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BANK—MAY NOT INVEST ITS CAPITAL, SURPLUS, UNDIVIDED PROFITS OR DEPOSITS IN CERTIFICATES REPRESENTING UNDIVIDED EQUITABLE INTERESTS IN A BOND TRUST.

SYLLABUS:

A bank organized and existing under the laws of Ohio may not invest its capital, surplus, undivided profits or deposits in certificates representing undivided equitable interests in a bond trust, although the corpus of such trust is composed entirely of bonds eligible for investment by such banks under Section 710-111, General Code.

COLUMBUS, OHIO, February 21, 1936.

HON. S. H. SQUIRE, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR: I have your letter with reference to the authority of state banks to invest their funds in certificates issued in the N. . . . A. . . . Bond Trust. As stated in your letter, a similar problem was considered in an opinion of this office, reported in Opinions of the Attorney General for 1933, Volume 1, page 143, where it was held as disclosed by the syllabus:

“A savings bank may not invest in investment trust shares or units even though the securities composing the trust conform to the requirements of the provisions of Section 710-140 of the General Code.”

Under the indenture there in question, a fixed trust was created consisting of shares of stock varying in amount, issued by various companies. Each unit was divided into 6,000 beneficial interests known as trust shares, the owner of each trust share being the beneficial owner of an undivided interest in each share of stock comprising a unit of the deposited property. Since the question there involved was whether the shares were legal investments for savings banks, Section 710-140, General Code, was considered.

The instant question concerns investments by banks, as defined by Section 710-2, General Code, and it is therefore necessary to consider the provisions of Section 710-111 of the General Code. This section enumerates eleven classes of securities in which a bank is authorized to invest its capital, surplus, undivided profits and deposits. This section does not enumerate certificates representing shares or interests in a bond trust. However, it is contended that the certificates constitute a legal investment

upon the assertion that the certificate holder is a legal owner of a direct participation in a fund composed of bonds which would constitute a legal investment for banks.

Under the trust agreement between D. . . . Group, Incorporated, as depositor, and the C. . . . B. . . . F. . . . Trust Company, as trustee, the depositor made a deposit with the trustee of 311 bonds, each in the principal amount of \$1,000, coming within certain defined classifications and meeting certain requirements. Simultaneously with the deposit the trustee executed certificates representing in the aggregate the ownership of 360 "equal undivided equitable interests in the Deposited Property." The indenture further provided that at any time prior to the termination of the trust "the Depositor, for the account of others, may cause to be created one or more additional interests." The gross amount received by the depositor for the account of any person, firm or corporation, less a service fee, was required to be invested in a bond or bonds eligible for deposit and the difference being made up in cash.

Section 1.07 of the agreement reads:

"The bonds and cash originally deposited with the trustee and all bonds, cash or other property thereafter deposited with or received by the trustee may be commingled by the trustee and shall be held and dealt with as one trust fund, and each Interest issued and outstanding hereunder shall rank *pari passu* with every other Interest so issued and outstanding and each such Interest shall be entitled with every other Interest to participate equally in the entire Deposited Property."

Section 6.01 of the agreement provided that the trust should continue in force until August 1, 1952, unless all certificates shall have been sooner surrendered for cash as permitted in Section 6.02. The latter section provided that at any time prior to the termination of the trust, the certificate holder, by presenting his certificate to the trustee, might receive in cash from the Deposited Property a sum equal to his proportionate share of the market value of such property as determined by the trustee, in accordance with the agreement.

Another provision of the agreement states that the certificate holder shall be entitled to receive from the trustee a semi-annual distribution equal to the amount of the proportionate part of the current distributable funds which are available.

Section 3.06 of the agreement provides that the depositor may certify to the trustee that all or any specified part of the bonds held as part of the Deposited Property shall be eliminated. After consulting with independent investment counsel, the trustee is authorized, for the purpose of protecting and preserving the quality of the investment, to determine

whether the bonds shall be eliminated. The net proceeds of any sale under this section shall be credited to currently distributable funds. As I view the agreement, the certificate holder owns an equitable interest in the fund created. In this regard I disagree with the depositor corporation, although I do not consider that the question of whether the remedy of the certificate holder is legal or equitable is dispositive of the legality of the investment.

In the case of *Ulmer v. Fulton*, 129 O. S., 323, the court held as disclosed by the first branch of the syllabus:

“Banks and trust companies have only such powers as are expressly conferred on them by their charters and by statute, or such as may fairly be implied from those expressly given.”

Whether the certificates in question constitute a legal investment depends entirely on whether the statute includes them. As pointed out in the former opinion, the statute there in question enumerated fifteen types of securities in which savings banks might invest their funds. Applying the maxim *expressio unius est exclusio alterius*, it was concluded that a savings bank could not invest in securities other than those enumerated.

Section 710-111, General Code, enumerates thirteen types of securities in which banking corporations may invest. Under the same principle no security other than those enumerated can be considered a legal investment.

Under the trust agreement the certificate holder does not own a particular bond. He may hold a direct participation in a fund composed entirely of bonds which would be a legal investment for banks. Since the statutes enumerate with particularity the list of bonds in which a bank may lawfully invest, I cannot escape the conclusion that a bank may not invest in certificates representing a proportionate interest in such bonds. Because of diversification, it might be advantageous to permit banks to invest in such certificates, but this is a matter to be considered by the legislature. As new types of investments have been created, the legislature has extended the list which constitutes lawful investment for banks. Those securities issued under the National Housing Act have recently been added to the list. Until similar action is taken with respect to the securities in question, I am constrained to hold that they are not proper investments for banks.

Summarizing, it is my opinion that a bank organized and existing under the laws of Ohio may not invest its capital, surplus, undivided profits or deposits in certificates representing undivided equitable interests in a bond trust, although the corpus of such trust is composed entirely of bonds eligible for investment by such banks under Section 710-111, General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.