OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 95-002

STATE MATTERS:
Authority of Commissioner of
Banks and Trust Companies

Honorable Suzanne L. Deuchler
Chairman
House Financial Institutions Committee
2131 Stratton Building
Springfield, Illinois 62706

Dear Representative Deuchler:

I have your letter wherein you inquire whether the Commissioner of Banks and Trust Companies may, by directive, relieve State-chartered banks from complying with the statutory requirement that they publish quarterly statements of condition, based upon the enactment of Federal legislation which relieved federally-chartered banks of a similar requirement. For the reasons hereinafter stated, it is my opinion that the Commissioner of Banks and Trusts does not have the authority to relieve State-chartered banks from complying with the publication requirement.

Section 308 of the Reigle Community Development and Regulatory Improvement Act of 1994 (Public Law 103-325, approved

September 23, 1994) amended section 7(a)(1) of the Federal Deposit Insurance Act (12 U.S.C. § 1817(a)(1)) and section 9 of the Federal Reserve Act (12 U.S.C. § 324) by striking out language authorizing Federal agencies to require federally chartered banks to publish the quarterly statements of condition (referred to as "call reports") which they are required to make to those supervising Federal agencies. Other sections of the Act provide for the electronic filing and dissemination of the reports, standardization of the reporting form among the agencies, and a report back to Congress by the agencies on measures taken to improve efficiency for both filers and users of the reports. (See Sen. Rept. No. 169, 103rd Cong., 1st Sess. 50-51, 79-80 (1993), reprinted in 1994 USCCAN 1881, 1934-35, 1962-63.)

You have stated that, based upon the Federal legislation, the Illinois Commissioner of Banks and Trust Companies has advised State-chartered banks under his supervision that they no longer must publish the quarterly statements of condition which they are required to make to the Commissioner in accordance with section 47 of the Illinois Banking Act (205 ILCS 5/47 (West 1992)), which provides, in pertinent part:

> " * * *
>
> * * * Each bank shall cause a true copy of its quarterly statement as filed with the Commissioner to be published at least once within the time specified by the Commissioner, and shall provide the Commissioner with evidence of publication on such forms and

> within such time as the Commissioner may specify in his call for such reports. Any bank failing to make and deliver such statement or to comply with any provisions of this Section may be subject to a penalty payable to the Commissioner of $100 for each day of noncompliance. * * *"

You have further advised that the Commissioner has publicly indicated his position that subsection 5(11) of the Illinois Banking Act (205 ILCS 5/5(11) (West 1993 Supp.)) authorizes him to act to conform requirements imposed upon State banks, including the publication requirement, to those imposed upon Federal banks. Subsection 5(11) provides:

> "General corporate powers. A bank organized under this Act or subject hereto shall be a body corporate and politic and shall, without specific mention thereof in the charter, have all the powers conferred by this Act and the following additional general corporate powers:
>
> * * *
>
> (11) Notwithstanding any other provisions of this Act, to do any act and to own, possess, and carry as assets property of the character, including stock, that is at the time authorized or permitted to national banks by an Act of Congress, but subject always to the same limitations and restrictions as are applicable to national banks by the pertinent federal law.
>
> * * * "

Subsection 5(11) clearly permits State banks to perform business acts or to have an interest in any property which is authorized or permitted to national banks. It does not, on its

face, relieve State banks of duties imposed by State statutes which do not conflict with Federal law or restrict the ability of State banks to carry out any functions permitted to national banks. The Federal banking amendments merely deleted language permitting supervisory agencies to require publication of reports. The reports remain public information, subject to publication or distribution, including by electronic means by either the agencies or banks.

Subsection 5(11) has never been construed to permit State chartered banks to ignore specific statutory requirements. In the only reported case relying upon the subsection, Town and Country Bank v. E. & D. Bancshares (1988), 172 Ill. App. 3d 1066, the court cited subsection 5(11) as authority for a bank to pledge its assets to guarantee the debt of another in exchange for benefits to the pledgor bank. Such investment decisions are specifically permitted to national banks and, although State banks are not expressly permitted to make such a pledge, neither are they expressly prohibited from doing so. Such an investment decision appears to be, as the court decided, within the purview of subsection 5(11).

On two occasions when subsection 5(11) was construed by Attorney General Scott, he concluded that it did not authorize banks to take actions which were prohibited by other statutory provisions. In opinion No. S-698, issued February 14, 1974 (1974

Ill. Att'y Gen. Op. 82), Attorney General Scott concluded that subsection 5(11) did not authorize State banks to charge a rate of interest higher than that allowed by the Illinois Interest Act even though national banks may be permitted to charge a higher rate. In opinion No. S-1489, issued May 12, 1980, my predecessor concluded that subsection 5(11) did not authorize State banks to establish branches for their trust departments, since the Illinois Banking Act specifically prohibited such branches, even though Federal law permitted national banks to locate trust departments at different offices.

The office of Commissioner of Banks and Trust Companies is created, and its powers are defined by, the Illinois Banking Act (205 ILCS 5/1 et seq. (West 1992)). The express statutory powers of a statutorily created office cannot be broadened by implication. An officer has only those implied powers which are necessary to carry out his express powers. Statutes delegating powers to public officers must be strictly construed. (Diedrich v. Rose (1907), 228 Ill. 610, 615; McKenzie v. McIntosh (1964), 50 Ill. App. 2d 370, 377.) Nowhere in the Act is the Commissioner expressly empowered to relieve banks from compliance with the mandatory requirements of the Act.

Subsection 5(11) of the Illinois Banking Act may reasonably be interpreted as authorizing the Commissioner to elect not to enforce against State banks statutes which are pre-

empted by Federal law or which restrict the banking activities of State banks with respect to activities in which Federal banks may engage. The requirement in section 47 of the Illinois Banking Act that State-chartered banks publish call reports, however, has not been preempted by Congress, and does not prevent any State bank from engaging in any banking activity in which Federal banks are authorized to engage.

While it is well established that Congress can preempt State banking regulations, that body has recently expressed its concern that preemption principles have been applied in an inappropriately aggressive manner, resulting in the preemption of State law in situations in which Federal interests did not warrant that result. Of particular concern were State laws protecting the rights of consumers, businesses and communities. (H.R. Conf. Rep. No. 651, 103rd Cong., 2d Sess. (1994), 53-54, reprinted in 1994 USCCAN 2039, 2074-75.) Accordingly, Congress included in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Public Law 103-328, approved September 29, 1994) procedural requirements under which Federal banking agencies preparing opinions or rules in connection with State laws regarding community investment, consumer protection, fair lending and establishment of intrastate branches must provide notice and a comment period to interested parties. (Public Law 103-328, sec. 114.) This is a reasonably clear statement that

Congress does not intend to preempt by implication State banking regulations which in no way impact upon Federal interests.

The publication provision in section 47 of the Illinois Banking Act provides that each bank "shall" publish its call reports, and imposes a substantial penalty for failure to comply. The use of such terms is indicative of mandatory intent. (Fumarole v. Chicago Bd. of Education (1990), 142 Ill. 2d 54.) Section 47 does permit the Commissioner significant discretion in determining when and how publication is to be made, but no provision of the Illinois Banking Act, either expressly or by implication, authorizes the Commissioner to relieve banks of that mandatory duty unless such duty restricts banking activities authorized by Federal law. Neither section 308 of Public Law 103-325 nor any other Federal enactment prohibits the State from requiring its banks to publish call reports, nor does it appear that publication will interfere with the doing of any banking act which State banks may be authorized to undertake pursuant to Federal law. Therefore, it is my opinion that the Commissioner of Banks and Trust Companies does not have the authority to relieve State banks of the duty to publish quarterly statements of condition.

I must note, however, that legislation has been introduced in the General Assembly (Senate Bill 552) which would, inter alia, eliminate the requirement in section 47 of the

Illinois Banking Act that banks publish their quarterly statements, to provide only that banks submit such reports to the Commissioner. Consequently, if this measure is enacted into law in its present form, it will significantly affect the continuing validity of this opinion.

Sincerely,

JAMES E. RYAN
ATTORNEY GENERAL