



ROLAND W. BURRIS
ATTORNEY GENERAL
STATE OF ILLINOIS



November 25, 1991

FILE NO. 91-045

FINANCE:
Investment Authority
of State Treasurer

Honorable Patrick Quinn
Treasurer
State of Illinois Center
100 West Randolph, Suite 15-1600
Chicago, Illinois 60601

Dear Treasurer Quinn:

I have your letter wherein you inquire whether you, as State Treasurer, have the authority under section 22 1/2 of the Deposit of State Moneys Act (Ill. Rev. Stat. 1989, ch. 130, par. 41a) or subsections 2(a)(1) or 2(a)(2) of the Public Funds Investment Act (Ill. Rev. Stat. 1990 Supp., ch. 85, par. 902(a)(1), (2)) to invest State funds in "obligations of United States government instrumentalities and agencies such as the Small Business Administration and certain National Mortgage

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Associations", where the obligations mature more than one year after the date of purchase. For the reasons hereinafter stated, it is my opinion that you are authorized, pursuant to the terms of section 2 of the Public Funds Investment Act, to invest State funds in obligations of agencies of the United States which mature more than one year after the date of purchase. As is discussed below, however, it is also my opinion, with respect to the specific entities which you have mentioned, that although the Small Business Administration and the Government National Mortgage Association are agencies of the United States, within the meaning of section 2 of that Act, the Federal National Mortgage Association is not.

Section 22 1/2, of the Deposit of State Moneys Act provides, in pertinent part:

"The State Treasurer may, with the approval of the Governor, invest and reinvest any State money in the treasury which is not needed for current expenditures due or about to become due, in obligations of the United States government or its agencies or of National Mortgage Associations established by or under the National Housing Act, 1201 [sic] U.S.C. 1701 et seq. maturing within one year after the date of purchase * * *. All such obligations shall be considered as cash and may be delivered over as cash by a State Treasurer to his successor.

* * *

"

You have asked, with respect to this provision, whether the phrase "maturing within one year after the date of purchase" applies to all obligations of the United States government and

its agencies, or only to obligations of national mortgage associations.

In construing a statute, the language of the statute is the best indication of the intent of the General Assembly, and that language should be given its plain and ordinary meaning. (Williams v. Illinois State Scholarship Commission (1990), 139 Ill. 2d 24, 50, 51.) The statute must be read as a whole (People v. Jordan (1984), 103 Ill. 2d 192, 206), and the history of the legislation and the course it has taken may also be considered. Anderson v. City of Park Ridge (1947), 396 Ill. 235, 244.

The structure of the sentence in question, plainly and logically read, leaves no doubt that the phrase "maturing within one year * * *" modifies the term "obligations" generally. Thus, this sentence must be construed to limit the investment authority of the Treasurer to investments which mature within one year, whether they are obligations of the United States government, its agencies or a national mortgage association. Moreover, the legislative history of section 22 1/2 of the Deposit of State Moneys Act strongly supports this construction. Prior to its amendment in 1977, section 22 1/2 authorized the Treasurer to invest "in obligations of the United States government maturing within one year after the date of purchase". (Ill. Rev. Stat. 1975, ch. 130, par. 41a.) Public Act 80-378, effective August 29, 1977 (1977 Ill. Laws

1313), inserted the references to agencies of the United States government and National Mortgage Associations before the word "maturing". The obvious intention of the General Assembly, in enacting this amendment, was to authorize the Treasurer to invest in additional types of obligations maturing within one year, and not to remove the one year maturation limitation on investments in obligations of the United States government.

Your second specific inquiry is whether subsections 2(a)(1) and 2(a)(2) of the Public Funds Investment Act independently permit investment in obligations of United States agencies or national mortgage associations which do not mature within one year from the date of purchase. Subsections 2(a)(1) and (2) of the Public Funds Investment Act provide, in pertinent part:

"(a) Any public agency may invest any public funds as follows:

(1) in bonds, notes, certificates of indebtedness, treasury bills or other securities now or hereafter issued, which are guaranteed by the full faith and credit of the United States of America as to principal and interest;

(2) in bonds, notes, debentures, or other similar obligations of the United States of America or its agencies;"

The State of Illinois is a public agency for purposes of the Public Funds Investment Act. (Ill. Rev. Stat. 1989, ch. 85, par. 901.)

The Treasurer is responsible for receiving the revenues and all other public moneys of the State (Ill. Rev. Stat. 1989, ch. 130, par. 7) and, in accordance with law, for investing monies deposited with him (Ill. Const. 1970, art. V, sec. 18). Section 5 of the Public Funds Investment Act (Ill. Rev. Stat. 1989, ch. 85, par. 905) provides:

"This Act, without reference to any other statute, shall be deemed full and complete authority for the investment of public funds, as hereinabove provided, and shall be construed as an additional and alternative method therefor."

The State Treasurer is, therefore, authorized to invest State funds under the authority of the Public Funds Investment Act without reference to the provisions of the Deposit of State Moneys Act. (See, 1982 Ill. Att'y Gen. Op. 19, 20; 1971 Ill. Att'y Gen. Op. 1.) Consequently, it is my opinion that the one year maturation requirement of section 22 1/2 of the Deposit of State Moneys Act has no application to investments which you may make under the supplemental investment authority of section 2 of the Public Funds Investment Act. (See, opinion No. NP-1286, issued August 18, 1977.) As a general principle, you may, in accordance with the provisions of section 2 of the Public Funds Investment Act, invest in obligations of the United States or its agencies which mature more than one year after the date of purchase.

This conclusion is not, however, fully dispositive of the underlying issue of whether you have the power to invest in

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obligations of the specific entities which you have mentioned, to wit: the Small Business Administration and national mortgage associations, where the obligations mature more than one year from the date of purchase. If these obligations consist of bonds, notes certificates of indebtedness, treasury bills or other securities which are guaranteed by the full faith and credit of the United States of America as to principal and interest, then the Treasurer may invest therein under the authority of subsection (2)(a)(1) of the Public Funds Investment Act even though the obligations do not mature within one year. Subsection (2)(a)(2) of that Act authorizes investments in bonds, notes, debentures or similar obligations of the United States or its agencies, again without a one year maturity requirement. Therefore, assuming that their obligations are not guaranteed by the full faith and credit of the United States, it must be determined whether the Small Business Administration and the national mortgage associations created by the National Housing Act (12 U.S.C. § 1701 et seq.) constitute "agencies" of the United States, for purposes of subsection 2(a)(2) of the Public Funds Investment Act.

Subsection 2(c) of the Public Funds Investment Act (Ill. Rev. Stat. 1990 Supp., ch. 85, par. 902(c)) provides:

" * * *

(c) For purposes of this Section, the term 'agencies of the United States of America' includes: (i) the federal land banks, federal

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intermediate credit banks, banks for cooperative, federal farm credit banks, or any other entity authorized to issue debt obligations under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.) and Acts amendatory thereto; (ii) the federal home loan banks and the federal home loan mortgage corporation; and (iii) any other agency created by Act of Congress.

* * *

"

The Small Business Administration was created as an "agency" under the general direction and supervision of the President of the United States and outside of any "other agency" of the Federal Government. (15 U.S.C. § 633.) The Federal courts have referred to the Administration as a nonincorporated, Federal agency and an integral part of the United States government. (United States v. Stuart (D.C. Pa. 1967), 271 F. Supp. 939, 944; see Small Business Administration v. McClellan (1960), 364 U.S. 446, 448-450, 81 S. Ct. 191, 194.) It is, therefore, my opinion that the Small Business Administration is an agency of the United States, for purposes of section 2 of the Public Funds Investment Act, and that the Treasurer has authority to invest in obligations of the Administration of the types listed in subsection 2(a)(2) even though they mature more than one year after purchase.

Unlike the Small Business Administration, the national mortgage associations were not expressly created as agencies of the United States. The Government National Mortgage Association and the Federal National Mortgage Association are the only

two national mortgage associations established under the National Housing Act (12 U.S.C. § 1717.) In determining whether the General Assembly intended to include entities such as national mortgage associations within the scope of subsection 2(c) of the Public Funds Investment Act, it is proper to consider the history of legislation on the subject and the course it has taken. (Acme Fireworks Corp. v. Bibb (1955), 6 Ill. 2d 112, 118.) Where a statute is unclear or susceptible of more than one meaning, one may clarify its application by looking to similar statutes as aids to construction. Mister v. A.R.K. Partnership (1990), 197 Ill. App. 3d 105, 113.

The language authorizing public agencies to invest public funds in obligations of the United States of America or its agencies (now subsection 2(a)(2)) and the definition of the term "agencies of the United States of America" (now subsection 2(c)) were added to the Public Funds Investment Act by Public Act 86-952, effective November 30, 1989. (1989 Ill. Laws 5712, 5758-59.) Similar definitions had previously been added to sections 11 and 22 1/2 of the Deposit of State Moneys Act (Ill. Rev. Stat. 1989, ch. 130, pars. 30 (as amended by Public Act 87-510, effective January 1, 1992), and 41a) by Public Act 80-378, effective August 29, 1977. (1977 Ill. Laws 1313.) The definition was inserted in section 22 1/2 in conjunction with an amendment to the first paragraph of that section, which, prior to its amendment, authorized the State Treasurer to

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invest only in obligations of the United States government. Public Act 80-378 added the phrase "or its agencies or of National Mortgage Associations established by or under the National Housing Act, 1201 [sic] U.S.C. 1701 et seq." after "the United States government". Had the General Assembly intended to include national mortgage associations generally within the definition of the term "agency of the United States government," the express reference to national mortgage associations in the first paragraph of section 22 1/2 would be meaningless. Statutes should, if possible, be construed so that no term is rendered superfluous or meaningless. Niven v. Siqueira (1985), 109 Ill. 2d 357, 365.

Prior to its amendment by Public Act 80-378, section 11 of the State Treasurer Act provided:

"For amounts not insured by the Federal Deposit Insurance Corporation, as security the State Treasurer may, in his discretion accept bonds or other securities of the United States * * * bonds, notes, debentures or participating certificates of the Federal National Mortgage Association, Federal Home Loan Bank, or any other obligations issued under the federal 'Farm Credit Act of 1971', as amended * * * or notes, bonds, debentures or other similar obligations issued by the federal land banks, federal intermediate credit banks, or banks for cooperative or any other obligations issued pursuant to the provisions of an Act of Congress of the United States known as the Farm Credit Act of 1971 and acts amendatory thereto." (Ill. Rev. Stat. 1976 Supp., ch. 130, par. 30.)

Public Act 80-378 added references to agencies of the United States, added the definition of "agencies", and deleted the

specific references to the Federal Home Loan Bank, Federal land banks, Federal intermediate credit banks and banks for cooperative. Each of the deleted entities was expressly included in the definition of the term "agencies". The fact that the Federal National Mortgage Association was not treated the same as the other federally authorized entities strongly suggests that the General Assembly did not intend for it to be considered an agency of the United States government.

There have been no reported cases construing the term "agency of the United States government", for purposes of the Public Funds Investment Act or the Deposit of State Moneys Act. There have, however, been numerous reported cases involving the question of whether a particular entity is an agency of the State or Federal government for various purposes, or was intended to be a separate, independent entity. In making this determination, the courts have generally examined the statutes creating the entity for indicia of intent, including the extent to which the entity is free from direct governmental control, its existence as a corporate entity, its funding, the status of the entity's employees, its ownership, the manner of selection of its governing officers, the governmental nature of the function it performs and the manner in which the entity is treated in other statutes. (See, e.g., Guse v. Board of Trustees of Public School Teachers' Pension and Retirement Fund (1990), 203 Ill. App. 3d 111, 115-119.

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(Chicago teachers' pension fund board is not a State agency for purposes of the Illinois Administrative Procedure Act); Lewis v. United States (9th Cir. 1982), 680 F.2d 1239, 1240-42

(Federal Reserve Bank is not a Federal agency under Federal Tort Claims Act); In re Hoag Ranches (9th Cir. 1988), 846 F.2d 1225, 1227-28 (production credit association is not a Federal agency for purposes of Federal Rules of Appellate Procedure).) I will apply a similar analysis in construing the intent of section 2 of the Public Funds Investment Act.

Located in the United States' Department of Housing and Urban Development, the Government National Mortgage Association is a body corporate without capital stock but with corporate succession until dissolved by Congress. (12 U.S.C. § 1717.) Congress specifically declared that the Association would "remain in the Government". (12 U.S.C. § 1716b.) All powers and duties of the Association are vested in the Secretary of Housing and Urban Development, and the Association is to be administered under the direction of the Secretary of the Department. The Secretary has the duty to determine the general policies to govern the Association's operations and has the power to adopt, amend and repeal bylaws governing the performance of the powers and duties granted to it or imposed upon it by law. With the advice and consent of the Senate, the President appoints the president of the Association, a position established within the Department of Housing and Urban

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Development. The Secretary selects and appoints persons to fill the offices of vice president and the other offices for which the bylaws provide, and these offices are executive offices of the association and are to perform executive functions, powers and duties prescribed by the bylaws or the Secretary. (12 U.S.C. § 1723(a).) The Association has the power to adopt a corporate seal, contract, sue and be sued, acquire or sell real or personal property, prescribe rules governing its business and to accept gifts, but no attachment, injunction or other similar process may be issued against the property of the Association or against the association with respect to its property. (12 U.S.C. § 1723a(a).) The Secretary has the power to select and appoint or employ officers, attorneys, employees and agents of the Association and to fix their compensation, subject to civil service and classification laws. (12 U.S.C. § 1723a(d)(1).) Although the Association is to determine the character and amount of its obligations and the manner in which they are to be incurred, paid and accounted for (12 U.S.C. § 1723a(b)), the Association must, as a "wholly owned Government corporation" (31 U.S.C. § 9101), prepare and submit a budget to the President each year in the manner the President prescribes by regulation. (31 U.S.C. § 9103.) The President is to submit the budget as part of the budget he submits to Congress. (31 U.S.C. § 9103(c).) The financial statements of a Government Corporation must be

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audited in accordance with generally accepted government auditing standards and are subject to audit by the Comptroller General of the United States (31 U.S.C. § 9105). The courts have referred to the Association as a "federal agency" (Rockford Life Insurance Co. v. Illinois Department of Revenue (1987), 482 U.S. 182, 187, 107 S. Ct. 2312, 2315, f.n.7) and as an "agency within the Department of Housing and Urban Development". Molton, Allen and Williams, Inc. v. Harris (D.C. Cir. 1980), 613 F.2d 1176, 1177.

Given the governmental nature of its structure, if not all of its actions (see, e.g., Warren v. Government National Mortgage Association (8th Cir. 1980), 611 F.2d 1229, cert. denied 449 U.S. 857, 101 S. Ct. 133 (an extrajudicial mortgage foreclosure by GNMA was not a Federal action for Due Process purposes)), it is my opinion that the Government National Mortgage Association is an agency of the United States government, for purposes of section 2 of the Public Funds Investment Act, and that the Treasurer may, therefore, invest in its obligations under the authority of subsection (a)(2) thereof.

Although the Federal National Mortgage Association (referred to by statute (12 U.S.C. § 1717(a)(2)(B)) and hereinafter as the "corporation") has the same general corporate powers as the Government National Mortgage Association (12 U.S.C. § 1723a(a)), its structure and

relationship to the government are much different. Unlike the Association, the corporation was established by Congress as a "government-sponsored private corporation" with succession until dissolved by Act of Congress, and was not established within any existing department or other agency of the United States. (12 U.S.C. §§ 1716b, 1717(a)(2).) The corporation is privately owned, there are no legal restrictions on its stock, and the stock is traded publicly. (Eastern Service Corp. v. Commissioner of Internal Revenue (2d Cir. 1981), 650 F.2d 379, 382 and 384; 12 U.S.C. § 1718(a).) The corporation is governed by a board of 18 members, 13 of whom are elected annually by the common stockholders and five of whom are appointed annually by the President of the United States. The President may remove members for good cause and may fill vacancies in appointive seats on the board, but the board fills vacancies in elective seats. The board of directors is to determine the general policies governing the operations of the corporation, may adopt bylaws, and shall select and appoint persons to fill the offices of president and vice president and other offices for which the bylaws provide. (12 U.S.C. § 1723(b).) The board has the power to select and appoint or employ other officers, attorneys, employees and agents and to fix their compensation without regard to Federal civil service and classification laws. (12 U.S.C. § 1723a(d)(2).) The employees of the corporation are not government employees and, with the

exception of certain employees employed before January 31, 1972, are not generally subject to civil service retirement laws. (12 U.S.C. § 1723a(d)(2); Calhoun v. Federal National Mortgage Association (11th Cir. 1987), 823 F.2d 451, 453-54.) Except as provided with respect to the civil service retirement law, the corporation is not subject to the provisions of Title 5 of the U.S. Code, Government Organization and Employees. (12 U.S.C. § 1723a(d)(2).) The secondary market operations of the corporation, including the establishment of purchase and sale prices and charges or fees, are to be consistent with the objective that the operations be within the income derived from the operations and be fully self-supporting. (12 U.S.C. § 1719 (a)(1) and (2).) The corporation is not a government corporation for budgetary purposes (31 U.S.C. § 9101), and its property is not protected from attachment or injunction as is that of the Government National Mortgage Association. (See, 12 U.S.C. § 1723a(a).) The corporation has been characterized as being nongovernmental. (Molton, Allen and Williams, Inc. v. Harris (D.C. Cir. 1980), 613 F.2d 1176, 1177.) Its obligations are not guaranteed by the United States and constitute neither debts nor obligations of the United States or of any agency or instrumentality thereof, other than the corporation. (12 U.S.C. § 1719 (b), (e).)

Notwithstanding its existence as a privately owned corporation, the corporation has been deemed to be a Federal

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instrumentality for some purposes. (See Rust v. Johnson (9th Cir. 1979), 597 F.2d 174, 178, cert. denied, 444 U.S. 964, 100 S. Ct. 450 (exercise of state power over mortgage interest of FNMA constitutes an exercise of state power over property of the United States); Federal National Mortgage Association v. Lefkowitz (S.D. N.Y. 1975), 390 F. Supp.1364, 1368 (FNMA is a Federal instrumentality for purposes of a Supremacy Clause claim).) In so finding, the court in Federal National Mortgage Association v. Lefkowitz stated:

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* * * A glance at the federal legislation involved, 12 U.S.C. § 1716 et seq., leaves little doubt that Congress intended FNMA to be recognized as a federal instrumentality. As mentioned above, FNMA is subject to the general regulatory power of the Secretary of Housing and Urban Development. 12 U.S.C. § 1723a(h). The Secretary of the Treasury also has specific regulatory power over certain of FNMA's financial transactions, and is authorized to purchase and hold as much as two billion dollars in obligations issued by FNMA. See 12 U.S.C. § 1719. Furthermore, congress has exempted FNMA from having to qualify to do business in any state, 12 U.S.C. § 1723a(a), and has cloaked FNMA with immunity from state taxation (with the exception of real estate taxes), 12 U.S.C. § 1723a(c)(1). It is clear that FNMA performs a significant governmental function in its secondary mortgage market operations, see 12 U.S.C. §§ 1716(a), 1719(a)(1), and that the federal government has an extensive interest and involvement in mortgage market assistance.

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390 F. Supp. 1364, 1368

In addition, the mortgage transactions of the corporation were recently made subject to audit by the Comptroller General of the United States. (12 U.S.C. § 1723a(j), added by Public Law 101-73, Title VII, § 731(m)(3), effective August 9, 1989.)

An organization does not, however, become a government agency merely because it is designated as a Federal instrumentality or because it is federally chartered and regulated. (In re Hoag Ranches (9th Cir. 1988), 846 F.2d 1225, 1227 (production credit associations are not government agencies for purposes of the Federal Rules of Appellate Procedure).) Many financial institutions are federally chartered and regulated and are considered Federal instrumentalities without attaining the status of government agencies, within the meaning of Federal procedural rules. In re Hoag Ranches (9th Cir. 1988), 846 F.2d 1225, 1227.

The Illinois General Assembly appears to have recognized the distinction between Federal agencies and instrumentalities in other investment provisions. Section 22 1/2 of the Deposit of State Moneys Act (Ill. Rev. Stat. 1989, ch. 130, par. 41a), which includes substantially the same definition of "agencies" of the United States as is incorporated in section 2 of the Public Funds Investment Act, authorizes the State Treasurer to invest in participations in loans, if the principal of the participation is fully guaranteed by an agency or instrumentality of the United States

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government. As amended by Public Act 87-510, effective January 1, 1992, section 11 of the Deposit of State Moneys Act (Ill. Rev. Stat. 1989, ch. 130, par. 30, as amended) would authorize the State Treasurer to accept, as collateral for deposits not insured by a Federal agency, securities constituting direct and general obligations of any agency or instrumentality of the United States, the interest and principal of which are unconditionally guaranteed by the United States, and in securities constituting the obligation of a United States agency or instrumentality. (1991 Ill. Leg. Serv. 2451.) Section 1-113(1) of the Illinois Pension Code (Ill. Rev. Stat. 1989, ch.108 1/2, par. 1-113) authorizes the boards of trustees of various pension funds or retirement systems to invest in obligations of any United States government agency or instrumentality, and in obligations the principal and interest of which are guaranteed unconditionally by the United States Government or an agency or instrumentality thereof.

The Federal National Mortgage Association was not designated as an agency by Congress or created within an agency of the United States. It is privately owned, and the stockholders select thirteen of its eighteen directors. Its affairs are directed by its board and managed by officers its board selects. Its employees are not governmental employees, and statutes applicable generally to government agencies and government corporations do not apply to the corporation. It is

my opinion, therefore, that the Federal National Mortgage Association is not an "agency created by Act of Congress" and, therefore, not an agency of the United States government, for purposes of section 2 of the Public Funds Investment Act. To conclude otherwise would be to ignore the structural distinctions made by Congress in establishing the national mortgage associations, as well as Illinois legislative history that strongly suggests that the Federal National Mortgage Association, at least, was not viewed by the General Assembly as a Federal agency. A contrary conclusion would also render meaningless that portion of the second sentence of subsection 2(b) of the Public Funds Investment Act (Ill. Rev. Stat. 1990 Supp., ch. 902(b)), which expressly authorizes public agencies to invest in short term discount obligations of the Federal National Mortgage Association. Consequently, it is my opinion that the State Treasurer may not invest in obligations of the Federal National Mortgage Association under the authority of subsection 2(a)(2) of the Public Funds Investment Act.

In summary, it is my opinion that:

- 1) investments made by the State Treasurer under the authority of section 22 1/2 of the Deposit of State Moneys Act in obligations of agencies of the United States government or in obligations of national mortgage associations must mature within one year after the date of purchase;
- 2) pursuant to subsection 2(a)(1) of the Public Funds Investment Act, the State Treasurer, like any other public agency, may invest in any bonds, notes, certificates of indebtedness, treasury

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bills or other securities guaranteed by the full faith and credit of the United States of America as to principal and interest without regard to the one year maturation requirement of section 22 1/2 of the Deposit of State Moneys Act; and

3) the Small Business Administration and the Government National Mortgage Association are agencies of the United States government, for purposes of subsection 2(a)(2) of the Public Funds Investment Act, which authorizes public agencies, including the State Treasurer, to invest in bonds, notes, debentures, or other similar obligations of the United States of America or its agencies without regard to the date of maturity; the Federal National Mortgage Association, however, is not an agency of the United States Government, for purposes of subsections 2(a)(2) of that Act.

Respectfully yours,

A handwritten signature in cursive script, reading "Roland W. Burris". The signature is written in dark ink and is positioned above the typed name and title.

ROLAND W. BURRIS
ATTORNEY GENERAL