<u>Interpretive Letter No. 98-02 (April 9, 1998)</u>

Bureau of Banks and Trust Companies

Shareholders of bank have sole authority to change the number of members on the bank's board of directors. The board may only exercise authority to appoint a new director prescribed in the by-laws if the vacancy on the board arose between shareholder meetings.

This letter is in response to your recent correspondence regarding the board of directors of * ("Bank"). You asked about increasing the number of directors on the board from four to five. Specifically, you requested the Office of Banks and Real Estate's ("Agency") opinion on three Unanimous Consent forms, two of which were to be submitted to the board of directors of Bank and one of which was to be submitted to the board of directors of * ("Corporation"), the sole shareholder of Bank, concerning the addition of a new director to Bank's board.

Section 16 of the Illinois Banking Act provides, in pertinent part, that:

> (2)(a) [T]he number of directors, not fewer than 5 nor more than 25, may be fixed from time to time by the stockholders at any meeting of the stockholders called for the purpose of electing directors or changing the number thereof by the affirmative vote of at least two-thirds of the outstanding stock entitled to vote at the meeting, and the number so fixed shall be the board regardless of vacancies until the number of directors is thereafter changed by similar action... 205 ILCS 5/16

Therefore, when the stockholders of Bank elected four directors at the last election and the Agency approved that number, as required under Section 16(2)(b), the membership of the board was fixed at four members and will remain at that number until the stockholders elect a new board or change the number thereof. As such, until Corporation meets or waives the meeting and unanimously consents in writing to an election of a new board of directors of Bank or a change in the number of Bank's existing board, there will be no more than four members on Bank's board of directors.

The consent forms you submitted do not achieve what you are trying to accomplish. The board of directors of Bank has no authority to increase the size of the board. Until Corporation acts, there is no reason to have the board of directors of Bank amend the by-laws concerning the number and election of directors or the appointment of a new director.

The resolution in the consent form to be adopted by Bank's board purports to amend Section 3 of Bank's by-laws to authorize the board to appoint a director "(i)n the case of the removal, death or resignation of a Director, <u>or in the case of any newly created directorship resulting from any increase in the number of Directors</u>" (emphasis added). The Agency finds that the proposed language underlined in the preceding sentence would be invalid as it is contrary to the statutory authority set forth in Section 16(3). Pursuant to Section 16(3), directors may only use the appointment power in Bank's by-laws to "fill a vacancy or vacancies <u>arising between shareholders' meetings</u>" (emphasis added). Our reading of the statute leads us to conclude that the shareholders of a state bank are obligated to elect the entire board of directors, and the appointment authority of the board may only be used when a director so elected by the shareholders leaves the board between shareholder meetings. Bank's proposed amendment to Section 3 of its by-laws allowing the directors to fill, by appointment, a new director's seat created but left unelected by the shareholders, is inconsistent with Section 16(3).

Pursuant to Section 43 of the Illinois Banking Act, a single consent form adopted by Corporation may accomplish Bank's intended objectives. The consent form could waive notice of a special meeting of the stockholder, fix the new number of Bank's board of directors at five, ratify the continued service of the four existing directors and elect * to fill the newly created fifth seat on the board, and direct the board to make the corresponding and desired changes to Bank's by-laws (which the board could

also accomplish with the appropriate waivers and consent under Section 43).