December 16, 1993

OPINION NO. 93-054

The Honorable Mary Ellen Withrow
Treasurer of State
State of Ohio
30 East Broad Street
Columbus, Ohio 43266-0421

Dear Treasurer Withrow:

You have requested a formal opinion regarding whether the program described below is a permissible investment by the Treasurer of State under Ohio law.

You have indicated that a program has been proposed to the Treasurer that involves the investment of a portion of the state funds held by the Treasurer in certain participating mortgage-backed securities originated upon quality multifamily housing properties within the State of Ohio. As described in the materials submitted in connection with your request, the payment of principal and interest on the securities will be 100% guaranteed or insured by the Government National Mortgage Association ("GNMA") or the Federal Housing Administration of the United States Department of Housing and Urban Development ("FHA"). These materials emphasize that the proposed investment differs from programs involving collateralized mortgage obligations ("CMO's") or other indirect forms of ownership of governmental obligations because under the proposed program the Treasurer will directly purchase and hold the participating mortgage-backed securities. Accordingly, the Treasurer, as the holder of the securities, will have the direct benefit of the GNMA guaranties or FHA insurance, as opposed to being an indirect beneficiary of such obligations under an indirect pledge or other collateralized structure.

In addition to the principal and interest, an investor in such participating mortgage-backed securities will be entitled to participate in increases in the value of the underlying properties by receiving additional payments contingent upon the success of the project. In view of the investor's right to receive these additional payments that may accrue, such securities bear interest at a rate which is somewhat below the market interest rate borne by comparable securities which do not possess a participatory component. Unlike the principal and interest, however, these additional contingent payments are not guaranteed or insured by the United States Government.

Organization and Status of GNMA and FHA as Part of the United States Government

GNMA was created in 1968 by partition of the Federal National Mortgage Association[1] into two separate and distinct corporations: (1) Federal National Mortgage Association ("FNMA") and (2) GNMA. *See* Housing and Urban Development Act of 1968, Pub. L. No. 90-448, Title VIII, §801, 82 Stat. 476, 536 (codified as amended at 12 U.S.C. §1716b (1988)). Such legislation provided that FNMA would be a "Government-sponsored private corporation," and that GNMA would "remain in the Government [of the United States of America]." *Id.; see also* 24 C.F.R. §300.5 (1993) ("[t]he Association [GNMA] is a Government corporation in the Department of Housing and Urban Development"). GNMA is authorized, *inter alia*, to guarantee privately issued securities backed by trusts or pools of mortgages or loans which are insured or guaranteed under certain governmental housing programs. *See generally* 12 U.S.C. §1721 (1988 & Supp. IV 1992);[2] 24 C.F.R. §300.3 (1993). 12 U.S.C. §1721(g) provides that the full faith and credit of the United States is pledged to the payment of all amounts which may be required to be paid under such guaranties issued by GNMA. *See also* 24 C.F.R. §390.13 (1993).

The FHA was originally established in 1934 by the National Housing Act, ch. 847, Title I, §1, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §1702 (Supp. IV 1992)). The FHA became an organizational unit within the United States Department of Housing and Urban Development ("HUD") in 1965 by virtue of the Department of Housing and Urban Development Act, Pub. L. No. 89-174, §5, 79 Stat. 667 (1965). *See* 24 C.F.R. §200.2 (1993). The FHA currently operates a variety of housing insurance programs under the provisions of the National Housing Act, as outlined generally at 24 C.F.R. §§200.10-.39 (1993). The obligations of the FHA to make payments with respect to the principal and interest of defaulted mortgages under the various insurance programs are backed by the United States Government. *See, e.g.,* 12 U.S.C. §1710 (1988 & Supp. IV 1992); 24 C.F.R. §§200.153-.162 (1993); 24 C.F.R. §§203.400-.411 (1993).

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[1] The origins of GNMA and its predecessor entities are discussed at 24 C.F.R. §300.5 (1993).

[2] 12 U.S.C. §1721 has been amended by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title III, §3004, 107 Stat. 312, 339.

Permissible Investments under Uniform Depository Act

Pursuant to the Ohio Uniform Depository Act, R.C. Chapter 135, the Treasurer of the State of Ohio is authorized to invest all or any part of the interim moneys[3] of the State in, *inter alia*, "United States treasury bills, notes, bonds, or any other obligations or securities issued by the United States treasury or *any other obligation guaranteed as to principal and interest by the United States*...." R.C. 135.143(A)(1) (emphasis added).

The authority for the Treasurer to invest in the proposed investment program thus depends upon whether the participating mortgage-backed securities under the proposed investment program constitute "obligations guaranteed as to principal and interest by the United States."[4] In this regard, it is clear that the participating mortgage-backed securities are "obligations" within the meaning of R.C. 135.143(A)(1).[5] Further, as noted above, both GNMA and the FHA are part of the United States Government, and their respective guaranties and insurance cover the principal and interest on the participating mortgage-backed securities and are backed by the United States Government.

Accordingly, two remaining issues are presented by the proposed investment program: first, whether, by virtue of the GNMA guaranties and FHA insurance, the participating mortgage-backed securities described in your request are "guaranteed ... by the United States" within the meaning of R.C. 135.143(A)(1); and second, whether the fact that income that is not guaranteed by the United

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[3] R.C. 135.01(F) defines "interim moneys" as:

> [P]ublic moneys in the treasury of the state or any subdivision after the award of inactive deposits has been made in accordance with section 135.07 of the Revised Code, which moneys are in excess of the aggregate amount of the inactive deposits as estimated by the governing board prior to the period of designation and which the treasurer or governing board finds should not be deposited as active or inactive deposits for the reason that such moneys will not be needed for immediate use but will be needed before the end of the period of designation.

R.C. 135.01(D) defines the term "governing board" of the state as the State Board of Deposit.

[4] *See also* Ohio Const. art. VIII, §§14, 16 (providing that it is a proper public purpose for the state and its political subdivisions to finance housing assistance programs).

[5] As discussed in 1993 Op. Att'y Gen. No. 93-030, the term "obligation" is not defined for purposes of R.C. 135.143, and such term is, therefore, required to be "read in context according to the rules of grammar and common usage." *See also* 1990 Op. Att'y Gen. No. 90-058. As noted in Op. No. 90-058 at 2-249, the definition of "[o]bligation" contained in *Black's Law Dictionary* 968 (5th ed. 1979) includes a formal and binding agreement or acknowledgment of a liability to pay a certain sum or do a certain thing. The participating mortgage-backed securities described in your request fall within this definition.

States may accrue with respect to participating mortgage-backed securities (in addition to the principal and interest that is guaranteed or insured) renders the provisions of the Ohio Uniform Depository Act inapplicable.

GNMA Guaranties and FHA Insurance Constitute Guaranties of the United States Government for Purposes of R.C. 135.143

As noted in 1993 Op. Att'y Gen. No. 93-030, slip op. at 5, *Black's Law Dictionary* 705 (6th ed. 1990) defines a "guaranty" generally as "[a] collateral agreement for performance of another's undertaking. An agreement in which the guarantor agrees to satisfy the debt of another (the debtor), only if and when the debtor fails to repay (secondarily liable) .... A promise to answer for payment of debt or performance of obligation if person liable in first instance fails to make payment or perform obligation." Both the GNMA guaranties and FHA insurance constitute such "guaranties" because in each case they obligate the United States Government to make payments to the holders of the GNMA-guaranteed or FHA-insured mortgages in the event that such payments are not made by the primary obligor under such instruments. Consequently, in each case GNMA and FHA are secondarily liable to satisfy the debts of another, *i.e.*, to make payment of the amounts owing on such obligations in the event they are not paid by the primary obligor. Because the GNMA guaranties and the FHA insurance constitute obligations of the United States Government in the nature of guaranties, the participating mortgage backed securities are obligations guaranteed by the United States as to principal and interest.

Effect of Additional Non-Guaranteed Contingent Payments

The remaining issue is whether the contingency of additional income accruing with respect to the participating mortgage-backed securities would make the provisions of R.C. 135.143(A)(1) inapplicable to the proposed investment. By virtue of the GNMA guaranties or FHA insurance, it is clear that such securities are "guaranteed *as to principal and interest* by the United States" as required by R.C. 135.143(A)(1) to be eligible for investment by the Treasurer. Under the plain language of the statute, there is no requirement that other possible income accruing with respect to an investment be so guaranteed.[6] Accordingly, in the circumstances described in your request, the existence of additional contingent income would not render the participating mortgage-backed securities ineligible for investment.

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[6] For example, many securities and other obligations are subject to earlier redemption at a premium. The plain language of R.C. 135.143(A)(1) would not require that the premium be backed by a United States Government guaranty in such circumstances.

Investment Considerations

It should be noted that any decision with respect to the investment of moneys of a governmental entity must be made in accordance with the fiduciary standards generally applicable to the investment of public moneys by such entity. *See, e.g., State v. Herbert*, 49 Ohio St. 2d 88, 358 N.E.2d 1090 (1976); *Crane Township, ex rel. Stalter v. Secoy*, 103 Ohio St. 258, 132 N.E. 851 (1921). In general, a public officer, as a fiduciary with respect to public funds under such officer's control, is required to exercise the same degree of care, skill, and judgment with respect to investment decisions as are consistent with the fiduciary responsibility to preserve and safeguard the financial integrity and soundness of such funds. *See generally* 1989 Op. Att'y Gen. No. 89-033 at 2-151 to 2-156. As noted in *Black's Law Dictionary* (6th ed. 1990) at 625, "[t]he status of being a fiduciary gives rise to certain legal incidents and obligations, including the prohibition against investing the money or property in investments which are speculative or otherwise imprudent."

Accordingly, the appropriateness of any particular investment in participating mortgage-backed securities such as those described in your request will depend upon a careful analysis of all relevant factors. Such factors include, *inter alia*, the amount of the proposed investment in such securities, the lack of marketability of such securities, the investing authority's need for liquidity, the size and diversity of the investing authority's portfolio, the investment authority's investment policies, the extent to which the stated interest rate is less than the market rate of interest for other comparable investments, the amount of the guaranteed portion of the investment, and the nature and value of the contingent payments, if any, which may accrue (including the terms and circumstances under which the investing authority may be entitled to receive such contingent payments). There may be circumstances, for example, in which the interest rate on the securities in question would be substantially below current market rates and dependence on the non-guaranteed income would be so substantial as to render the amount contemplated for investment inappropriate, or the investment itself unreasonable and imprudent.

Conclusion

It is, therefore, my opinion, and you are hereby advised, that, pursuant to R.C. 135.143(A)(1) and subject to the same fiduciary standards of care, skill and judgment as are generally applicable to the investment of interim moneys of the State of Ohio, the Treasurer of the State of Ohio is authorized to invest interim moneys of the State of Ohio in participating mortgage-backed securities guaranteed or insured as to principal and interest by the General National Mortgage Association or the Federal Housing Administration within the United States Department of Housing and Urban Development.

Respectfully,

LEE FISHER
Attorney General

December 16, 1993

The Honorable Mary Ellen Withrow
Treasurer of State
State of Ohio
30 East Broad Street
Columbus, Ohio 43266-0421

SYLLABUS: 93-054

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