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BOND INVESTMENT CONTRACT — BOND INVESTMENT COMPANY — SUBSCRIPTION AGREEMENT — TRUSTEES CERTIFICATE — MORTGAGE INDEBTEDNESS — SECURITY — LICENSE — PROPOSED CHURCH REFINANCING PLAN — HELD TO CONSTITUTE BOND INVESTMENT CONTRACT — SECTION 697 G.C.

SYLLABUS:

Proposed church refinancing plan discussed and held to constitute a bond investment contract.

Columbus, Ohio, May 1, 1942.

Hon. Paul L. Selby, Chief, Division of Securities,
Columbus, Ohio.

Dear Sir:

You have requested my opinion as follows:

"I request your official opinion with respect to the questions stated at the conclusion of this letter. The facts which give rise to these questions are as follows:

A plan for the refunding or refinancing of mortgage indebtedness of churches and of fraternal organizations has been introduced into the state of Ohio by the Columbian National Life Insurance Company of Boston, Massachusetts, and its local representative in Ohio who organizes and promotes such plans. The plan has been used in at least one or two cases in Ohio, is now proposed for adoption in a church in Columbus, Ohio, and may become the subject of general use throughout the state if found to comply with all applicable Ohio laws. The questions involved are of great general and public interest.

In a typical case now pending, the plan operates as follows: The church is encumbered by a mortgage indebtedness of approximately \$50,000 which the Board of Trustees of the church desire to refinance in accordance with the terms of the proposed plan. The plan is explained by a representative of the insurance company whom we shall refer to as the Promoter. The Trustees of the church obtain a consent and agreement of three of their members to act as Trustees of the Refinancing Fund hereinafter referred to as 'Trustees.' The following agreements, proceedings and acts are executed and carried out:

1. The Trustees enter into an agreement with the Promoter employing the Promoter to form and organize the Syndicate and

to cooperate in keeping it alive and functioning and to organize the campaign to obtain subscriptions to the plan for which the Trustees agree to pay the Promoter a sum equal to 6% of all funds subscribed or obtained in the way of gifts, exchanges, pledges or subscriptions of securities at any time during the continuance of the plan. A copy of this agreement is marked 'Exhibit A' and attached hereto for your information. It may be noted that the agreement is signed only by the Trustees and not by the Promoter.

2. A written agreement is then entered into between the insurance company and the Trustees with respect to the manner and method of insuring the lives of the subscribers to the plan. A copy of this agreement is marked 'Exhibit B' and attached hereto for your information.

3. A 'trust agreement' is executed by and between the church, as party of the first part, and referred to as 'Trustor' and the three Trustees, as parties of the second part, and referred to therein as 'Trustees,' with respect to the operation of the Syndicate and the rights of the persons who become holders of trustee certificates issued thereunder and referred to therein as 'Beneficiaries.' The text of the proposed trust agreement is attached hereto and marked 'Exhibit C' for your information. We refer you to the terms of the instrument for more complete statement of its provisions than could be set forth at length in this letter. You will note, however, that a statement is sent to the prospective Trustees with respect to their liability, a copy of which is marked 'Exhibit D' and is attached hereto for your information. Exhibit D relates principally to the exemption of the Trustees from all personal liability.

4. The Promoter and the Church and the Trustees then proceed to solicit subscription agreements to the Refinancing Fund from the members of the Church and other interested persons. Subscriptions are received on the form and subject to the conditions contained in the copy of the subscription agreement or promissory note which we have marked 'Exhibit E' and attach hereto for your information. You will note that 'Exhibit E' provides for terms of payment and names a beneficiary to be written into the Trustees' Certificate. The plan proposed contemplates a 10% down payment with the balance payable in monthly installments over a period of five years and provides for loss of rights of the subscriber in the event of default. As subscriptions are received, the Trustees execute a certificate in accordance with Article V on page 4 of the Trust Agreement (Exhibit C) which certificate is to be in the form of specimen copy which we have marked 'Exhibit F' and attach hereto for your information.

For further explanation of the plan we attach a copy of a typical church bulletin as 'Exhibit G.'

You will note that the certificate to be issued to the sub-

scriber is to be signed only by the Trustees and is the only instrument delivered to the subscriber. The amount to be filled in the certificate is 150% of the amount subscribed by the subscriber. For example, a subscriber who subscribes \$500 will receive a certificate for \$750 payable to him or to his beneficiary at the maturity of the 35 year endowment life insurance policy or upon the death of the subscriber. The application for the insurance policy is signed by the subscriber but the policy is assigned to the Trustees whose only stated obligation is that the proceeds of the policy, if and when received either as an endowment or death claim, will be disbursed to the subscriber or to his beneficiary, etc. 'This certificate imposes no liability on the Columbian National Life Insurance Company. its only liability being that stipulated in the policy of insurance issued by it.'

We request your opinion with respect to the following questions:

1. Is the Trustees' Certificate to be issued by the Trustees a 'security' within the scope of the Ohio Securities Act, with particular reference to the definition section, Sec. 8624-2(2), G.C.?

2. If in your opinion, the Trustees' Certificate is a 'security' under the Ohio Securities Act, is the security exempt from registration requirements? We refer you to Sec. 8624-3(7), G.C., as to securities issued or guaranteed by an insurance company and to Sec. 8624-3(8), G. C., as to securities issued by a non-profit corporation. You will note that the insurance company is exempted from liability on the Trustees' Certificate by express provision therein. You will further note that the Trustees' Certificate purports to be either an evidence of indebtedness or a promise to pay money which may take it out of the exemption provided for the securities of a non-profit corporation.

3. If in your opinion the Trustees' Certificate is a 'security' within the definition of the Securities Act, are transactions in such securities exempt from registration under Section 8624-4, G.C.?

4. If in your opinion the instruments constitute securities and are not exempt from registration requirements, and transactions therein are not exempt from registration requirements, who is the issuer of such securities? Or to put it more directly, is the non-profit corporation the issuer, or are the Trustees the issuer? (Only a corporation could register securities under the provisions of Sections 8624-6, 7 and 8, G.C., in a case of this kind, there being more than 10 subscribers or purchasers involved).

5. If in your opinion the Trustees' Certificate is a security, is it necessary that such Trustees' Certificate be registered by

description or by qualification (See Sec. 8624-10) before being offered for sale or sold in the state of Ohio?

6. Is a license as a dealer or salesman required of the persons who engage in the subscription campaign and sales of Trustees' Certificates under this plan? (See Sec. 8624-17, G.C. as amended).

We understand that the Supervision of Bond Investment Companies is requesting your opinion as to whether or not the plan of sale of the Trustees' Certificates on an installment basis constitutes the operation of a 'bond investment company,' under Ohio laws. If in your opinion, this plan of operation does constitute operation of a bond investment company, jurisdiction over the subject matter would be vested in the Supervisor of Bond Investment Companies. We request that you advise us as to whether or not jurisdiction with respect to this plan of operation is vested in the Supervisor of Bond Investment Companies or in the Division of Securities."

The paragraph numbered 2 of Section 8624-2, General Code, specifically provides that the provisions of the Ohio Securities Act shall not apply to bond investment companies. If, therefore, the agreement evidenced by the documents you have submitted with your letter constitutes a bond investment contract and if this plan of operation constitutes the trustees or church a bond investment company, the entire Ohio Securities Act is inapplicable. It is therefore necessary to determine whether the plan you have submitted to me for my consideration amounts to the operation of a bond investment company.

Section 697, General Code, provides:

"Every corporation, partnership or association other than a building and loan association, which places or sells certificates, bonds, debentures or other investment securities of any kind, on the partial payment or installment plan, and every investment guaranty company doing business on the service dividend plan shall be deemed a bond investment company."

I must therefore consider whether certificates or other investment securities are sold on the partial payment plan by a corporation, partnership or association other than a building and loan association. Obviously, none of the parties to the proposed transaction are building and loan associations.

It does not appear from your letter or any of the papers accompanying it whether the church in question is incorporated or unincorporated,

but, if it is unincorporated, it is certainly an association. An association is defined in 7 C.J.S., 16, as "a collection of persons who have joined together for a certain object." This same definition is equally applicable to the trustees and they, too, constitute an association because they have united for the accomplishment of a common purpose.

It is therefore unnecessary for me to determine whether the certificate is issued by the church or the trustees, for, in either event, the issuer falls within the descriptive terms of the section defining a bond investment company.

This brings me to the question of whether the trustees' certificate amounts to a certificate or investment security as such terms are used in Section 697, General Code, *supra*. By express reference in the certificate, the entire trust agreement is made a part of the certificate. Among other things, the trust agreement contemplates that the trustees shall acquire the outstanding indebtedness of the church and the mortgage securing it and hold same for the benefit of the subscribers to the refinancing plan. It is further provided in such trust agreement that endowment insurance shall be procured by the trustees on the life of each subscriber or some person nominated by him and, if his subscription contract is carried out to completion, he is entitled to receive the proceeds of the endowment policy at its maturity. If the subscriber should die before completing his subscription payments and is not in default with respect thereto, his beneficiary receives the face amount of such policy less the unpaid balance on his subscription.

While there is no definition of the term investment security in the statutes relating to bond investment companies, it seems clear that the certificate now in question possesses attributes which make it what is commonly known as an investment security and there is no reason to believe that the General Assembly used such term in Section 697, General Code, *supra*, in other than its ordinary acceptance. The subscription agreement signed by the subscriber is payable in installments and therefore the certificate is sold on the partial payment or installment plan.

For these reasons, I am of the opinion that this plan of operation constitutes the carrying on of the business of a bond investment company as such term is defined in our statutes, and that the trustees' certificate,

when considered together with the entire plan, constitutes a bond investment contract. It is therefore unnecessary for me to answer the specific questions which you have set forth in your letter.

Respectfully,

THOMAS J. HERBERT
Attorney General.