September 23, 2009

The Honorable Mary Taylor, CPA
Auditor of State
88 E. Broad St.
Columbus, Ohio 43215

SYLLABUS: 2009-036

1. Federal law addresses the question of when a subdivision, as defined in R.C. 135.181(A)(3) and which has a security interest in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law, may present a claim to the Federal Deposit Insurance Corporation for securities in the pool. Pursuant to 12 U.S.C.A. § 1821(d)(9), 12 U.S.C.A. § 1821(e)(12), and 12 U.S.C.A. § 1823(e)(1), such a subdivision may present such a claim for securities in the pool when the Federal Deposit Insurance Corporation, as receiver, is liquidating or winding up the affairs of the institution, provided that the subdivision's security interest in the securities meets the following two criteria: (1) it is legally enforceable and perfected; and (2) it is set forth in a written agreement that has been approved by, and recorded in the minutes of, the board of directors or loan committee of the institution and has been maintained continuously, from the time of its execution, as an official record of the institution.

2. Subject to the caveat that the questions addressed in this opinion are ultimately subject to determination by either the Federal Deposit Insurance Corporation or a court of law as matters of federal law under 12 U.S.C.A. § 1821(e)(12), a reading of Ohio law standing alone indicates that the security interest of a subdivision in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law is "legally enforceable" when the conditions set forth in R.C. 1309.203(B) are satisfied.

3. Subject to the caveat that the questions addressed in this opinion are ultimately subject to determination by either the Federal Deposit Insurance Corporation or a court of law as matters of federal law under 12 U.S.C.A.

§ 1821(e)(12), a reading of Ohio law standing alone indicates that, pursuant to R.C. 1309.308(A), a subdivision that has a security interest in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law has a "perfected security interest" in securities in the pool when the subdivision's security interest in the securities attaches and all of the applicable requirements for perfection in R.C. 1309.310-.316 have been satisfied.

4. Subject to the caveat that the questions addressed in this opinion are ultimately subject to determination by either the Federal Deposit Insurance Corporation or a court of law as matters of federal law under 12 U.S.C.A. § 1821(e)(12), a reading of Ohio law standing alone indicates that the security interest of a subdivision in a pool of uncertificated securities deposited with a qualified trustee in accordance with R.C. 135.181(E) is (1) "legally enforceable" when the conditions set forth in R.C. 1309.203(B) are satisfied and (2) "perfected" by establishing "control" as defined in R.C. 1308.24.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

September 23, 2009

OPINION NO. 2009-036

The Honorable Mary Taylor, CPA
Auditor of State
88 E. Broad St.
Columbus, Ohio 43215

Dear Auditor Taylor:

You have requested an opinion concerning the protection afforded by the Federal Deposit Insurance Corporation (FDIC) to a subdivision that has public moneys on deposit with a financial institution that is placed in receivership. In your letter, you explain that the

> [FDIC] serves as the receiver when a financial institution fails. To be treated as a secured creditor, the FDIC requires government investors to have a perfected security interest in the collateral pledged to protect their deposits. Do you think that [subdivisions] in Ohio whose deposits are protected by pooled collateral pursuant to [R.C. 135.181] have a perfected security interest in the collateral under Ohio law? Your opinion will dictate whether [the subdivisions] are recognized as secured or general creditors by [the] FDIC if an Ohio bank were to fail.

Although your question thus frames the matter purely as one involving Ohio law, it is immediately clear from the broader context that the issues you pose involve mixed or joint questions of federal and state law where the two are explicitly intertwined. For example, as will be seen later in this opinion, your specific question relates to the ability of a subdivision to present a valid claim to the FDIC for assets of a financial institution that is placed in receivership, which implicates the provisions of various federal banking laws, namely 12 U.S.C.A. § 1821(d)(9), 12 U.S.C.A. § 1821(e)(12), and 12 U.S.C.A. § 1823(e)(1). We will therefore consider your question in the broader context of whether a subdivision that has a security interest in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the

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institution and not otherwise secured by law may present a claim to the FDIC for securities in the pool when the FDIC, as receiver, is liquidating or winding up the affairs of the institution.[1] Because the matters you present implicate federal law, and are ultimately subject to determination by either the FDIC or a court of law as matters of federal law under 12 U.S.C.A. § 1821(e)(12), we are unable to answer them definitively by means of an opinion rendered solely on matters of state law. *See* 1999 Op. Att'y Gen. No. 99-007 at 2-55 (the Attorney General is not empowered to provide authoritative interpretations of federal law). Consequently, we will suggest later that you pursue further clarification and guidance by seeking a formal opinion from the FDIC on these same issues. Nonetheless, since your efforts to pursue that route may predictably be met by a response from the FDIC that it finds itself hindered in rendering authoritative guidance by the fact that the matter depends in part on state law, we will proceed as a practical matter to set out our best judgments about the matters implicated here under Ohio law. We do so in an effort to help you clarify and narrow the issues involved in what both of us acknowledge to be a difficult area of the law, which involves construing intricate legal provisions that are intended to govern very complex financial operations.

Deposits of Public Moneys in Public Depositories

Before turning to your specific question, it is helpful to review the relevant provisions of R.C. Chapter 135 (Uniform Depository Act) governing the deposit of public moneys in public depositories by subdivisions and counties.[2] R.C. 135.01-.21 authorize subdivisions[3] to deposit

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[1] The question you have posed does not concern a subdivision's right to share in moneys on deposit with an institution or proceeds from the sale of assets not pledged by the institution under R.C. 135.181(B) when the institution is placed in receivership, and accordingly this opinion does not address the right of a subdivision to such moneys or proceeds. *See generally Busher v. Fulton,* 128 Ohio St. 485, 191 N.E. 752 (1934) (syllabus, paragraph one) (the ordinary relationship of debtor and creditor is created between a bank and the clerk of courts and a deposit by the clerk of courts in the bank possesses no trust quality, and upon the insolvency of the bank the clerk of courts has no right of preference); *State ex rel. Village of Warrensville Heights v. Fulton,* 128 Ohio St. 192, 190 N.E. 383 (1934) (syllabus, paragraph two) ("[t]he ordinary relationship of debtor and creditor is thereby created between the bank and the municipality, and the rights of the municipality are no greater and no different from those of an individual depositor"); *Village of Metamora,* 53 Ohio App. 238, 240, 4 N.E.2d 719 (Fulton County 1935) ("[m]oney in the bank vault is presumed to be such special deposit, and as to it the village does have a preference over general creditors of the bank").

[2] The basic term "subdivision" here is more complicated than would be expected. Except as otherwise provided in R.C. Chapter 135, a county is not a subdivision for purposes of R.C. Chapter 135. *See* R.C. 135.01(L); R.C. 135.181(A)(3); R.C. 135.45(F)(2)(a); R.C. 135.46(H)(5). For purposes of R.C. 135.181, however, a county is a subdivision. R.C. 135.181(A)(3). *See also* note three, *infra*.

their public moneys in public depositories. For purposes of these statutes, any institution mentioned in R.C. 135.03[4] is eligible to become a public depository of the active, inactive, and interim deposits of public moneys of a subdivision. R.C. 135.04(D)-(E).

Similar provisions governing the deposit of public moneys by counties in public depositories appear in R.C. 135.31-.40. Under these provisions, "[a]ny eligible institution described in [R.C. 135.32(A)[5]] that has an office located within the territorial limits of the county is eligible to become a public depository of the [public moneys that constitute the] active moneys of the county." R.C. 135.33(B). Also, a county investing authority may deposit public

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[3] Except as otherwise provided in R.C. 135.14 and R.C. 135.181, the term "subdivision," as used in R.C. 135.01-.21, is defined as

> any municipal corporation, except one which has adopted a charter under Article XVIII, Ohio Constitution, and the charter or ordinances of the chartered municipal corporation set forth special provisions respecting the deposit or investment of its public moneys, or any school district or educational service center, a county school financing district, township, municipal or school district sinking fund, special taxing or assessment district, or other district or local authority electing or appointing a treasurer, except a county. In the case of a school district or educational service center, special taxing or assessment district, or other local authority for which a treasurer, elected or appointed primarily as the treasurer of a subdivision, is authorized or required by law to act as ex officio treasurer, the subdivision for which such a treasurer has been primarily elected or appointed shall be considered to be the "subdivision." The term also includes a union or joint institution or enterprise of two or more subdivisions, that is not authorized to elect or appoint a treasurer, and for which no ex officio treasurer is provided by law.

R.C. 135.01(L).

[4] R.C. 135.03 provides that "[a]ny national bank located in this state and any bank as defined by [R.C. 1101.01], subject to inspection by the superintendent of financial institutions, is eligible to become a public depository [for the public moneys of a subdivision], subject to [R.C. 135.01-.21]." R.C. 135.03 provides further that "[any] domestic association as defined in [R.C. 1151.01], or any savings bank as defined in [R.C. 1161.01], authorized to accept deposits is eligible to become a public depository [for the public moneys of a subdivision], subject to [R.C. 135.01-.21]."

[5] R.C. 135.32(A) provides, in part, that "[a]ny national bank located in this state and any bank as defined in [R.C. 1101.01], subject to inspection by the superintendent of financial institutions, is eligible to become a public depository [for the public moneys of a county], subject to [R.C. 135.31-.40]."

moneys that constitute the inactive moneys of a county in the securities and obligations described in R.C. 135.35. Included among those securities and obligations are "[t]ime certificates of deposit or savings or deposit accounts, including, but not limited to, passbook accounts, in any eligible institution mentioned in [R.C. 135.32[6]]." R.C. 135.35(A)(3).

An institution listed in R.C. 135.03 or R.C. 135.32 may not acquire a deposit of public moneys from a subdivision or county under R.C. 135.04, R.C. 135.33, or R.C. 135.35 unless the institution has pledged security for the repayment of all public moneys deposited in the institution. *See* R.C. 135.18; R.C. 135.181; R.C. 135.37. *See generally* 1937 Op. Att'y Gen. No. 995, vol. II, p. 1738 (syllabus, paragraph two) ("[a] treasurer is required … to require of a designated depository that it pledge and deposit with him eligible securities as security for the public moneys therein deposited"). Although requiring a specific pledge of collateral from the institution is likely to be the most secure approach to collateralization in instances where it can be achieved, *see* R.C. 135.18 (specifying pledge of "eligible securities of aggregate market value equal to or in excess of the amount of public moneys to be at the time so deposited); R.C. 135.37 (same), another permissible method by which an institution may satisfy the pledging requirement is the "pooling" method set forth in R.C. 135.181. This statute states, in relevant part:

> (B) In lieu of the pledging requirements prescribed in [R.C. 135.18] and [R.C. 135.37], an institution designated as a public depository at its option may pledge a single pool of eligible securities to secure the repayment of all public moneys deposited in the institution and not otherwise secured pursuant to law, provided that at all times the total market value of the securities so pledged is at least equal to one hundred five per cent of the total amount of all public deposits to be secured by the pooled securities that are not covered by any federal deposit insurance….
>
> (C) The securities described in [R.C. 135.18(B)[7]] shall be eligible as collateral for the purposes of [R.C. 135.181(B)], provided no such securities pledged as collateral are at any time in default as to either principal or interest.

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[6] In addition to the institutions listed in R.C. 135.32(A), *see* note five, *supra,* R.C. 135.32(B) states that "[a]ny domestic association as defined in [R.C. 1151.01], or any savings bank as defined in [R.C. 1161.01], authorized to accept deposits is eligible to become a public depository [for the public moneys of a county], subject to [R.C. 135.31-.40]."

[7] For purposes of R.C. 135.181(B), the following securities described in R.C. 135.18(B) may be pledged: (1) "[b]onds, notes, or other obligations of the United States"; (2) "[b]onds, notes, debentures, letters of credit, or other obligations or securities issued by any federal government agency or instrumentality, or the export-import bank of Washington"; (3) "[o]bligations of or fully insured or fully guaranteed by the United States or any federal government agency or instrumentality"; (4) "[o]bligations partially insured or partially guaranteed by any federal agency or instrumentality"; (5) "[o]bligations of or fully guaranteed by

> (D) The state and each subdivision shall have an undivided security interest in the pool of securities pledged by a public depository pursuant to [R.C. 135.181(B)] in the proportion that the total amount of the state's or subdivision's public moneys secured by the pool bears to the total amount of public deposits so secured.

If an institution chooses to satisfy its pledging requirement by way of the pooling method set forth in R.C. 135.181(B), it must "designate a qualified trustee and deposit with the trustee for safekeeping the eligible securities pledged pursuant to [R.C. 135.181(B)]." R.C. 135.181(E). The institution may substitute eligible securities at any time provided it remains in compliance with R.C. 135.181(B), and the institution may, in lieu of endorsing each security, provide the trustee with a power of attorney authorizing the trustee to assign the securities. R.C. 135.181(G), (K).

In the event that an institution fails to pay over, as provided by law, any portion of a subdivision's public moneys held by the institution and secured by the pooling method pursuant to R.C. 135.181(B), then the subdivision's treasurer

> shall give written notice of this failure to the qualified trustee holding the pool of securities pledged against public moneys deposited in the depository, and at the same time shall send a copy of this notice to the depository. Upon receipt of this notice, the trustee shall transfer to the treasurer for public sale, the pooled securities that are necessary to produce an amount equal to the deposits made by the treasurer and not paid over, less the portion of the deposits covered by any federal deposit insurance, plus any accrued interest due on the deposits; however, the amount shall not exceed the state's or subdivision's proportional security interest in the market value of the pool as of the date of the depository's failure to pay over the deposits, as that interest and value are determined by the trustee. The treasurer shall sell at public sale any of the bonds or other securities so transferred.…[8] When a sale of bonds or other securities has been so made and

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the federal national mortgage association, federal home loan mortgage corporation, federal farm credit bank, or student loan marketing association"; (6) "[b]onds and other obligations of this state"; (7) "[b]onds and other obligations of any county, township, school district, municipal corporation, or other legally constituted taxing subdivision of this state"; (8) "[b]onds of other states of the United States"; (9) "[s]hares of no-load money market mutual funds"; (10) "[a] surety bond issued by a corporate surety"; and (11) "[b]onds or other obligations of any county, municipal corporation, or other legally constituted taxing subdivision of another state of the United States." R.C. 135.18(B)(1)-(11).

[8] In lieu of selling the securities in accordance with R.C. 135.181(I), a county, municipal corporation, township, or school district may retain the securities and collect the interest or

> upon payment to the treasurer of the purchase money, the treasurer shall transfer such bonds or securities whereupon the absolute ownership of such bonds or securities shall pass to the purchasers. Any surplus after deducting the amount due the state or subdivision and expenses of sale shall be paid to the public depository. (Footnote added.)

R.C. 135.181(I). Accordingly, pursuant to R.C. 135.181(I), when an institution fails to pay over, as provided by law, a subdivision's public moneys secured by the pooling method pursuant to R.C. 135.181(B), the subdivision may claim the securities pledged to secure the repayment of the public moneys. However, if the deposits of the institution are insured by the FDIC,[9] and the FDIC is charged, as receiver, with liquidating or winding up the affairs of the institution, a subdivision claiming securities pledged by the institution under R.C. 135.181(B) must comply with federal law in order to obtain the securities.

Disposition of Securities when an Institution's Assets Are under the Control of the FDIC as Receiver

Although the Attorney General is not empowered to provide authoritative interpretations of federal law, 1999 Op. Att'y Gen. No. 99-007 at 2-55, we can advise you as to the pertinent provisions of federal law governing the presentation of claims to the FDIC. *See also* 1997 Op. Att'y Gen. No. 97-025 at 2-146; 1989 Op. Att'y Gen. No. 89-001 at 2-1 n.1; 1988 Op. Att'y Gen. No. 88-007 at 2-21 and 2-22. Under federal law, the FDIC may be appointed as a receiver for the purpose of liquidating or winding up the affairs of an insured depository institution. 12 U.S.C.A. § 1821(c); *see* R.C. 1125.20. In its capacity as receiver, the FDIC has the following powers prescribed in 12 U.S.C.A. § 1821(d):

> (2) General powers. (A) Successor to institution. [The FDIC] shall, as conservator or receiver, and by operation of law, succeed to—
>
> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and
>
> (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

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principal payments due; refund, exchange, or otherwise dispose of the securities; or issue bonds the payment of which is secured by the securities. *See* R.C. 135.51-.54.

[9] 12 U.S.C.A. § 1811(a) provides that "[t]here is hereby established [the FDIC] which shall insure, as hereinafter provided, the deposits of all banks and savings associations which are entitled to the benefits of insurance under … [12 U.S.C.A. §§ 1811 et seq.]" *Accord* 12 U.S.C.A. § 1821(a)(1)(A). *See generally* 12 U.S.C.A. § 1814(a) (setting forth instances in which depository institutions are insured by the FDIC); 12 U.S.C.A. § 1815(a) (same).

> (B) Operate the institution. [The FDIC] may (subject to the provisions of section 1831q of this title), as conservator or receiver—
>
> (i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;
>
> ….
>
> (E) Additional powers as receiver. [The FDIC] may (subject to the provisions of section 1831q of this title), as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

See R.C. 1125.22. Thus, when the FDIC is required to liquidate or wind up the affairs of an institution, the FDIC is granted authority under 12 U.S.C.A. § 1821(d)(2)(E) to proceed to sell or otherwise dispose of the assets of the institution. This authority extends to securities pledged by the institution under R.C. 135.181(B).

An asset acquired by the FDIC as receiver, however, may be subject to claims that are made against the institution for the asset. *See* 12 U.S.C.A. § 1821(d)(3)-(8); R.C. 1125.23. When a claim for an asset is made, the FDIC is required to determine whether to allow or reject the claim. 12 U.S.C.A. § 1821(d)(3); R.C. 1125.23(B). Accordingly, a subdivision that has a security interest in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law may present a claim to the FDIC for securities in the pool when the FDIC, as receiver, is liquidating or winding up the affairs of the institution.[10]

Agreements as the Bases for Claims

Such a claim for securities must be based upon an agreement between a subdivision and the institution since the security interest of the subdivision in the pool of securities pledged by the institution under R.C. 135.181(B) must be documented in the institution's records. *See* 12 U.S.C.A. § 1821(d)(9)(A); 12 U.S.C.A. § 1823(e)(1); *see also Langley v. FDIC*, 484 U.S. 86, 91-92 (1987). Further, pursuant to 12 U.S.C.A. § 1821(d)(9)(A), "[e]xcept as provided in [12 U.S.C.A. § 1821(d)(9)(B)[11]], any agreement which does not meet the requirements set forth in

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[10] For the purpose of this opinion it is assumed that the institution has failed to pay over a subdivision's public moneys as provided by law and secured by the pooling method pursuant to R.C. 135.181(B) and that the qualified trustee has not transferred to the subdivision any securities from the pool of securities pledged by the institution pursuant to R.C. 135.181(B). *See* R.C. 135.181(I) (requiring a qualified trustee to transfer securities pledged by an institution under R.C. 135.181(B) to a subdivision when the institution fails to pay over any of the public moneys deposited in the institution).

[11] 12 U.S.C.A. § 1821(d)(9)(B) provides, in part, that:

[12 U.S.C.A. § 1823(e)] shall not form the basis of, or substantially comprise, a claim against the receiver or [the FDIC]." This means that an agreement may not form the basis of a claim for securities pledged by an institution under R.C. 135.181(B) when that institution is under FDIC receivership unless the requirements set forth in 12 U.S.C.A. § 1823(e)(1) are satisfied.

12 U.S.C.A. § 1823(e)(1) states, in part:

> No agreement which tends to diminish or defeat the interest of [the FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against [the FDIC] unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,[12]
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution. (Footnote added.)

Agreements that fail to meet the requirements of 12 U.S.C.A. § 1823(e)(1) are not enforceable against the FDIC, and the claimant has no right to the claimed asset. *Langley v. FDIC. See generally N. Ark. Med. Ctr. v. Barrett*, 962 F.2d 780 (8th Cir. 1992) (holding that 12 U.S.C.A. § 1823(e) applies to both debtors and creditors (*i.e.*, depositors) of financial institutions that go into receivership). Therefore, pursuant to 12 U.S.C.A. § 1821(d)(9) and 12 U.S.C.A. § 1823(e)(1), a subdivision that has a security interest in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law may not present a claim to the FDIC for securities in the pool when the FDIC, as receiver, is liquidating or winding up the affairs of the institution unless the subdivision's security interest in the securities is set

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> Notwithstanding section 1823(e)(2) of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

[12] The provision found in 12 U.S.C.A. § 1823(e)(1)(B), which requires an agreement to be executed contemporaneously with the acquisition or transfer of an asset, does not apply when the agreement provides for the lawful collateralization of deposits of public moneys by subdivisions. 12 U.S.C.A. § 1823(e)(2)(A).

forth in a written agreement that has been approved by, and recorded in the minutes of, the board of directors or loan committee of the institution and maintained continuously, from the time of its execution, as an official record of the institution.[13]

Requirement that a Security Interest in Securities Be Legally Enforceable and Perfected

In addition to the requirements set forth in 12 U.S.C.A. § 1823(e)(1), federal law requires a subdivision's security interest in securities pledged by an institution under R.C. 135.181(B) to be legally enforceable and perfected in order to be recognized as a valid claim for the securities. Specifically, 12 U.S.C.A. § 1821(e)(12) provides:

> Certain security interests not avoidable. No provision of this subsection shall be construed as permitting the avoidance of any *legally enforceable or perfected security interest in any of the assets of any depository institution* except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution. (Emphasis added.)

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[13] R.C. 135.181 does not require a written agreement between a subdivision and an institution designated as a public depository before or during the time the subdivision's public moneys are deposited in the institution. Absent such a written agreement, there will be many circumstances in which a subdivision may not present a claim to the FDIC for securities in a pool pledged by an institution under R.C. 135.181(B) when the FDIC, as receiver, is liquidating or winding up the affairs of the institution. 12 U.S.C.A. § 1823(e)(1)(A). Nonetheless, there may be other circumstances in which a subdivision's claim may be subject to other provisions of federal or state law where a written agreement may not be required. S*ee generally MVB Mortgage Corp. v. FDIC,* Case No. 2:08-cv-771, 2009 U.S. Dist. LEXIS 58890, at *10 (S.D. Ohio July 9, 2009) (12 U.S.C.A. § 1823(e)(1) does not bar an alleged creditor's claim when the FDIC, as receiver, is liquidating or winding up the affairs of an Ohio depository institution. Instead, the alleged creditor's claim is "determined in accordance with applicable Ohio law").

Until the General Assembly requires such a written agreement, we recommend that a subdivision that has public moneys in an institution that secures the deposit of such moneys by pledging a pool of securities under R.C. 135.181(B) enter into a written agreement with the institution that comports with the requirements of 12 U.S.C.A. § 1823(e)(1). In order to comply with the requirements of 12 U.S.C.A. § 1823(e)(1), the agreement should state that the subdivision has a security interest in the pool of securities pledged under R.C. 135.181(B) and require the agreement be approved by, and recorded in the minutes of, the board of directors or loan committee of the institution and maintained continuously, from the time of its execution, as an official record of the institution.

The FDIC reads this provision to mean that the FDIC will reject a claim for an asset when the claimant's security interest in the asset is not legally enforceable and perfected.[14] Accordingly, it follows that in order for a subdivision's claim for securities pledged by an institution under R.C. 135.181(B) to be accepted and recognized by the FDIC, the subdivision must have a "legally enforceable" and "perfected security interest" in the securities. *See* 2001 Op. Att'y Gen. No. 2001-026 at 2-148 to 2-149 ("[p]ursuant to R.C. 1.49(F), if a statute is ambiguous, the administrative construction of the statute may be considered"); *Indus. Comm. v. Brown*, 92 Ohio St. 309, 311, 110 N.E. 744, 745 (1915) ("[a]dministrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do").

To determine whether a subdivision's security interest in securities pledged under R.C. 135.181(B) is legally enforceable and perfected we must examine Ohio law.[15] R.C. Chapter 1309, which is Ohio's codification of the provisions of the model Uniform Commercial Code governing secured transactions, sets forth rules governing the enforceability and perfection of security interests created pursuant to an agreement. *See generally* R.C. 1309.109(A) (except as otherwise provided in R.C. 1309.109(C) and R.C. 1309.109(D),[16] R.C. Chapter 1309 applies to

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[14] A representative of the FDIC has informed us that the FDIC interprets "or" to mean "and" in the phrase "legally enforceable *or* perfected security interest in any of the assets." 12 U.S.C.A. § 1821(e)(12) (emphasis added). Although this is not the most natural or obvious way to read the language of the federal statute, that is not a matter of state law for interpretation by the Attorney General in a formal opinion, and the federal courts notably defer to federal administrative agencies in implementing statutory language they are authorized to enforce unless their actions are judged to be clearly contrary to the court's own reading. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

[15] Either federal common law or state law may apply when determining whether a claimant's security interest in an asset of an institution under the control of the FDIC is legally enforceable and perfected. *See, e.g.*, 12 U.S.C.A. § 1821(g)(4); R.C. 1301.05; R.C. 1308.05; R.C. 1309.301; R.C. 1309.303-.306; *FDIC v. Blue Rock Shopping Ctr., Inc.*, 766 F.2d 744, 747 (3rd Cir. 1985). For the purpose of this opinion, we will examine the provisions of Ohio law governing the enforceability and perfection of security interests.

[16] Pursuant to R.C. 1309.109(D)(14), the provisions of R.C. Chapter 1309 do not apply to "[a] transfer by a government, state, or governmental unit." A subdivision, as defined in R.C. 135.181(A)(3), is a "governmental unit" for purposes of R.C. 1309.109(D)(14). *See* R.C. 1309.102(A)(45); R.C. 1309.102(A)(76). As a result, R.C. Chapter 1309's provisions governing the enforceability and perfection of security interests do not apply when a transfer of a security interest or payment of money is made by a subdivision, as defined in R.C. 135.181(A)(3). *See*

"[a] transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract"[17]).

MP Star Fin., Inc. v. Cleveland State Univ., 107 Ohio St. 3d 176, 2005-Ohio-6183, 837 N.E.2d 758 (2005).

When a subdivision deposits its public moneys in an institution and the institution pledges a pool of securities under R.C. 135.181(B) to secure the repayment of all public moneys deposited in the institution, the subdivision has not transferred title or ownership of its public moneys to the institution. Because a subdivision does not dispose of or part with any assets or an interest in any assets when it deposits its public moneys in an institution that pledges a pool of securities under R.C. 135.181(B) to secure the repayment of all public moneys deposited in the institution, a transfer has not been made by the subdivision for purposes of R.C. 1309.109(D)(14), and, as such, the provisions of R.C. Chapter 1309 apply to such transactions. *See generally MP Star Fin., Inc. v. Cleveland State Univ.*, at ¶8 (defining "transfer" for purposes of R.C. 1309.109(D)(14) "as '[t]he conveyance or removal of something from one place, person, or thing to another'" and "as '[a]ny mode of disposing of or parting with an asset or an interest in an asset'" (quoting *The American Heritage Dictionary* 1832 (4th ed. 2000) and *Black's Law Dictionary* 1535 (8th ed. 2004), respectively)).

[17] As used in R.C. Chapter 1309, a "contract" is "the total legal obligation that results from the parties' *agreement* as affected by [R.C. Chapters 1301, 1302, 1303, 1304, 1305, 1307, 1308, 1309, and 1310], and any other applicable rules of law." R.C. 1301.01(K) (emphasis added). R.C. 1301.01(C), in turn, defines an "agreement" for purposes of R.C. Chapters 1301, 1308, and 1309, *inter alia*, as

> the bargain of the parties in fact as found in their language or by implication from other circumstances, *including* course of dealing, *usage of trade*, or course of performance as provided in [R.C. 1301.11 and R.C. 1302.11]. Whether an agreement has legal consequences is determined by [R.C. Chapters 1301, 1302, 1303, 1304, 1305, 1307, 1308, 1309, and 1310], if applicable; otherwise by the law of contracts. (Emphasis added.)

Because the definition of "agreement" includes "the bargain of the parties in fact as found … by implication from other circumstances, including … usage of trade … as provided in [R.C. 1301.11]," it follows that the pledging arrangement established by R.C. 135.181(B) to secure the deposit of public moneys in an institution is an agreement that creates a security interest for purposes of R.C. Chapter 1309. *See generally* R.C. 1301.11(B) ("[a] usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts"); R.C. 1309.102(C) ("[t]he terms and principles of construction and interpretations set forth in [R.C. 1301.01-.14] are

With respect to enforceability, R.C. 1309.203(B) states that a security interest created pursuant to an agreement becomes legally enforceable against a debtor[18] and third parties when the following conditions are satisfied:

> Except as otherwise provided in divisions (C) to (I) of this section,[19] a security interest is enforceable against the debtor and third parties with respect to the collateral[20] only if:
>
> (1) Value has been given;
>
> (2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
>
> (3) One of the following conditions is met:
>
> (a) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
>
> (b) The collateral is not a certificated security and is in the possession of the secured party under section 1309.313 of the Revised Code pursuant to the debtor's security agreement;
>
> (c) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 1308.27 of the Revised Code pursuant to the debtor's security agreement; or

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applicable to [R.C. Chapter 1309]"). *See generally also* R.C. 135.181(D) ("each subdivision shall have an undivided security interest in the pool of securities pledged by a public depository pursuant to [R.C. 135.181(B)]"); *Black's Law Dictionary* 1153 (6th ed. 1990) ("pledge" means, *inter alia*, "a security interest in a chattel or in an intangible represented by an indispensable instrument (such as formal, written evidence of an interest in an intangible so representing the intangible that the enjoyment, transfer, or enforcement of the intangible depends upon possession of the instrument), the interest being created by a bailment for the purpose of securing the payment of a debt or the performance of some other duty. A pledge is a promise or agreement by which one binds himself to do or forbear something…. Much of the law of pledges has been replaced by the provisions for secured transactions in Article 9 of the U.C.C." (citation omitted)).

[18] Unless the context requires otherwise, the term "debtor," as used in R.C. Chapter 1309, includes "[a] person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor." R.C. 1309.102(A)(28)(a).

[19] It is unnecessary to review R.C. 1309.203(C)-(I) because the situations identified therein do not apply to the enforceability of a security interest in securities pledged by a depository institution pursuant to R.C. 135.181(B).

[20] For purposes of R.C. Chapter 1309, unless the context requires otherwise, "collateral" is "property subject to a security interest or agricultural lien." R.C. 1309.102(A)(12).

> (d) The collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under section 1309.104, 1309.105, 1309.106, or 1309.107 of the Revised Code pursuant to the debtor's security agreement. (Footnotes added.)

See also R.C. 1309.201(A) (unless otherwise provided by the Revised Code, "a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors").

A security interest created pursuant to an agreement thus is legally enforceable when the conditions set forth in R.C. 1309.203(B) are met. Accordingly, under Ohio law, the security interest of a subdivision in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law is "legally enforceable" when the conditions set forth in R.C. 1309.203(B) are satisfied. *See generally* note seventeen, *supra* (the pledging arrangement established by R.C. 135.181(B) to secure the deposit of public moneys in an institution is an agreement that creates a security interest for purposes of R.C. Chapter 1309).

As to the perfection of the security interest in such securities, R.C. 1309.308(A) provides that, except as otherwise provided in R.C. 1309.308 and R.C. 1309.309,[21] a security interest is perfected when it attaches and all of the applicable requirements for perfection in R.C. 1309.310-.316 have been satisfied. Pursuant to R.C. 1309.203(A), "[a] security interest *attaches to collateral when it becomes enforceable against the debtor with respect to the collateral*, unless an agreement expressly postpones the time of attachment." (Emphasis added.) As explained above, a security interest created pursuant to an agreement is legally enforceable when the conditions set forth in R.C. 1309.203(B) are satisfied. R.C. 1309.203(B); *see* R.C. 1309.201(A). A subdivision's security interest in securities pledged by an institution under R.C. 135.181(B), therefore, attaches when the conditions set forth in R.C. 1309.203(B) are satisfied.[22]

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[21] R.C. 1309.308 concerns the perfection of agricultural liens and the continued perfection of a security interest. R.C. 1309.309 concerns security interests that are perfected upon attachment. Because our review of the types of securities that may be pledged by an institution under R.C. 135.181(B) discloses that the securities listed therein do not come within the ambit of the exceptions set forth in R.C. 1309.308 and R.C. 1309.309, it is unnecessary for us to address the application of these exceptions in this opinion.

[22] A subdivision and an institution may not postpone by agreement the time of attachment of the security interest of the subdivision in securities pledged by the institution to secure public moneys deposited in the institution. Such a practice would thwart the General Assembly's intent to safeguard public moneys that are deposited in institutions designated as public depositories and could result in a loss of those moneys. *See generally* R.C. 135.181(D) ("[t]he state and each subdivision shall have an undivided security interest in the pool of securities pledged by a public

In addition, the question whether a subdivision's security interest in securities pledged by an institution under R.C. 135.181(B) attaches as provided in R.C. 1309.203 and meets all of the applicable requirements for perfection set forth in R.C. 1309.310-.316 must be answered on a case-by-case basis by the FDIC or a court of law because the application of R.C. 1309.203(B) and R.C. 1309.310-.316 is contingent upon value being given, the institution having rights in the pledged securities, and the type of securities pledged.[23] *See* R.C. 1309.203(B); *see, e.g.*, R.C. 1309.310 (when filing is required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply); R.C. 1309.311 (perfection of security interests in property subject to certain statutes, regulations, and treaties); R.C. 1309.312 (perfection of security interests in chattel paper, deposit accounts, documents, goods covered by documents, instruments, investment property, letter-of-credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of possession); R.C. 1309.313 (when possession by or delivery to secured party perfects security interest without filing); R.C. 1309.314 (perfection by control); R.C. 1309.315 (secured party's rights on disposition of collateral and in proceeds); R.C. 1309.316 (continued perfection of security interest following change in governing law). *See generally* 1991 Op. Att'y Gen. No. 91-016 at 2-82 n.2 ("[t]he opinion-rendering function of the Attorney General is not an appropriate forum for making findings of fact"); 1990 Op. Att'y Gen. No. 90-111 at 2-502 (the Attorney General is "unable to make findings of fact"). Accordingly, pursuant to R.C. 1309.308(A), a subdivision that has a security interest in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law has a "perfected security interest" in securities in the pool when the subdivision's security interest in the securities attaches and all of the applicable requirements for perfection in R.C. 1309.310-.316 have been satisfied.

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depository pursuant to division (B) of this section in the proportion that the total amount of the state's or subdivision's public moneys secured by the pool bears to the total amount of public deposits so secured"); 1937 Op. Att'y Gen. No. 995, vol. II, p. 1738 (syllabus, paragraph one) (R.C. Chapter 135 "has to do with the safeguarding of public moneys and must be construed strictly").

[23] Under R.C. 135.181(B), the types of securities that may be pledged by an institution include, *inter alia*, investment property, negotiable instruments, and letters of credit. *See* note seven, *supra*; *see also* R.C. 1309.102(A)(49) (defining "investment property" for purposes of R.C. Chapter 1309); R.C. 1309.102(B)(17) *and* R.C. 1303.03(A) (defining "negotiable instrument" for purposes of R.C. Chapter 1309); R.C. 1309.102(B)(15) *and* R.C. 1305.01(A)(10) (defining "letter of credit" for purposes of R.C. Chapter 1309).

Enforceability and Perfection of a Security Interest in a Pool of Uncertificated Securities Pledged Under R.C. 135.181(B)

We understand that institutions typically pledge a pool of securities that consists of only "uncertificated securities," as defined in R.C. 1308.01(A)(18),[24] to satisfy the pledging requirement of R.C. 135.181(B), and that at no time does the pool contain other types of securities. In light of this information, we will now consider the issues of state law that bear upon whether a subdivision's security interest in such a pool of uncertificated securities is able to become "legally enforceable" and "perfected."[25]

This determination requires a careful examination of the Ohio statutory provisions governing the enforceability and perfection of security interests and the manner in which those provisions interact. We caution, however, that a conclusive determination cannot be made by means of an opinion of the Attorney General but, rather, is a matter for determination by the FDIC or a court of law. *See* 2006 Op. Att'y Gen. No. 2006-054 at 2-566. It is clear that we cannot predict what decision the FDIC or a court might reach as a matter of federal law. *See id.*; 2004 Op. Att'y Gen. No. 2004-022 at 2-186; 2003 Op. Att'y Gen. No. 2003-011 at 2-92. We are able, nonetheless, to explain the manner in which the FDIC or a court might address this issue and provide you with our opinion regarding the analysis we believe would be appropriate in

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[24] R.C. 1308.01(A)(18) defines an "uncertificated security" as "a security that is not represented by a certificate." The registration of ownership of uncertificated securities is done through the book-entry system. "The 'book entry' form of ownership allows [an institution] to own securities without a certificate." U.S. Securities and Exchange Commission Website, http://www.sec.gov/answers/bookentry.htm. (last visited September 15, 2009).

When institutions pledge a pool of securities that consists of only uncertificated securities to satisfy the pledging requirement of R.C. 135.181(B), the institution remains the registered owner of the securities and retains the rights appurtenant to the securities. The fact that the uncertificated securities have been pledged under R.C. 135.181(B) by an institution to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law is noted on the records of the institution and the qualified trustee of the pool of securities pledged. *See* R.C. 135.181(E).

[25] This opinion does not consider the priority of a subdivision's security interest in relation to any other claims to securities in a pool of uncertificated securities pledged under R.C. 135.181(B) by an institution, including claims made by other subdivisions. *See generally* R.C. 135.181(D) (each subdivision shall have an undivided security interest in a pool of securities pledged by an institution under R.C. 135.181(B) in the proportion that the total amount of the subdivision's public moneys secured by the pool bears to the total amount of public moneys so secured); R.C. 1309.331 (establishing priority of rights of purchasers of securities and priority of interests in security entitlements).

making that determination. For further clarification and guidance, we encourage you to seek a formal opinion from the FDIC.

As indicated previously, pursuant to R.C. 1309.203, a subdivision's security interest in securities pledged by an institution under R.C. 135.181(B) attaches and is legally enforceable when the following three conditions set forth in R.C. 1309.203(B) are satisfied:

- value has been given;
- the institution has rights in the pledged securities or the power to transfer rights in the pledged securities to the subdivision; and
- one of the conditions set out in R.C. 1309.203(B)(3) is satisfied.

In a situation involving a pool of uncertificated securities pledged under R.C. 135.181(B), a subdivision has given value by depositing its public moneys with the institution. *See generally* R.C. 1301.01(RR) (as used in R.C. Chapter 1309, "a person gives 'value' for rights if the person[26] acquires them in any of the following manners … [g]enerally, in return for any consideration sufficient to support a simple contract" (footnote added)). Further, as the registered owner of the securities pledged under R.C. 135.181(B), the institution retains the rights appurtenant to the securities, including, but not limited to, the right to sell or assign the securities. *See* note twenty-four, *supra*; *see also* R.C. 135.181(G), (K). The first two conditions of R.C. 1309.203(B) thus are satisfied when an institution pledges uncertificated securities pursuant to R.C. 135.181(B).

With respect to the third condition set forth in R.C. 1309.203(B), a subdivision's security interest in uncertificated securities pledged under R.C. 135.181(B) does not attach and is not enforceable unless the subdivision satisfies R.C. 1309.203(B)(3)(d), which requires the subdivision to have control of investment property[27] under R.C. 1309.106[28] pursuant to the security agreement.[29] Moreover, if the subdivision obtains control under R.C. 1309.106, the

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[26] As used in R.C. 1301.01(RR), "person" includes governmental subdivisions. *See* R.C. 1301.01(DD); R.C. 1301.01(BB).

[27] R.C. 1309.102(A)(49) defines "investment property" for purposes of R.C. Chapter 1309 as "a security, whether certificated or uncertificated, a security entitlement, a securities account, a commodity contract, or a commodity account."

[28] R.C. 1309.106 establishes the manner by which a person may obtain control of investment property.

[29] R.C. 1309.203(B)(3)(d) provides that, if the other conditions of R.C. 1309.203(B) are satisfied, a security interest is enforceable against the debtor and third parties with respect to

subdivision has a perfected interest in the uncertificated securities: "A security interest in investment property … may be perfected … under [R.C. 1309.106]." R.C. 1309.314(A). *See generally* R.C. 1309.314(C).[30] Accordingly, in order for a subdivision's security interest in uncertificated securities pledged under R.C. 135.181(B) to become legally enforceable and perfected, the subdivision must meet the requirements for control set forth in R.C. 1309.106.

Pursuant to R.C. 1309.106(A), "[a] person has control of a certificated security, uncertificated security, or security entitlement as provided in [R.C. 1308.24]." R.C. 1308.24, in turn, provides, in relevant part:[31]

> (C) A purchaser has "control" of an uncertificated security if:
> (1) The uncertificated security is delivered to the purchaser; or
> (2) The issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.
> (D) A purchaser has "control" of a security entitlement if:
> (1) The purchaser becomes the entitlement holder; or
> (2) The securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder; or

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investment property if the secured party has control of the investment property under R.C. 1309.106 pursuant to the debtor's security agreement.

[30] R.C. 1309.314(C) states:

> A security interest in investment property is perfected by control under [R.C. 1309.106] from the time the secured party obtains control and remains perfected by control until:
> (1) The secured party does not have control; and
> (2) One of the following occurs:
> (a) If the collateral is a certificated security, the debtor has or acquires possession of the security certificate;
> (b) If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or
> (c) If the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

[31] For the purpose of this opinion, we are using the versions of the statutes in R.C. Chapter 1308 that are applicable to transactions that occur on or after January 1, 1998. *See generally* 1997-1998 Ohio Laws, Part I, 495 (Am. Sub. H.B. 170, eff., in part, Nov. 21, 1997) (title) (adopting "the Revised Article 8 of the Uniform Commercial Code—Investment Securities," which is codified in R.C. Chapter 1308).

(3) Another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges having control on behalf of the purchaser.

We must now consider whether it is possible for a subdivision to obtain control, as provided in R.C. 1308.24, of uncertificated securities pledged under R.C. 135.181(B). A review of R.C. 1308.24 discloses that two arguments may support the proposition that a subdivision has the requisite control.[32]

First, a subdivision could assert that it has control pursuant to R.C. 1308.24(C)(2) because it has the power to sell an uncertificated security pledged under R.C. 135.181(B) without the consent of the registered owner.[33] R.C. 1308.24(C)(2) provides that a purchaser[34] has control of an uncertificated security when "[t]he issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner."[35]

To support this argument, the subdivision could refer to R.C. 135.181(I) and R.C. 135.181(K). R.C. 135.181(I) authorizes a subdivision to sell and transfer ownership of uncertificated securities in a pool pledged under R.C. 135.181(B) by an institution to purchasers when the institution fails to pay over the subdivision's public moneys deposited in the institution. *See also* R.C. 135.51-.54. In order to facilitate the sale and transfer of uncertificated securities, R.C. 135.181(K) requires an institution to furnish to the qualified trustee holding the securities

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[32] The language of R.C. 1308.24 must be liberally construed and applied to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties. R.C. 1301.02. In light of this mandate, R.C. 1308.24 must be interpreted in a manner that will promote commercial practices established by R.C. 135.181.

[33] As stated in note twenty-four, *supra*, an institution that pledges uncertificated securities pursuant to R.C. 135.181(B) is the registered owner of the securities.

[34] A pledgee is a "purchaser" for purposes of R.C. 1308.24. *See* R.C. 1301.01(FF) and R.C. 1301.01(GG) (as used in R.C. Chapter 1308, unless the context otherwise requires, a "purchaser" is a "person who takes by purchase" and a "purchase" includes "taking by … pledge").

[35] A subdivision that has satisfied the requirements of R.C. 1308.24(C)(2) has control of an uncertificated security even if the institution, as a registered owner, retains the right to make substitutions for the uncertificated security, to originate instructions to the issuer, or otherwise to deal with the uncertificated security. R.C. 1308.24(F).

an appropriate resolution and irrevocable power of attorney authorizing the trustee to assign the securities for sale without the consent of the institution:[36]

> In lieu of placing its unqualified endorsement on each security, a public depository pledging securities pursuant to [R.C. 135.181(B)] that are not negotiable without its endorsement or assignment may furnish to the qualified trustee holding the securities an appropriate resolution and irrevocable power of attorney authorizing the trustee to assign the securities. The resolution and power of attorney shall conform to terms and conditions the trustee prescribes.

Thus, under R.C. 135.181(I) and R.C. 135.181(K), a subdivision is granted the right to sell uncertificated securities pledged under R.C. 135.181(B) without the consent of an institution when the institution fails to pay over the subdivision's public moneys deposited in the institution, and, as such, could have control of uncertificated securities pledged under R.C. 135.181(B) as provided in R.C. 1308.24(C)(2).[37] *See generally In re: Pfautz,* 264 B.R. 551, 552 (Bankr. W.D.

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[36] As noted earlier, uncertificated securities are not represented by a certificate. *See* R.C. 1308.01(A)(18); note twenty-four, *supra*. It is thus impossible for an institution to place its unqualified endorsement on uncertificated securities. This means that R.C. 135.181(K) must apply when an institution pledges a pool of uncertificated securities to satisfy the pledging requirement of R.C. 135.181(B). If this were not the case, a qualified trustee would be unable to assign such securities for sale when an institution fails to pay over a subdivision's public moneys deposited in the institution. *See generally* R.C. 135.181(I) (a qualified trustee "shall transfer to the treasurer for public sale, the pooled securities that are necessary to produce an amount equal to the deposits made by the treasurer and not paid over, less the portion of the deposits covered by any federal deposit insurance, plus any accrued interest due on the deposits; however, the amount shall not exceed the state's or subdivision's proportional security interest in the market value of the pool as of the date of the depository's failure to pay over the deposits, as that interest and value are determined by the trustee"); R.C. 1.47 (in enacting a statute, it is presumed that the "entire statute is intended to be effective" and that a "result feasible of execution is intended").

[37] Application of R.C. 1308.24(C)(2) is contingent upon the "*issuer*" of the uncertificated security agreeing to comply with instructions originated by the purchaser without further consent by the registered owner. Thus, in order for R.C. 1308.24(C)(2) to apply, a subdivision, as a purchaser, *see* note thirty-four, *supra*, must be able to prove that the issuer of an uncertificated security has agreed to comply with instructions originated by the subdivision without further consent by the institution that is the registered owner of the security. *See* U.C.C. § 8-106 cmt. 5 (amended 1999), 2C U.L.A. 495, 495 (2005) ("[f]or a purchaser to have 'control' under [U.C.C. § 8-106(c)(2) (amended 1999), which is codified at R.C. 1308.24(C)(2)], it is essential that the issuer … actually be a party to the agreement"). *See generally In re: Pfautz,* 264 B.R. 551 (Bankr. W.D. Mo. 2001) (finding that a third party pledge agreement and loan collateral agreement established that the issuer had agreed to comply with instructions originated by the

Mo. 2001) ("[t]he language in the Third Party Pledge Agreement authorizes the secured party to dispose of the collateral in the event of default. By signing the Agreement, the debtors agreed to allow [the secured party] to sell the uncertificated securities without their consent. Thus, [the secured party] properly perfected its security interest" under Mo. Stat. Ann. § 400.8-106(c), which is analogous to R.C. 1308.24(C)).

The second argument is based upon the language of R.C. 1309.106(C), which states that "[a] secured party having control of all security entitlements … carried in a securities account … has control over the securities account." *See generally* White & Summers, *Uniform Commercial Code,* § 31-9b (5th ed. 2002) ("the typical lender who seeks an interest in most of the securities in the conventional securities account will have to qualify under [U.C.C. 8-106(d) or U.C.C. 8-106(e) (governing control of security entitlements)]," which are codified at R.C. 1308.24(D) and R.C. 1308.24(E), respectively). A "securities account" for purposes of R.C. Chapters 1308 and 1309 is "an account to which a financial asset[38] is or may be credited in accordance with an agreement under which the person[39] maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset." R.C. 1308.51(A) (footnotes added); *see* R.C. 1308.01(B)(8); R.C. 1309.102(B)(23). Moreover, R.C. 1308.51(B) explains that, "[e]xcept as otherwise provided in [R.C. 1308.51(D) and R.C. 1308.51(E)],[40] a person acquires a security entitlement if a securities intermediary: … [i]ndicates by book entry that a financial asset has been credited to the person's securities account." (Footnote added.) *See generally* R.C. 1308.51(C) (if a condition of R.C. 1308.51(B) "has been met, a person has a security entitlement even though the securities intermediary does not itself hold the financial asset").

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purchaser without further consent by the registered owner). We understand that it is questionable whether a subdivision will be able to prove that the issuers of uncertificated securities that are pledged under R.C. 135.181(B) by an institution to secure public moneys have agreed to comply with instructions originated by the subdivision without further consent by the institution. *See generally* White & Summers, *Uniform Commercial Code,* § 31-9b (5th ed. 2002) ("[b]ecause of the existence and 'remote holding' (by Deposit Trust) of stock certificates, it will be uncommon for secured creditors to get control of such a stock under [U.C.C. 9-106(c)]," which is codified at R.C. 1308.24(C)).

[38] R.C. 1308.01(A)(9) provides that, for purposes of R.C. Chapter 1308, the term "financial asset" means a "security," whether certificated or uncertificated. *See* R.C. 1308.01(A)(15)(a).

[39] Banks are "persons" for purposes of R.C. Chapter 1308. *See* R.C. 1301.01(DD); *see also* R.C. 1301.01(BB).

[40] Neither R.C. 1308.51(D) nor R.C. 1308.51(E) applies when an institution pledges uncertificated securities in accordance with R.C. 135.181(B). *See* note twenty-four, *supra*.

For purposes of R.C. Chapters 1308 and 1309, the terms "securities intermediary" and "security entitlement" have the following meanings:

> (14) "Securities intermediary" means:
> (a) A clearing corporation; or
> (b) A person, including a bank[41] or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.
> ….
> (17) "Security entitlement" means the rights and property interest of an entitlement holder[42] with respect to a financial asset specified in [R.C. 1308.51-.61]. (Footnotes added.)

R.C. 1308.01(A); *see* R.C. 1309.102(B)(24).

Accordingly, it could be argued that a pool of uncertificated securities pledged under R.C. 135.181(B) by an institution constitutes a securities account, as defined in R.C. 1308.51(A), since it may be asserted that the institution has an agreement[43] with the qualified trustee of the

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[41] For purposes of R.C. 1308.01, a "bank" is "any person engaged in the business of banking." R.C. 1301.01(D).

[42] An "entitlement holder," as used in R.C. Chapter 1308, is "a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of [R.C. 1308.51(B)(2) or R.C. 1308.51(B)(3)], that person is the entitlement holder." R.C. 1308.01(A)(7).

[43] Because the definition of "agreement" for purposes of R.C. Chapter 1308 includes "the bargain of the parties in fact as found … by implication from other circumstances, including … usage of trade … as provided in [R.C. 1301.11]," *see* R.C. 1301.01(C); note seventeen, *supra,* it appears that the pledging arrangement established by R.C. 135.181(B) to secure the deposit of public moneys in an institution is an agreement that creates a securities account. *See generally* R.C. 1301.11(B) ("[a] usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts"); R.C. 1309.102(C) ("[t]he terms and principles of construction and interpretations set forth in [R.C. 1301.01-.14] are applicable to [R.C. Chapter 1309]"). *See generally also* R.C. 135.181(E) ("[a]n institution designated as a public depository shall designate a qualified trustee and deposit with the trustee for safekeeping the eligible securities pledged pursuant to [R.C. 135.181(B)]").

pool whereby the trustee undertakes to treat the institution as an entitlement holder[44] that is entitled to exercise the rights that comprise the uncertificated securities.[45] *See generally* U.C.C. § 8-501 cmt. 1 (1994), 2C U.L.A. 579, 579 (2005) ("[a]s the securities business is presently conducted, several significant relationships clearly fall within the definition of a securities account, including the relationship between … a bank acting as securities custodian and its custodial customers"); 1989 Op. Att'y Gen. No. 89-077 (syllabus, paragraph three) ("[a] federal reserve bank serving as a qualified trustee pursuant to … R.C. 135.181 meets the requirements imposed by statute when it performs safekeeping of securities, reporting, evaluation, and related activities as set forth [by statute], regardless of whether it refers to its functions as those of a trustee or those of a custodian"). *See generally also* U.C.C. § 8-501 cmt. 1 (1994), 2C U.L.A. 579, 579 (2005) ("[t]here is no requirement that a formal or written agreement be signed" in order to establish a securities account); Russell A. Hakes, *U.C.C. Article 8: Will the Indirect Holding of Securities Survive the Light of Day?*, 35 Loy. L.A. L. Rev. 661, 680 (2002) ("a written agreement is not necessary to create a securities account").

It also might be argued that, insofar as a qualified trustee engages in banking, the trustee is a bank for purposes of R.C. Chapter 1308 and thus a securities intermediary if the trustee in the ordinary course of its business maintains securities accounts for others and is acting in that capacity. *See* R.C. 1301.01(D); R.C. 1308.01(A)(14). *See generally* R.C. 135.181(F) ("[a]ny federal reserve bank or branch thereof located in this state or federal home loan bank, without compliance with [R.C. Chapter 1111] and without becoming subject to any other law of this state relative to the exercise by corporations of trust powers generally, is qualified to act as trustee for the safekeeping of securities, under this section. Any institution mentioned in [R.C. 135.03 or R.C. 135.32[46]] which holds a certificate of qualification issued by the superintendent of financial institutions or any institution complying with [R.C. 1111.04, R.C. 1111.05, and R.C. 1111.06] is

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[44] As explained in note twenty-four, *supra,* an institution that pledges uncertificated securities under R.C. 135.181(B) remains the registered owner of the pledged securities and retains the rights appurtenant to such ownership. Thus, the institution appears to be an entitlement holder, as defined in R.C. 1308.01(A)(7).

[45] We are aware that it might be argued that a subdivision, rather than an institution, is an entitlement holder that is entitled to exercise the rights that comprise an uncertificated security pledged under R.C. 135.181(B). However, insofar as the qualified trustee does not indicate by book entry that a security pledged by an institution under R.C. 135.181(B) has been credited to an account held by the subdivision, the subdivision has not acquired a security entitlement. *See* R.C. 1308.51(B); *see also* note twenty-four, *supra*. Because the subdivision is not identified in the records of the qualified trustee as having a security entitlement against the qualified trustee, the subdivision is not an entitlement holder with respect to such security. R.C. 1308.01(A)(7).

[46] The institutions referred to in R.C. 135.03 and R.C. 135.32 include entities engaged in banking. *See* notes four, five, and six, *supra.*

qualified to act as trustee for the safekeeping of securities under this section, other than those belonging to itself or to an affiliate as defined in [R.C. 1101.01(A)]").

Finally, it may be argued that the institution, as an entitlement holder, has a security entitlement in each uncertificated security pledged under R.C. 135.181(B) since the qualified trustee indicates by book entry when each security has been credited to the institution's securities account. *See* R.C. 1308.51(B); note twenty-four, *supra*. *See generally* R.C. 135.181(E) (the qualified trustee must provide to an institution a copy of a receipt describing the securities pledged under R.C. 135.181(B) by the institution); R.C. 135.181(L) ("[u]pon request of a [subdivision] no more often than four times per year, a qualified trustee shall … provide an itemized list of the securities in the pool"). *See generally also* Russell A. Hakes, *U.C.C. Article 8: Will the Indirect Holding of Securities Survive the Light of Day?*, 35 Loy. L.A. L. Rev. 661, 681 (2002) ("[t]he security entitlement is created by any such credit to a securities account even if the securities intermediary has no rights to the financial asset").

If it can be established that an institution, as an entitlement holder, has a security entitlement in each uncertificated security pledged under R.C. 135.181(B), a subdivision, as a purchaser, could acquire control as provided in R.C. 1308.24(D)(2), which states that a purchaser has control of a security entitlement if the qualified trustee, as the securities intermediary, "has agreed[47] that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder."[48] (Footnote added.) For purposes of R.C. 1308.24, an

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[47] R.C. 1308.24(D)(2) requires a qualified trustee, as a securities intermediary, to agree to "comply with entitlement orders originated by the purchaser without further consent by the entitlement holder." *See generally* U.C.C. § 8-106 cmt. 5 (amended 1999), 2C U.L.A. 495, 495 (2005) ("[f]or a purchaser to have 'control' under [U.C.C. § 8-106(d)(2) (amended 1999), which is codified at R.C. 1308.24(D)(2)], it is essential that the … securities intermediary … actually be a party to the agreement"). Because R.C. 135.181(I) explicitly requires a qualified trustee to assign securities pledged by an institution under R.C. 135.181(B) without the consent of the institution upon the written demand of a subdivision when the institution fails to pay over the subdivision's public moneys deposited in the institution, it could be argued that the trustee, as a securities intermediary, has agreed to comply with entitlement orders originated by the subdivision, as a purchaser, without further consent by the institution, as an entitlement holder.

[48] Pursuant to R.C. 1308.24(D)(1), a subdivision has control of a security entitlement when it becomes an entitlement holder with respect to a financial asset specified in R.C. 1308.51-.61. As explained earlier, a subdivision does not become an entitlement holder as to an uncertificated security pledged by an institution under R.C. 135.181(B) to secure the subdivision's public moneys deposited in the institution. *See* note forty-five, *supra*; *see also* note twenty-four, *supra.* A subdivision therefore is not an entitlement holder with respect to such securities and, as such, can not obtain control pursuant to R.C. 1308.24(D)(1) of a security entitlement against the qualified trustee for an uncertificated security pledged by an institution under R.C. 135.181(B).

"entitlement order" is "a notification communicated to a securities intermediary directing transfer or redemption of a financial asset to which the entitlement holder has a security entitlement." R.C. 1308.01(A)(8). Because a subdivision is a purchaser for purposes of R.C. 1308.24 when uncertificated securities are pledged under R.C. 135.181(B), *see* note thirty-four, *supra*, and has the authority to sell such uncertificated securities without the consent of the institution when an institution fails to pay over the subdivision's public moneys deposited in the institution, *see* R.C. 135.181(I), the FDIC or a court of law could determine that a subdivision has control, as provided in R.C. 1308.24(D)(2),[49] of all the uncertificated securities in a pool of uncertificated securities pledged under R.C. 135.181(B),[50] and, thus, control of the pool as a securities account.[51] R.C. 1309.106(C).

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[49] A subdivision that has satisfied the requirements of R.C. 1308.24(D)(2) has control of a security entitlement even if the institution, as an entitlement holder, retains the right to make substitutions for the security entitlement, to originate entitlement orders to the securities intermediary, or otherwise to deal with the security entitlement. R.C. 1308.24(F).

[50] We are aware that R.C. 1309.208(B) states that within ten days after receiving an authenticated demand by a debtor a secured party having control of uncertificated securities under R.C. 1308.24(D)(2) shall send the securities intermediary with which the security entitlement is maintained an authenticated record *that releases the securities intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party*. If it is determined that a subdivision has control, as provided in R.C. 1308.24(D)(2), of uncertificated securities pledged under R.C. 135.181(B), then R.C. 1309.208(B) does not apply since it is limited "to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value." R.C. 1309.208(A).

[51] No federal or state court has determined whether a purchaser of an uncertificated security has control under R.C. 1308.24(D)(2) when the purchaser's ability to sell the security without the prior consent of the debtor is contingent upon the debtor defaulting under the terms of a security agreement. Comment seven to U.C.C. § 8-106 (amended 1999), which is codified at R.C. 1308.24(D)(2), however, suggests that a purchaser of an uncertificated security has control under U.C.C. § 8-106 (amended 1999) even though the arrangement between a purchaser and debtor places conditions on the authority of the purchaser to sell the security without the prior consent of the debtor. Comment seven provides, in pertinent part:

> The key to the control concept is that the purchaser has the ability to have the securities sold or transferred without further action by the transferor. There is no requirement that the powers held by the purchaser be exclusive.... *Nor is there a requirement that the purchaser's powers be unconditional*, provided that further consent of the entitlement holder is not a condition. (Emphasis added.)

Once again, in construing these provisions of state law, we are seeking to provide you with guidance about how the FDIC or a court of law ultimately would determine these issues as a matter of federal law in the context of your original question, where those provisions of federal law are explicitly intertwined with related issues of state law. In this regard, the discussion above sets out how the FDIC or a court of law might determine that, under R.C. 1309.203(B) and R.C. 1308.24, the security interest of a subdivision in a pool of uncertificated securities deposited with a qualified trustee in accordance with R.C. 135.181(E) is "legally enforceable" and "perfected" by "control." Again, we would stress that this guidance should not be misunderstood as a definitive interpretation of federal law, which cannot be provided by means of an Attorney General opinion. *See* 1999 Op. Att'y Gen. No. 99-007 at 2-55.

Implications of this Opinion

In summary, we find it advisable to repeat once more the strong caveats that must be understood to surround the legal analysis provided above. This opinion explains the principles established under Ohio law for enforcing and perfecting security interests in investment property. The discussion and conclusions set forth in this opinion reflect our studied analysis of current statutes and applicable case law. Interpretation and application of the provisions of law governing the enforceability and perfection of security interests when the FDIC, as receiver, is liquidating or winding up the affairs of an institution pursuant to its authority under federal law, rest with the FDIC or ultimately with the courts. Moreover, as the discussion above amply demonstrates, questions pertaining to state law on the enforceability and perfection of security interests are quite complex and subject to varying interpretations.[52] It is thus quite difficult to

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U.C.C. § 8-106 cmt. 7 (amended 1999), 2C U.L.A. 495, 495-96 (2005).

Thus, comment seven to U.C.C. § 8-106 (amended 1999) seems to indicate that a subdivision has control under R.C. 1308.24(D)(2) even though its authority to sell uncertificated securities pledged by an institution under R.C. 135.181(B) without the consent of the institution is contingent upon the institution failing to pay over the subdivision's public moneys deposited in the institution. *See generally* U.C.C. § 8-106 cmt. 4 (amended 1999), 2C U.L.A. 493, 493-94 (2005) ("[t]here is no requirement that the control party's right to give entitlement orders be exclusive. The arrangement might provide that only the control party can give entitlement orders, or that either the entitlement holder or the control party can give entitlement orders").

[52] In 1987 the Colorado Attorney General considered whether the FDIC would honor pledges of collateral made pursuant to the Colorado Public Deposit Protection Act of 1975 (CPDPA), article 10.5, title 11, C.R.S. (1986 Supp.), and the Colorado Savings and Loan Association Public Deposit Protection Act, article 47, title 11, C.R.S. (1986 Supp.) (CSLAPDPA), in the event a financial institution fails and there is inadequate federal insurance coverage for all public deposits. 1987 Colorado Op. Att'y Gen. No. 87-1. In concluding that the FDIC would honor such pledges of collateral, the Colorado Attorney General stated that the CPDPA and the CSLAPDPA establish "a trust fund or special deposit for public deposits secured

predict with any certainty what conclusion the FDIC or a court of law might reach if they are required to determine, as a matter of federal law, whether a subdivision's security interest in a pool of uncertificated securities pledged under R.C. 135.181(B) by an institution is legally enforceable and perfected for purposes of 12 U.S.C.A. § 1821(e)(12). For those reasons, we again encourage you to pursue further clarification and guidance by seeking a formal opinion from the FDIC on these same issues.

In addition, if you desire more clarity from a practical standpoint, then specific legislative changes can also be pursued in the General Assembly, which has the ability to examine the issues and legislate more authoritatively on the matter. In this regard, it may be prudent for the General Assembly to delineate additional requirements that subdivisions and public depositories must satisfy when securities are pledged to secure deposits of public moneys under R.C. 135.18, R.C. 135.181, or R.C. 135.37. Such requirements may include, but are not limited to, mandating a written pledge agreement between a subdivision and public depository before the subdivision's public moneys are deposited in the public depository, *see* note thirteen, *supra*, or requiring a writing between a subdivision, qualified trustee, and public depository whereby the qualified trustee agrees to comply with entitlement orders originated by a subdivision without further consent by the public depository when the public depository fails to pay over the subdivision's public moneys deposited in the public depository, *see* note forty-seven, *supra*.[53] By enacting

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by eligible collateral pledged pursuant to [these Acts]. The receiver of a failed institution would be required to apply the proceeds of the eligible collateral to pay public deposits rather than satisfying the claims of other creditors." *Id.*, slip op. at 2.

Insofar as the pledging requirements of R.C. 135.181 are similar to provisions in the CPDPA and the CSLAPDPA, the FDIC or a court of law could follow the reasoning expressed by the Colorado Attorney General in 1987 Colorado Op. Att'y Gen. No. 87-1 and determine that the pool of securities pledged by an institution under R.C. 135.181(B) to secure the deposit of public moneys by subdivisions constitutes a trust fund or special deposit containing securities that the FDIC is required to transfer to the subdivisions pursuant to R.C. 135.181(I). *See generally Ward v. Fulton,* 125 Ohio St. 382, 386, 181 N.E. 815 (1932) ("[i]t was evidently the intention of the Legislature that the bank should give such security for the return of the money as would bring the money back into the county treasury, no matter what financial disasters or embarrassment might attend the affairs of the bank"); *In re Dissolution of the Springfield Savings Soc.,* 12 Ohio App. 2d 120, 127, 231 N.E.2d 314 (Clark County 1966) ("[t]he fact that security is given for a governmental subdivision's deposit is a fact to be considered only when the assets of the Society are insufficient to repay the deposits").

[53] Examples of laws of other states that may provide guidance to the General Assembly in amending Ohio's security pledging requirements for public deposits are the following: (1) Kan. Stat. Ann. § 9-1402 and Kan. Stat. Ann. § 9-1405 (securities, security entitlements, financial assets, and securities accounts pledged for a deposit of public moneys shall be in a securities

more stringent requirements, the General Assembly may make it easier for a subdivision to establish to the FDIC or a court of law that it is in compliance with 12 U.S.C.A. § 1821(d)(9) and 12 U.S.C.A. § 1823(e)(1) and that its security interest in a pool of uncertificated securities deposited with a qualified trustee in accordance with R.C. 135.181(E) is "legally enforceable" and "perfected" for purposes of 12 U.S.C.A. § 1821(e)(12).

The General Assembly also could include other measures to further safeguard public moneys that are deposited in public depositories.[54] Specifically, when a pool of securities is

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account); (2) Ky. Rev. Stat. Ann. § 91A.060(1) ("[t]he amount of funds on deposit in an official depository shall be … collateralized in accordance with [12 U.S.C.A. § 1823] to the extent uninsured, by any obligations, including surety bonds permitted by [Ky. Rev. Stat. Ann § 41.240(4)]"); (3) Neb. Rev. Stat. § 77-23,100(3) ("[a]ny qualified trustee shall be authorized, acting for the benefit of custodial officials, to take any and all actions necessary to take title to or to effect a first perfected security interest in the securities deposited, pledged, or in which a security interest is granted"); (4) N.M. Stat. Ann. § 6-10-18(A) ("[a]ny bank or savings and loan association designated as a depository by the proper treasurer, board of finance or board of control, prior to delivery of securities of the kind specified in [N.M. Stat. Ann. § 6-10-16] to secure that deposit, shall enter into a written agreement with the state board of finance or the board of finance of the county, municipality or board of control whose money it desires to receive and hold on deposit"); (5) N.M. Stat. Ann. § 6-10-18(B) ("the treasurer, board of finance or board of control shall instruct the custodial bank in possession of the securities to transfer the securities or such portion of the securities as may be required to the treasurer or other official or its designated agent for disposition in accordance with Subsection C or D of this section"); (6) N.M. Stat. Ann. § 6-10-23(A) (a "custodial bank is authorized to comply with the written instructions given by the depository bank or savings and loan association and the treasurer of the state, county, municipality, school district, public institution or board involved in accepting the securities for safekeeping, in releasing and delivering all or any portion of such pledged securities held in safekeeping"); and (7) W. Va. Code § 31A-8-13 ("[i]n every such case, the hypothecation of such securities or assets shall be by proper legal transfer as collateral security to protect and indemnify by trust any and all loss in case of any default on the part of the banking institution in its capacity as a depository for any such deposits as aforesaid, and such collateral security shall be released only by order of record of the public officer or public body, or by the receiver of a closed or insolvent banking institution, if the proceeding be not in court, with the consent in writing of the commissioner of banking, and if the proceeding be in court, with the consent in writing of the commissioner of banking and the approval of the court, when satisfied that full and faithful accounting and payment of all the moneys has been made under the provisions hereof").

[54] In some states a public depository is required to post a bond or have deposit insurance before it may receive a deposit of public moneys. *See, e.g.,* Ky. Rev. Stat. Ann. § 91A.060(1); Neb. Rev. Stat. § 77-2399; N.M. Stat. Ann. § 6-10-15; 72 P.S. § 3791.

pledged to secure the repayment of all public moneys deposited with a public depository, it is advisable that a party other than the public depository itself be charged with monitoring the adequacy of the pledged collateral. While R.C. 135.181 grants each subdivision an undivided security interest in the collateral pledged by a public depository, it lacks a provision for regulatory oversight. As a consequence, if a public depository that is not in compliance with R.C. 135.181 defaults, public moneys could be at risk.

In order to avoid such a risk, other states that have authorized the pledging of a pool of securities to secure deposits of public moneys have included an enforcement provision by placing a state official, typically the state treasurer, as the regulator and administrator of such collateral pools. States that have enacted such a provision to regulate state-administered collateral pools are Florida, Virginia, and Washington. *See, e.g.,* Fla. Stat. Chapter 280; Va. Code Ann. Chapter 44; Wash. Rev. Code Chapter 39.58. While the structure and requirements of these states' collateral pools may differ, laws in each of these states address the oversight issue. Accordingly, the General Assembly may look to these laws when considering a regulatory scheme to monitor the adequacy of pools of securities pledged under R.C. 135.181.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Federal law addresses the question of when a subdivision, as defined in R.C. 135.181(A)(3) and which has a security interest in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law, may present a claim to the Federal Deposit Insurance Corporation for securities in the pool. Pursuant to 12 U.S.C.A. § 1821(d)(9), 12 U.S.C.A. § 1821(e)(12), and 12 U.S.C.A. § 1823(e)(1), such a subdivision may present such a claim for securities in the pool when the Federal Deposit Insurance Corporation, as receiver, is liquidating or winding up the affairs of the institution, provided that the subdivision's security interest in the securities meets the following two criteria: (1) it is legally enforceable and perfected; and (2) it is set forth in a written agreement that has been approved by, and recorded in the minutes of, the board of directors or loan committee of the institution and has been maintained continuously, from the time of its execution, as an official record of the institution.

2. Subject to the caveat that the questions addressed in this opinion are ultimately subject to determination by either the Federal Deposit Insurance Corporation or a court of law as matters of federal law under 12 U.S.C.A. § 1821(e)(12), a reading of Ohio law standing alone indicates that the security interest of a subdivision in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure

the repayment of all public moneys deposited in the institution and not otherwise secured by law is "legally enforceable" when the conditions set forth in R.C. 1309.203(B) are satisfied.

3. Subject to the caveat that the questions addressed in this opinion are ultimately subject to determination by either the Federal Deposit Insurance Corporation or a court of law as matters of federal law under 12 U.S.C.A. § 1821(e)(12), a reading of Ohio law standing alone indicates that, pursuant to R.C. 1309.308(A), a subdivision that has a security interest in a pool of securities pledged under R.C. 135.181(B) by an institution designated as a public depository to secure the repayment of all public moneys deposited in the institution and not otherwise secured by law has a "perfected security interest" in securities in the pool when the subdivision's security interest in the securities attaches and all of the applicable requirements for perfection in R.C. 1309.310-.316 have been satisfied.

4. Subject to the caveat that the questions addressed in this opinion are ultimately subject to determination by either the Federal Deposit Insurance Corporation or a court of law as matters of federal law under 12 U.S.C.A. § 1821(e)(12), a reading of Ohio law standing alone indicates that the security interest of a subdivision in a pool of uncertificated securities deposited with a qualified trustee in accordance with R.C. 135.181(E) is (1) "legally enforceable" when the conditions set forth in R.C. 1309.203(B) are satisfied and (2) "perfected" by establishing "control" as defined in R.C. 1308.24.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General