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FILE NO. S-1000

SECURITIES:
Foreign Corporation Acting
As An Investment Adviser
in Illinois

Richard K. Lignoul
Commissioner of Banks and Trust Companies
Room 400 Reisch Building
4 West Old State Capitol Plaza
Springfield, Illinois 62701

Dear Mr. Lignoul:

I have your letter wherein you state that Bankshares of Indiana, Inc., a registered one bank holding company located in Indiana, has notified the Federal Reserve Bank of Chicago of its intention to operate as an investment adviser in Illinois. According to the notice filed with the Federal Reserve Bank, Bankshares' advisory service will consist of: (1) providing portfolio investment advice to any person; (2) acting in an agency capacity with respect to both discretionary (managing agency) accounts and accounts where the approval of the client is required before any investment change is made; (3) furnish-

ing general economic information and advice, including statistical forecasting and industry studies; (4) counseling others, either directly or through publications and writings, as to the value of securities and the advisability of buying or selling particular securities; and (5) issuing analyses and reports concerning securities. You ask whether these proposed interstate activities of Bankshares constitute a violation of either: (1) the prohibition against branch banking contained in section 6 of the Illinois Banking Act (Ill. Rev. Stat. 1973, ch. 16 1/2, par. 106) or; (2) "AN ACT to provide for and regulate the administration of trusts by trust companies". Ill. Rev. Stat. 1973, ch. 32, pars. 287 et seq.

With regard to the first part of your question, it must be noted that Bankshares' subsidiary, Bank of Indiana, although a national bank, is nonetheless subject to Illinois law prohibiting branch banking. (First National Bank of Logan v. Walker Bank and Trust Company, 385 U.S. 252 (1966).) That prohibition is found in section 6 of the Illinois Banking Act (Ill. Rev. Stat. 1973, ch. 16 1/2, par. 106) which states:

> "No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in

> this or any other state of the United States any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business."

The question of what constitutes a "branch" of a national bank is a matter of Federal law. (First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969)) and the applicable Federal definition is found in the McFadden Act. (12 U.S.C. sec. 36(f).) It states:

> "(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

Regardless of the definition applied here, however, it seems clear that an office for the dissemination of investment advice opened by a foreign bank holding company is not a "branch" of the holding company's subsidiary bank. Bankshares is an independent corporation capable of operating an investment advisory service. Although Bank of Indiana will hold in "safe-keeping" securities and cash owned by certain of Bankshares' clients, the investment advisory service is one provided by Bankshares and not the bank.

It is, therefore, my opinion that the proposed operation of Bankshares in Illinois as an investment adviser would not violate section 6 of the Illinois Banking Act.

The second part of your question concerns the possible applicability of "AN ACT to provide for and regulate trusts and trust companies" [hereinafter called the Trust Companies Act] (Ill. Rev. Stat. 1973, ch. 32, pars. 287 et seq.), to Bankshares' proposed activities.

As a foreign corporation, Bankshares is governed by section 1a of the Trust Companies Act (Ill. Rev. Stat. 1973, ch. 32, par. 287a), which states in part:

> "After the effective date of this amendatory Act no foreign corporation, including banks, now or hereafter organized under the laws of any other state or territory, and no national banking association having its principal place of business in any other state or territory may procure a certificate of authority under this Act * * * . The right and eligibility of any foreign corporation or any national banking association having its principal place of business in any other state or territory hereafter to act as trustee, executor, administrator, administrator to collect, guardian, conservator, or in any other like fiduciary capacity in this state shall be governed solely by the provisions of 'An Act authorizing foreign corporations, including banks, and national banking associations domiciled in other states, to act in a fiduciary capacity in this state upon certain conditions herein set forth', adopted by the 68th General Assembly."

This provision makes it clear that Bankshares could not receive a certificate to do business as a trust company in Illinois. The question remains, however, as to whether Bankshares' proposed activities amount to its acting as a "trustee, executor,

administrator, administrator to collect, guardian, conservator, or in any other like fiduciary capacity", so as to come within "AN ACT authorizing foreign corporations, including banks and national banking associations domiciled in other States, to act in a fiduciary capacity in this State * * * " [hereinafter referred to as the Foreign Corporations as Fiduciaries Act], Ill. Rev. Stat. 1973, ch. 32, pars. 304.1 et seq.

The first step in such a determination is to ascertain whether or not any sort of fiduciary capacity is involved in the relationship of an investment adviser to his client. Speaking with regard to the general question of what constitutes a fiduciary relationship, the Supreme Court of Illinois in Schweickhardt v. Chessen, 329 Ill. 637 at 649, stated:

> "* * * A fiduciary relation is not limited to cases of trustee and cestui que trust, guardian and ward, attorney and client, or other recognized legal relations, but it exists in all cases where confidence is reposed on the one side and a resulting superiority and influence on the other side arises therefrom. The origin of the confidence is immaterial. It may be moral, social, domestic or merely personal. If the confidence in fact exists, is reposed by one party and accepted by the other, the relation is fiduciary, and equity will regard the dealings between the parties according to the rules which apply to such relations. * * * "

Applying this approach to the operation Bankshares

proposes to undertake, it would seem that at least with regard to its management of discretionary accounts, Bankshares will be acting in a fiduciary capacity. Certainly no investor would entrust the management of his portfolio to the total discretion of Bankshares unless he had considerable confidence in Bankshares' professional capabilities.

To a lesser degree, perhaps, the same would seem to be true with regard to agency accounts as well. Although in this case the investor has final say as to any investment changes, there still presumably exists a considerable degree of confidence in Bankshares' ability and as a result, Bankshares will exert a corresponding degree of influence over the client.

Support for this interpretation of the investment adviser - client relationship, can also be found in the language of the United States Supreme Court in the case of S. E. C. v. Capital Gains Bureau, 375 U.S. 180 (1963) at 191. There the court in discussing the Investment Advisers Act of 1940 (15 U.S.C., sec. 80b-1) stated that the Act's passage reflected a recognition on the part of Congress of the "delicate fiduciary nature of an investment advisory relationship". [citations omitted].

Similarly, in Scott on Trusts, Third Edition, section 16A, the author states that "an investment adviser is in a

fiduciary relation to his clients, even though he is not technically a trustee * * * ".

I conclude, therefore, that the proposed activities of Bankshares will lead, at least in certain instances, to the creation of a fiduciary relationship between Bankshares and its customers. It remains then to determine whether this relationship is of the sort that the legislature had in mind when it enacted the Foreign Corporations as Fiduciaries Act.

As in any case involving the construction of a statute, the primary object is to give effect to the intention of the General Assembly. (People ex rel. Hanrahan v. White, 52 Ill. 2d 70.) Normally, legislative intent is determined by recourse to the words of the statute. (Western Nat. Bank of Cicero v. Village of Kildeen, 19 Ill. 2d 342.) Section 2 of the Foreign Corporations as Fiduciaries Act (Ill. Rev. Stat. 1973, ch. 32, par. 304.2) states in pertinent part:

> "* * * No foreign corporation shall be permitted to act as trustee, executor, administrator, administrator to collect, guardian, conservator or in any other like fiduciary capacity in this state except as provided in this Act; * * * "

The question is thus whether in carrying out its proposed activities in Illinois, Bankshares would be acting as a "trustee, executor, administrator, administrator to collect, guardian,

conservator, or in any other like fiduciary capacity * * * ".

It is my opinion that Bankshares will not be acting as an executor, administrator, administrator to collect, guardian or conservator insofar as it has described its planned activities. These five fiduciary offices all involve the management of the estate of an individual who is either deceased or legally incompetent. Nothing in the material submitted by Bankshares indicates that they intend to provide such services.

Neither it seems will Bankshares' position vis-à-vis its clients, be that of "trustee" in the formal sense of one to whom another's property is legally committed in trust. It was held in Martin v. Rockford Trust Co., 281 Ill. App. 441 at 444 that a trust may be said to exist "where the legal estate is in one person and the equitable estate in another, or where there are rights, titles and interest in property distinct from the legal ownership". Similarly, the court in Mahan v. Schroeder, 142 Ill. App. 538 at 546, aff'd. 236 Ill. 392, stated that "in order to constitute an express executed trust, there must be a transfer of the legal title of the subject matter of the trust by the owner to the trustee for the beneficial use of the cestui que trust". No such separation of legal from

equitable title takes place in the relation of an investment adviser to its client, even when a discretionary account is involved. Although Bank of Indiana or some other approved institution will have possession of the securities and cash, title will remain with the client. At no time will it pass to Bankshares.

Even if Bankshares' proposed activities do not come within the fiduciary relationships expressly set forth in section 2 of the Foreign Corporations as Fiduciaries Act, it is still possible, of course, that they do constitute action of a "like fiduciary capacity" for the purposes of that Act. In order to determine whether or not this is in fact the case, it is useful to construe the language of section 2 in light of the constructual maxim of ejusdem generis. This principle states that where general words follow particular and specific words in a statute, the general words are construed to include only persons, places, things or modes of action in the same general class as those indicated by the particular words. (City of Rockford v. Hey, 366 Ill. 526.) It is, therefore, necessary to outline briefly some of the characteristics of the six fiduciary relationships listed in section 2 so as to be able to compare them to those of the investment adviser's relation to its client.

I have already pointed out one fundamental difference between the fiduciary capacity of a "trustee" and that of an investment adviser in that the former takes legal title to the property that is the object of its fiduciary duty, while the latter does not. Another basic distinction is the absence in the case of the investment adviser - client relationship of the sort of legal formalities that attach to every stage of the trust relationship. It is particularly significant in this regard to note the active role played by the courts in the administration of the trust.

It is generally accepted that courts of equity have plenary jurisdiction in the administration of trust estates (Patterson v. Vermilion Academy, 312 Ill. 386), and that it is their duty to see to it that the rights of the cestui que trust are protected. (Suffolk v. Leiter, 261 Ill. App. 82.) In order to carry out this responsibility the courts are given the power to exercise supervisory control over trustees (Ohlheiser v. Shephard, 84 Ill. App. 2d 83) and this power of judicial scrutiny is evident at every stage of the trust relationship.

As a general rule the creator of a trust has complete discretion in the selection of a trustee (In Re Estate of Beckwith v. Cooper, 258 Ill. App. 411), and the court may not intervene even if the appointment is one the court would not

itself have made. (Teater v. Salander, 305 Ill. 17.) It is also well accepted, however, that a trust will not fail for want of a trustee (Stowell v. Prentiss, 323 Ill. 309) and where no trustee is designated in a testamentary trust the court will appoint one. (Dwyer v. Cahill, 238 Ill. 617.) The court may also appoint a trustee to fill a vacancy existing for any other reason where no other provision for filling the vacancy exists. Churchill v. Marr, 300 Ill. 302.

The court may also play an important role in the execution of a trust. Trustees can, for example, seek the court's aid in the management and execution of the trust. (Rackemann v. Tilton, 236 Ill. 49), and may under the proper circumstances petition the court for instructions. (Stone v. Baldwin, 331 Ill. App. 421.) In extreme cases the court itself has the power to execute the trust. Smith v. Kelly, 387 Ill. 213.

All of this may be contrasted to the relative absence of standardized legal controls and restrictions surrounding the relationship of the investment adviser to its client, even in those instances when a discretionary account is involved. Although certain aspects of an investment adviser's operations are regulated - at the Federal level under the provisions of

the Investment Advisers Act of 1940 (15 U.S.C., sec. 80b-1), and in Illinois under the Illinois Securities Law of 1953 (Ill. Rev. Stat. 1973, ch. 121 1/2, pars. 137.1 et seq.) - its dealings with an individual client are not subject to the sort of close scrutiny and control that the courts are empowered to exercise with regard to an individual trust. The selection of an investment adviser by an individual investor is, for example, strictly a matter of private choice and under no circumstances would a court seek to intervene. Similarly, once appointed, the investment adviser could not seek advice from the court as to the management of the account. Finally, it is equally inconceivable that a court would seek to manage a discretionary account itself, should the original investment adviser relinquish its duties for whatever reason. In a sense, what is involved is a contract rather than a property relationship, and the contract, rather than a series of standardized rules, controls.

Certain formal rules with respect to the duration and termination of a trust are also inapplicable to the relationship of an investment adviser and its client. It is generally true, for example, that a trust may be created by the grantor to continue until the expiration of a certain period or the happening of a particular event, and it will terminate on the expiration of the period or the happening of the event (Friese

v. Friese, 373 Ill. 216), and no sooner. (Altschuler v. Chicago City Bank & Trust Co., 380 Ill. 137.) Absent such specification by the grantor, a trust normally continues until the trust purpose is accomplished. (LaSalle Nat. Bank v. McDonald, 2 Ill. 2d 581.) It is true that several jurisdictions have held that a trust is not invalid because the trustee is given the discretion to terminate it at an appointed time or under certain circumstances. Even in such a situation, however, the trustee's discretion is not arbitrary but must be exercised in the interest of the beneficiary and in accord with the express provisions of the trust. C.J.S. Trusts, sec. 92.

In the case of the investment adviser and its client, on the other hand, there are no limits placed on the duration of their relationship or their power to terminate it. It has no "purpose" other than continuing mutual profit and either party may decide at any time and for any reason to end it.

The fiduciary offices of executor and administrator also differ fundamentally from that of an investment adviser. While the latter is concerned with increasing the value of a living client's property, the former are concerned solely with the collection and distribution of the property of the

deceased. (Johnston v. Maples, 49 Ill. 101.) Equally pronounced is the difference between the duties of an administrator to collect and those of an investment adviser. According to section 105 of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, par. 105) an administrator to collect is appointed only:

> "Upon the filing of a verified petition of any interested person or upon its own motion, the court may issue letters of administration to collect: (a) when any contingency happens which is productive of delay in the issuance of letters testamentary or of administration and it appears to the court that the estate of the decedent is liable to waste, loss or embezzlement or (b) when a person is missing from his usual place of residence and cannot be located or while in military service is reported by the Federal Government or an agency or department thereof as missing, or missing in action. In order to act as administrator to collect one must be qualified to act as an administrator under this Act. The selection of an administrator to collect for the estate of a decedent shall be in the discretion of the court giving due consideration to the person named as executor in the will or, if there is no will or if no executor is named, to the preferences in Section 96. The selection of an administrator to collect for the estate of a missing person shall be in accordance with the preferences in Section 96."

Once appointed, his duties according to section 107 of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, par. 107) are, unless leave of court is obtained, "to sue for and collect the personal estate and debts due the decedent or missing person * * * ".

His task is thus primarily one of preserving the estate until an executor or administrator is appointed. In Re Estate of Breault, 29 Ill. 2d 165.

As was true with regard to the trustee and his trust, the relation of an executor, administrator or administrator to collect to the estate is closely supervised at all stages by the judiciary. Section 75 of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, par. 75), for example, provides that the qualifications of the executor chosen by the testator are always subject to the scrutiny of the court. Similarly, under sections 95 and 105 of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, pars. 95 and 105) the issuance of letters of administration and administration to collect, is also the responsibility of the court.

Once appointed the performance of an executor, administrator or administrator to collect is subject to continuing judicial scrutiny. Under section 276 of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, par. 276) the court is given the power to remove an executor, administrator or administrator to collect for any of a number of offenses and it is expressly provided that the court may act in this regard "upon its own motion".

The specialized nature of an executor's or administrator's duties dictate in every case a natural point of termination of those duties. Once the estate is settled, there is no longer any need for an executor or administrator and the office ceases to exist. The same is also true with regard to an administrator to collect. As stated in section 108 of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, par. 108):

> "On the issuance of letters testamentary or of administration or the satisfactory establishment of the survival and location of the missing person the powers of an administrator to collect cease and he shall forthwith deliver to the executor or administrator or the missing person, as the case may be, the estate which has come to his possession subject to the proper disbursements made and proper expenses incurred by him."

Should an executor or administrator seek to resign before the estate is settled, section 282 of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, par. 282) requires that he first obtain the approval of the court.

Once again the formality of the fiduciary relationships just discussed, stands in sharp contrast to the relative informality that characterizes the relation of an investment adviser and its client. As was noted above, the investor is free to select an investment adviser without judicial approval. Once created, the duration of the relationship is totally a matter of the parties' discretion.

Sections 113 and 133 of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, pars. 113 and 133 ) also give to the courts the power to appoint conservators for the mentally incompetent and guardians for minors.

Having been appointed, conservators and guardians are also subject to the ongoing supervision of the courts. Sections 276 and 282 of the Probate Act, dealing with the removal and resignation of executors and administrators, apply to conservators and guardians as well.

As was the case with executors, administrators and administrators to collect, the nature of the duties of conservators and guardians is such that upon a happening of certain events the office of conservator or guardian always terminates. The applicable standards in this case are found in section 312 of the Probate Act (Ill. Rev. Stat. 1973, ch. 3, par. 312) which states:

> "The office of a guardian or conservator terminates when the ward if a minor attains his majority, when the letters of a guardian or conservator are revoked when the guardian or conservator dies, or subject to Section 322, when the ward dies. The marriage of a female minor ward terminates the right of her guardian to her custody and education but not to her estate."

To summarize then, it is evident that the fiduciary

relationships listed in section 2 of the Foreign Corporations as Fiduciary Act all involve a degree of formality that is not present in the relationship of an investment adviser to its client. In the case of a trust or the estate of a deceased or legally incompetent individual, it may be said that the underlying fiduciary relationship has an existence beyond that of the personal relation of the individual fiduciary to the beneficiary. If a trustee dies or is removed, another must be appointed because the trust continues as long as its purpose is unfulfilled. The same is true with respect to the executor, administrator, administrator to collect, guardian or conservator. As long as the estate remains unsettled or the individual remains legally incompetent, a fiduciary officer is required.

This is not the case with respect to an investment adviser and his client. The only "purpose" of the relationship is the mutual profit of the parties and as such the relationship has no significance beyond those parties. It is a strictly personal transaction and when one party withdraws, the relationship simply ceases to exist.

I am, therefore, of the opinion that Bankshares' proposed activities would not constitute action as "trustee,

executor, administrator, administrator to collect, guardian or conservator or in any other like fiduciary capacity", and as such they do not constitute a violation of the Illinois Trust Companies Act.

Very truly yours,

ATTORNEY GENERAL