

**FIRST NATIONAL BANK OF AKRON**

**Investment Advisers Act of 1940 Section 206  
Investment Company Act of 1940 Section 3(c)-(11)**

**Feb 27, 1976**

**Our Ref. No. 75 1109CC  
First National Bank of Akron  
File No.**

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT REGULATION**

Section 3(c)-(11) of the Investment Company Act of 1940 (the "Act") excludes from the definition of "investment company, any collective trust fund maintained by a bank consisting solely of assets of qualified trusts under Section 401 of the Internal Revenue Code of 1954. In our view, this exclusion would be unavailable unless the trustee bank is charged with full investment discretion.

Based upon the facts and representations in this letter and the enclosed trust agreement, we will not recommend that the Commission take any action if the collective trust fund established by the First National Bank of Akron (the "Trustee") is organized and operated without registration under the Investment Company Act of 1940, if the parties proceed in reliance upon your opinion as counsel that registration is not required. This position is conditioned upon the Trustee's having and exercising full investment responsibility, and on obtaining the requisite approval regarding the collective trust fund's tax status.

Finally, we note that paragraph 3.3 of Article III of the trust agreement may in our view, violate Section 206 of the Investment Advisers Act of 1940. Any " hedge clause" which purports to relieve an adviser from liability for violations of the Advisers Act with respect to any matter in which he has acted in "good faith" or which limit liability to "willful misconduct" are void under Section 215(a) of the Advisers Act. That section provides:

"Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation or order thereunder shall be void."

Consequently, as stated in Investment Advisers Act Release No. 58, any hedge clause which purports to relieve an adviser from liability for any conduct as to which a client has a cause of action which is non waivable under federal or state law would violate the antifraud provisions of Section 206 of the Act, since the effect of such a clause would be to lead clients to refrain from exercising their rights. Therefore, to the extent that advisers are, or may be in particular circumstances, subject to standards higher than those specified in the exculpatory clause, the attempted disclaimer would constitute a fraudulent or deceptive practice.

In our view, the same misleading effect may be present even if such a clause also explicitly provides that rights under federal or state law cannot be relinquished, since, if the hedge clause purports to limit liability to acts done in bad faith or to wilful misconduct it is unlikely that a client who in unsophisticated in the law would realize that he may have a right of action under federal or state law even where his adviser has acted in good faith. Accordingly, this paragraph should be modified.

Alan Rosenblat, Chief Counsel  
Division of Investment Management Regulation

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**November 25, 1975**

**Securities and Exchange Commission  
Washington, D.C. 20549**

**First National Bank of Akron (Akron, Ohio)  
REQUEST FOR NO ACTION**

Gentlemen:

We represent First National Bank of Akron (Akron, Ohio) (the "Bank"), a national banking association, created under the National Banking Act. The Bank, whose principal offices are in Akron, Ohio, is in the general banking business and has trust powers.

Attached hereto is a proposed Declaration of Trust to be adopted by the Bank (the "Investment Trust") (Exhibit "A"). The Investment Trust is to be a collective investment fund created under Section 9.18(a)2 of the regulations of the Comptroller of the Currency which provides:

"(a) Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively:

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonuses or other trusts which are exempt from Federal income taxation under the Internal Revenue Code."

The Investment Trust is to be qualified under Section 401(a) of the Internal Revenue Code and exempt from Federal income taxation under Section 501(a) of the Internal Revenue Code. Only eligible retirement, pension, profit sharing, and stock bonus trusts which are exempt from Federal income taxation under the Internal Revenue Code ("Participants") will be permitted to participate in the Investment Trust. Participation will depend on the Bank acting as trustee, co trustee or as agent for the trustee or trustees of participating trusts.

Those trusts which cover employees, some or all of whom are employees within the meaning of 401(c) (1) of the Internal Revenue Code ("Keogh" Plans), will not qualify to be Participants. The Investment Trust will consist of two (2) funds which will be designated the "Fixed Income Fund" or the "Equity Fund," or similar names, the assets of which shall be primarily invested in securities of the type indicated by their designations.

It is intended that The Willard Funds, Inc. (TWF), an Ohio corporation with its offices in Cleveland, Ohio, which will be compensated by the Participants or related employers, will be a so called "Coordinator" for the Investment Trust. TWF is in the business of analyzing, through various statistical techniques, investment fund management performance and recommending investment management alternatives to its corporate clients. While TWF is licensed under the Investment Advisers Act, it does not itself engage in management of investment portfolios or recommending purchase or sale of particular securities. Its duties as Coordinator, which are set out more fully under Article III of Exhibit A, will include recommending to the Bank an array of investment advisers from which the Bank may choose an investment adviser ("Fund Counsellor") for one or both of the Funds of the Investment Trust; providing the Bank with statistical analysis of past performance of portfolios over which recommended investment advisers had discretionary authority, for the use of the Bank in selecting Fund Counsellors; consulting from time to time with employers whose trusts participate in the Investment Trust regarding the division

of contributions to and the proportion of assets invested in the Equity Fund and the Fixed Income Fund of the Investment Trust and regarding the formulation of a written funding policy as required under sections 420(a) and (b) of ERISA. The Coordinator will also have the authority to approve all Participants in the Trust, but the Bank will not be required to accept Participants approved by the Coordinator.

TWF is associated with E.M. Klein & Associates of Cleveland, Ohio, which is an actuarial consultant, rendering actuarial services of all types. It is expected that E.M. Klein & Associates will render actuarial services for the Participants.

Neither the Bank nor the Coordinator, TWF, shall advertise or publicize the Investment Trust other than by furnishing to prospective customers a financial report prepared for Participants in the manner approved by the Comptroller of the Currency, and the Coordinator will not specifically promote the Investment Trust. TWF does, however, expect to include such Investment Trust among its recommendations to its clients.

The Fund Counsellor whose function is set forth under Article IV of Exhibit A shall give advice and made recommendations to the Bank, as trustee, for acquisitions and dispositions of investments by the Investment Fund. The Fund Counsellor shall furnish the Bank, as trustee, with sufficient detail concerning its recommendations to enable the Bank to make a reasonable determination as to the merits and suitability of the transaction. The Bank shall not be obligated to follow the recommendations of its Fund Counsellor. The Bank shall have full, final and complete authority for the approval of all investments and intends to exercise that authority.

The Trustee shall receive compensation for its services annually from each Participant upon a mutually negotiated basis. The Fund Counsellor will be paid by the Trust Fund for its services, and these charges will be passed on to the Participants in proportion to each Participant's holding in the Trust. The amount to be paid to the Fund Counsellor is to be negotiated. However, the Bank anticipates that such fees shall not, on the average, exceed those charged to the Participants by the Bank for its services. The Coordinator will receive no compensation from the Bank and will look solely to its own clients for compensation for its services.

Based on the foregoing facts, it is our opinion that, although the participation interests in the Investment Trust may be considered to be "securities" under the law, they are exempt from registration under both the Securities Act of 1933 and the Securities Exchange Act of 1934 by virtue of Section 3(a)2 and 3(a)12, respectively. Further, we are of the opinion that the Investment Trust is exempt from the Investment Company Act of 1940 by virtue of Section 3(c)11 thereof.

We, therefore, respectfully request a letter from you indicating whether you concur in our opinion as expressed herein and whether you will recommend that the Commission will take no action with respect to the issuance and sale of securities as described herein.

Very truly yours,

BROUSE & MCDOWELL CO., L.P.A.

By Frank H. Harvey, Jr.