terms of this Agreement or of the 750 Agreement.

The S.B.A. guarantee and hence the U.S. Government's pledge of faith to the payment of principal and interest, as recognized above, would not extend to new terms to the agreement providing for the payment by lender to investor of principal and interest on the balance at the expiration of the three-year term under the sale back agreement. Thus, should the lender fail to repurchase at the end of the three-year term, the county's only remedy would be based upon the contract with the lender. There would be no action against the S.B.A. or the United States with regard to the accelerated payment provision. The fact that the S.B.A.-U.S. guarantee would not extend to the sale back provision, however, does not affect the ability of the county to invest in secondary market certificates, since R.C. 321.44 does not require that these particular obligations mature within three years of the date of purchase. Should the lender fail to honor the sale back provision, the county would still have the S.B.A's guarantee of payment in case of default of the borrower.

If, however, Clause 17 were modified and the S.B.A. were to include a three-year sale back provision in the Terms and Conditions of Form 1086, then assuming

that the S.B.A. had the power to do so, the S.B.A. could guarantee secondary market certificates with a three-year sale back provision.

Therefore, it is my opinion, and you are advised, that when the Small Business Administration guarantees the payment of principal and interest on secondary market certificates, the faith of the United States is pledged for such obligations. A board of county commissioners may, therefore, invest currently inactive funds in such certificates pursuant to R.C. 321.44