

SHUMAKER, LOOP & KENDRICK

NORTH COURTHOUSE SQUARE 1000 JACKSON TOLEDO, OHIO 43624

(419) 241-4201

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p.a. 5/21/84  
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ALAN B. LOOP  
FRANCIS J. GALLAGHER  
ROBERT B. GOSLINE  
MALCOLM B. RAMEY  
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GREGORY G. ALEXANDER  
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JOHN C. STRAUB

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
450 5th Street, N.W.  
Washington, D.C. 20549

Re: Request for No-Action Letter Relating to The Northwestern Ohio Building and Construction Trades Foundation Section 3(a)(2) of the Securities Act of 1933; Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934; Section 12(h) and Rule 12h-1(a) of the Securities Exchange Act of 1934; Sections 3(c)(5) and 3(c)(11) of the Investment Company Act of 1940; Section 202(a)(11) of the Investment Advisers Act of 1940  
Our File No. N1575/16191

Ladies and Gentlemen:

The Northwestern Ohio Building and Construction Trades Council (the "Council") is a confederation of local building and construction trades unions which represent building and construction tradesmen working in northwestern Ohio. The local unions are affiliates of members of the AFL-CIO Building Trades Department. The Northwestern Ohio Council of Construction Employers (the "Employers") is a confederation of employers engaged in the building and construction industry in the same geographic area.

The Council and the Employers, on behalf of the local unions and employer's associations within their respective groups, desire to establish a construction industry investment program for the benefit of the employee pension benefit plans which they or their members co-sponsor (collectively, the "Plans"). Our firm has been retained as

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
October 27, 1983  
Page 2

special counsel by the Council and the Employers to assist in establishing the program.

In brief, a foundation will be established pursuant to a written agreement among the Plans who want to participate in the foundation. (A draft of the foundation's organizational agreement is attached as Exhibit A to this letter.) The foundation will be administered by a Board of Trustees. The trustees will be directed to establish an investment plan to allow the Plans to invest in construction period mortgage loans. The foundation will contact lending institutions in northwestern Ohio to learn of the availability of participations in mortgage loans, and pass this information along to its member Plans. Each individual Plan will determine whether to participate in the proposed loan, and the extent of its participation. This decision will be communicated to the foundation, which will tabulate the responses and inform the lending institution as to the aggregate amount which the Plans wish to invest. A separate trust will be established for each lending transaction. The Plans participating in a mortgage will establish this trust, with the foundation acting as trustee. (A draft of the trust agreement is attached as Exhibit B to this letter.) The Plans will transfer their investments to the trust, which will forward the funds to the lending institution. The foundation will have minimal investment responsibilities, serving merely as a conduit through which the Plans and lending institutions can communicate to indicate mutual interest in participating in mortgage loans.

We respectfully request that you advise us that the Staff of the Securities and Exchange Commission (the "Commission") will not recommend that the Commission take any enforcement action if the program is organized and operated in the manner set forth in this letter:

(1) without registering the foundation or the individual trusts as investment companies under the Investment Company Act of 1940 (the "Investment Company Act"), in reliance upon the exclusions from the definition of an investment company set forth in Sections 3(c)(5) and 3(c)(11) of the Investment Company Act;

(2) without registering the interests in the trusts as securities under Section 2(1) of the Securities Act of 1933 (the "1933 Act"), in reliance upon the exemption from the registration provisions set forth in Section 3(a)(2) of the 1933 Act;

(3) without registering the interests in the trusts as securities under Section 12(g) of the

Securities Exchange Act of 1934 (the "1934 Act") in the event that the statutory minimums specified in that section are exceeded, in reliance upon the exemption from the registration provisions set forth in Rule 12h-1(a) adopted under that act;

(4) without registering either the foundation or the trusts as broker-dealers under the 1934 Act, in reliance upon an exemption from the definitions of broker and dealer set forth in Sections 3(a)(4) and 3(a)(5) of the 1934 Act; and

(5) without registering the foundation or the trusts as investment advisers under the Investment Advisers Act, in reliance upon an exemption from the definition of investment adviser set forth in Section 202(a)(11) of the Investment Advisers Act.

#### A. DESCRIPTION OF PROPOSED OPERATIONS

As noted above, the Council and the Employers desire to develop an investment vehicle for the employee pension benefit plans maintained by their respective members. The Plans are all qualified under Section 401 of the Internal Revenue Code of 1954, as amended (the "Code"), and comply with the requirements of the Labor Management Relations Act of 1947, as amended, 29 U.S.C.A. §§141 et seq. (1973 and Supp. 1983) (the "LMRA"), and the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§1001 et seq. (1975 and Supp. 1983) ("ERISA").

Under the program, the Council and the Employers will establish a foundation to be known as The Northwestern Ohio Building and Construction Trades Foundation (the "Foundation"). The Foundation will be a not-for-profit unincorporated association organized under and governed by the laws of Ohio, and will be qualified under Section 401 of the Code. The Foundation will provide that any employee benefit plan qualified under Section 401 of the Code and co-sponsored by the Council or any local union affiliated with it or the Employers or any employer affiliated with it may elect to participate in the Foundation, if collective investment of the Plan's funds is not prohibited by the instrument, judgment, decree, or order creating the Plan. The Foundation will be administered by a Board of Trustees (the "Trustees"). Every Plan participating in the Foundation shall be entitled to two Trustees on the Foundation's Board, one appointed by the union co-sponsor of the Plan and the other by the employer co-sponsor of the Plan.

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
October 27, 1983  
Page 4

The Foundation will allow the Plans to focus a portion of their funds on investments that would benefit both their members and the local community. Rather than investing in anonymous corporations or other more traditional investment media, the Plans hope to encourage new construction within their jurisdictions and create jobs for their members. By creating an umbrella organization such as the Foundation, the Plans can contribute to the financing of a larger number of projects, and involve themselves in more extensive projects. The Plans can also achieve the expertise and the economies of scale inherent in larger investments. Additionally, the Foundation will allow the Plans to minimize their investment risk by providing a diversification among types and locations of available investments that they could not individually obtain.

The Foundation will approach every bank, savings and loan association, and insurance company in the northwestern Ohio area and ask that they allow the Foundation's members the opportunity to participate in all construction period mortgage loans made by them. All such participations shall be made in accordance with documents prepared by the Foundation, unless the participating Plans agree to use the paperwork of the lending institution.

Upon receiving information from lending institutions regarding an appropriate loan, the Foundation shall pass on this information to the individual Plans. Each individual Plan through its trustees or other investment manager shall then determine if it desires to participate in the specific loan opportunity, and, if so, the amount of its participation. The Plans would relay their decisions to the Foundation, which would, in turn, inform the lending institution of the aggregate amount of participation desired. ~~The participating Plans would then create a trust (the "Trust") by entering into a trust agreement with the Foundation as trustee, and forwarding their investment to the Foundation.~~ The Foundation will collect the investments of the Plans, and immediately forward to the lending institution each investment received. The lending institution will hold all funds contributed to it in certain specified investments until it receives all funds and the loan transaction is closed.

Income of the Trust would be paid to the Foundation as trustee, and would be immediately distributed to the Plans participating in that trust. The Foundation will thus not hold Plan funds for any length of time, but merely serve as a conduit for payment and distribution, thereby greatly simplifying the record-keeping and accounting obligations of the lending institutions. The Foundation will not have discretion over the investment, management, or disposition of Trust assets other than as related to the Foundation's reserves described below, and will render no investment advice to the Plans.

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
October 27, 1983  
Page 5

The Foundation will incur a limited amount of general administrative expenses in the nature of postage, photocopying, and other operational expenses, as well as legal and accounting expenses. These expenses will be attributable to or allocated between the individual Trusts as determined by vote of the Foundation's Board of Trustees. The Foundation's expenses will be reimbursed from a reserve established by the Foundation from fees collected from the mortgage borrower through the lending institution at the time the Trusts acquire their respective participation interests. These fees will be in the amount of expenses as estimated by the Board. Any excess reserves will be distributed to the Plans, and any additional expenses shall be reimbursed from the assets of the Trust or Trusts responsible for the expenses, all as determined by the Trustees. The Foundation reserves would be deposited with one or more banks or savings and loan institutions maintaining an office in Lucas County, Ohio, and invested by the Foundation as specified in the individual trust agreements.

The loan transactions proposed to be entered into through the Foundation may fund projects which will be built by employers whose employees are covered by the Plans. These investments would be prohibited by the terms of ERISA absent an exemption from Section 406 of that act. A class exemption has been adopted by the Department of Labor (the "Department") and the Internal Revenue Service (the "Service") for transactions similar in nature to those described here. Under Prohibited Transaction Exemption 76-1(B) ("PTE 76-1(B)"), loans which observe the following conditions may be made by an employee benefit plan to an employer who has employees covered by the plan: (1) only construction period loans may be made, and a commitment for permanent financing must have been made by someone other than the plan before the loan can be made; (2) the decision to make the loan must be made by an independent bank or insurance company which meets the requirements of Section 3(38) of ERISA, or by a savings and loan association subject to regulation by the Federal Home Loan Bank Board, pursuant to its sole discretionary authority or control regarding management of plan assets; (3) the bank, insurance company, or savings and loan association must commonly make such loans on similar terms and conditions from its own funds, and the loan must satisfy their qualifications established for the review of such loans; (4) immediately after making the loan, the aggregate amount of investments (including loans) of an individual plan in any one employer participating in the plan cannot exceed ten percent of the fair market value of the plan's assets, and the aggregate amount of investments of the plan in loans to all its participating employers cannot exceed thirty-five percent of the plan's fair market value; and (5) certain records of the plan must be retained and made available to specified individuals, including plan participants and beneficiaries, for six years from the date of the loan.

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
October 27, 1983  
Page 6

The program as herein described does not fall within PTE 76-1(B) because the trustees of the Plans, which may not include a bank, insurance company, or savings and loan association, will make the investment decisions on behalf of the Plans. The Foundation has filed an application with the Department for an administrative exemption under ERISA Section 408(a), based on the criteria of PTE 76-1(B). For purposes of its response to this letter, the Staff may assume that such a ruling will be received.

#### B. STATUTORY PROVISIONS AND ANALYSIS

Based upon the facts set forth above, it is our opinion that the actions of the proposed Foundation and the purchase of interests in the individual Trusts by the Plans may be accomplished without (1) registration of the Foundation or the Trusts as investment companies under the Investment Company Act; (2) registration of interests in the Trusts as securities under the 1933 Act; (3) registration of interests in the Trusts as securities under the 1934 Act; (4) registration of the Foundation or the Trusts as broker-dealers under the 1934 Act; and (5) registration of the Foundation or the Trusts as investment advisers under the Investment Advisers Act.

##### 1. Investment Company Act of 1940.

The purchase of participations in construction period mortgage loans may constitute the acquisition of a security. Even if the participations are viewed as securities, the Foundation does not fall within the definition of "investment company" at Section 3(a)(1) of the Investment Company Act, as it will not engage in the business of investing in securities, but will merely acquire such securities on behalf of each Trust in its capacity as trustee, and passively hold them on behalf of the Trusts. It could be argued, however, that each Trust will engage in the business of "owning [or] holding . . . securities . . . having a value exceeding 40 per centum of the value of such issuer's total assets . . ." Investment Company Act, Section 3(a)(3).


Section 3(c) provides various exemptions from the definition of "investment company." In particular, companies meeting the following criteria are not within the definition of "investment company":

(5) Any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following businesses: . . . (C) purchasing or otherwise

acquiring mortgages and other liens on and interests in real estate.

(11) Any employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under Section 401 of the Internal Revenue Code of 1954 . . .

A. Section 3(c)(5)(C). The Plans will hold equity interests in the Trusts which will not be redeemable except upon withdrawal from or liquidation of the Trust. Interests in the Trusts will not be made available to the public, but only to those Plans which elect to participate in the Trust through their involvement with the Foundation.

 The Trusts will be acquiring "interests in real estate," as they will purchase interests in loans secured by a mortgage upon real property. See Home Savings and Loan Association, 1981 Fed. Sec. L. Rep. (CCH) ¶76,704 (avail. Oct. 16, 1980). The actions of the Trusts will thus fall within the plain language of Section 3(c)(5)(C).

B. Section 3(c)(11). The employee benefit plans underlying the Trusts and the Foundation are excluded from the definition of an investment company by the first clause of Section 3(c)(11) of the Investment Company Act.

The individual Trusts themselves can be viewed as single, non-collective trusts, consisting of the assets of and established at, the instance of benefit plans maintained by "related companies."<sup>1</sup> As explained in Communications Workers of America, supra, "a trust which is established and controlled by an employer or employers and/or by a union representing its or their employees" need not be subject to registration

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1. "Related companies" refers generally to "a parent corporation and a group of subsidiary corporations," Bank-Trusteed Pension and Profit-Sharing Plans, 1973-74 Fed. Sec. L. Rep. (CCH) ¶79,768 (avail. Apr. 18, 1974), or employers whose employees participate in a trust sponsored by the union of the employees. Communications Workers of America, 1980 Fed. Sec. L. Rep. (CCH) ¶76,321 (avail. Jan. 27, 1980). See E. W. Scripps, available January 5, 1983. Although we are not aware of any instance where a "trust of trusts" has qualified as a non-collective trust, the Staff has stated that such a situation is possible. See Communications Workers of America, supra. The Staff has also indicated its willingness to consider the applicability of the first clause of Section 3(c)(11) to different groups of companies on a case-by-case basis. Bank-Trusteed Pension and Profit-Sharing Plans, supra.

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
October 27, 1983  
Page 8

under the Investment Company Act, since, because of the direct interest of the sponsors in the welfare of their members/employees, imposing the protections of the Investment Company Act is unnecessary. See also Part IV(B)(1)(d) of Commission Release No. 33-6188, 1 Fed. Sec. L. Rep. (CCH) ¶1051 (Feb. 1, 1980). In the present situation, several unions will join together with a group of employers to establish the Trusts. This can only enhance the protections to be gained from having plan sponsors who are interested in the beneficiaries' welfare.

The Plans are related in the sense that they have voluntarily banded together to pursue a common investment goal to the benefit of their members and employees. The sponsoring employers and unions can also be seen to be related by their geographic location and the fact that they all work in some aspect of the construction industry. The Foundation as trustee of the Trusts will be qualified under Section 401 of the Code, will have no investment discretion, and will not be able to "sell" investment services to other benefit plans. The Plans will maintain responsibility for each Trust's performance through their power to terminate their participation in the Trust.

We are therefore of the opinion that, assuming the Trusts fall within Section 3(a) of the Investment Company Act, the Trusts will be exempt from registration as an investment company by the provisions of either Section 3(c)(5) or Section 3(c)(11) as explained above.

## 2. Securities Act of 1933.

Interests in the Trusts to be held by the Plans could be deemed to be "securities" as defined in Section 2(1) of the 1933 Act. Section 3(a)(2) exempts the following from the registration provisions of that act:

. . . any interest or participation in a single . . . trust fund . . . which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under Section 401 of the Internal Revenue Code of 1954 . . . other than any [such] plan . . . (i) the contributions under which are held in a single trust fund maintained by a bank . . . for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities . . . issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer, (ii) which covers employees some or all of whom are employees within



Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
October 27, 1983  
Page 9

the meaning of Section 401(c)(1) of such Code, or (iii) which is a plan funded by an annuity contract described in Section 403(b) of such Code.

The Staff stated in Communications Workers of America, supra, that the first clause of Section 3(c)(11) of the Investment Company Act and the words "single . . . trust fund" in Section 3(a)(2) of the 1933 Act describe the same type of trust. As indicated above, the Trusts will fall within the first clause of Section 3(c)(11) of the Investment Company Act. The Plans underlying each Trust will acquire interests or participations in the Trust, which interests or participations will be "issued in connection with" a Section 401 employee benefit plan.

No interest in the Trust is expected to be issued in connection with or held by any plan which covers employees, some or all of which are employees within the meaning of Section 401(c)(1) of the Code, or any plan funded by an annuity contract described in Section 403(b) of the Code. None of the Trust funds will be used for direct investment by members of the public, and none of the funds is presently expected to include assets of any Keogh plans or Individual Retirement Accounts.<sup>2</sup> To the extent that a single trust fund is created for a single employer, it will not be maintained by a bank, but by the Foundation and, in any event, the Foundation will not cause that trust fund to invest an amount in excess of the employer's contribution for the purchase of securities issued by the employer or by any company directly or indirectly controlling, controlled by, or under common control with the employer.

It is thus our opinion that, assuming the interests of the Plans in the Trusts are securities under Section 2(1) of the 1933 Act, the interests will be exempted from the registration requirements of that act by the provisions of Section 3(a)(2) as explained above.

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2. If, however, at some point in the future, the Trust elects to commingle the assets of Keogh plans with the Trust assets, interests or participations offered or sold to Keogh plans (or any other plans not covered by the exemption provided by Section 3(a)(2) of the 1933 Act) will be registered pursuant to the 1933 Act unless an exemption from such registration is then available. This approach is consistent with that noted in Part II(B)(2) of Commission Release No. 33-6281, 1 Fed. Sec. L. Rep. (CCH) ¶1052 (Jan. 15, 1981).

3. Securities Exchange Act of 1934: Registration of Securities.

Section 12(g) of the 1934 Act requires issuers with assets exceeding \$1,000,000 and a class of equity security (other than an exempted security) held of record by 500 or more persons, and who meet the other conditions specified therein, to register the class of security with the Commission.

Rule 12h-1(a) (formerly Rule 12h-2(a)), promulgated under Section 12(h) of the 1934 Act, exempts from the requirements of Section 12(g):

Any interest or participation in an employee stock bonus, stock purchase, profit-sharing, pension, retirement, incentive, thrift, savings or similar plan which is not transferable by the holder except in the event of death or mental incompetency, or any security issued to fund such plans.

Assuming that Section 12(g) could apply to the Trusts, the Trusts are excluded from the provisions of Section 12(g) by Rule 12h-1(a), as the language of Rule 12h-1(a) is equivalent to that contained in Section 3(a)(2) of the 1933 Act exempting interests in a single trust fund issued in connection with a stock bonus, pension, or profit-sharing plan qualified under Section 401 of the Code. The Trusts can be seen as pension or retirement plans maintained by a group of related companies, and interests in the Trusts issued to the Plans will not be transferable by the Plans.

Thus, we are of the opinion that interests or participations in the Trusts should not be required to be registered under the provisions of Section 12(g)(1) of the 1934 Act.

4. Securities Exchange Act of 1934: Registration as Broker-Dealer.

Section 3(a)(4) of the 1934 Act provides: "The term 'broker' means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank."

Section 3(a)(5) of the 1934 Act provides:

The term "dealer" means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
October 27, 1983  
Page 11

individually or in some fiduciary capacity, but not as a part of a regular business.

Section 15(a)(1) of the 1934 Act provides in part:

It shall be unlawful for any broker or dealer . . . to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

It might be argued that either or both the Foundation and the individual Trusts would have to register as brokers or dealers. The individual Trusts, however, will not be engaging in the business of effecting transactions in securities, either for their own account or on behalf of their participating Plans. As indicated above, each Trust will enter into only a single transaction, the purchase of a participation in a mortgage loan, and will dissolve upon the completion of that transaction. Funds held as reserves by the Trusts may be invested by the Foundation as trustee in exempt securities, i.e., commercial paper, banker's acceptances, commercial bills, obligations issued or guaranteed by the United States, and notes not having a maturity exceeding nine months. To the extent that a Trust would invest in non-exempt securities, these investments would be made only through a broker-dealer registered under the 1934 Act. The Trusts will hold any securities acquired for investment, and will not purchase with the intent to distribute these securities.

We are also of the opinion that the Foundation need not register as a broker or a dealer. The Foundation will not be acquiring securities on its own behalf. As it will be acting merely as a conduit to facilitate the collective purchase of participations by the Plans, it will not actually effect transactions for the accounts of others. See Digital Equipment Corp., 1979 Fed. Sec. L. Rep. (CCH) ¶81,931 (avail. Oct. 2, 1978). The Foundation will hold no funds other than reserves for its expenses, and have only minimal investment responsibility. It will merely act in an administrative capacity to collect the contributions of the Plans and deliver the collected contributions to the institution selling the mortgage participation interests to the Trusts. The Foundation will act only on the Plans' behalf, and will not solicit additional customers or otherwise seek to act on behalf of anyone other than the Plans. The Foundation will have no significant

assets, and will not sponsor, analyze, or recommend any loan participation proposals. The Foundation, through the members of its Board of Trustees, is already subject to common law and contractual fiduciary duties to the Plans, and to the requirements of ERISA and the LMRA. Finally, the Foundation will not undertake any sales or promotional efforts, and will receive no compensation from the Plans for any actions taken by it on behalf of the Trusts, but would receive only reimbursement for expenses incurred in performing its ministerial functions.

When all of these factors are taken together, it becomes evident that neither the Trusts nor the Foundation need to be registered as a broker-dealer. Requiring registration would serve merely to increase the regulatory burden and expense upon the Foundation and its member Plans while duplicating the regulating effect of bodies already charged with oversight responsibilities, including the Plans themselves.

5. Investment Advisers Act of 1940.

Section 202(a)(11) of the Investment Advisers Act defines an "investment adviser" as:

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analysis or reports concerning securities; . . .

In our opinion, neither the Trusts nor the Foundation will fall within the definition of "investment adviser." Assuming that the Plans will be purchasing "securities," as defined in Section 202(a)(18) of the Investment Advisers Act, through the Trusts, it could be argued that the Foundation will be in the business of advising others, namely the Plans, as to the advisability of investing in, purchasing, or selling securities. A close analysis of the Foundation's responsibilities, however, makes it clear that the Plans have sole responsibility for making investments, and that the Foundation provides no advisory services to the Plans. The Foundation merely transmits information from the lenders to the Plans, and receives instructions from the Plans concerning the amount the Plans want to invest. The Foundation thus has no part in the investment decisions of the Plans.

The Trusts are merely the vehicles through which participations are purchased, and have no separate existence or function

Office of Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
October 27, 1983  
Page 13

apart from holding their particular participations. The Trusts will therefore play no role in the investment decisions of the Plans.

C. REQUESTED NO-ACTION POSITION

Based upon the foregoing facts, statutes, and releases, the prior no-action positions taken by the Commission Staff, and our analysis of the policy considerations and statutes involved, we respectfully request that the Staff advise us that it will not recommend to the Commission that any action be taken under the 1933 Act or 1934 Act regarding the proposed operations of the Foundation and the Trusts as summarized in this letter.

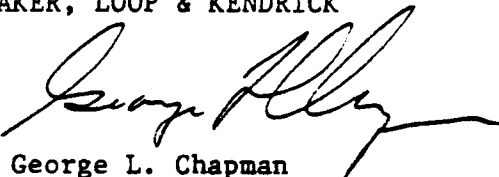
We ask that you forward an enclosed copy of this letter to the Office of Chief Counsel for the Division of Investment Management for confirmation that the Foundation and the Trusts need not be registered as an investment company under the Investment Company Act or as an investment adviser under the Investment Advisers Act, as explained above.

Please contact the undersigned if you have any questions.

Very truly yours,

SHUMAKER, LOOP & KENDRICK

By



George L. Chapman

GLC/sjs  
Attachments  
Enclosures  
cc: Marc Gertner, Esq.

# SHUMAKER, LOOP & KENDRICK

NORTH COURTHOUSE SQUARE 1000 JACKSON TOLEDO, OHIO 43624

(419) 241-4201

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GREGORY J. SHIBLEY

OF COUNSEL  
G. CHARLES SCHARF  
SWIFT C. CORWIN  
JOHN C. STRAUB

November 30, 1983

Re: The Northwest Ohio Building and  
Construction Trades Foundation  
Our File No. N1575/16191

Ms. Karen B. Burgess  
Division of Market Regulation  
Securities and Exchange Commission  
450 5th Street, N. W.  
Washington, D.C. 20549

Dear Ms. Burgess:

Based on our conversations concerning our no-action request on behalf of the above-captioned Foundation (the "Foundation"), we hereby submit a revised request that the Staff of the Securities and Exchange Commission (the "Commission") advise us that it will not recommend that the Commission take any enforcement action concerning the actions of the Foundation without registering the Foundation as a broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act").

This letter will supplement the factual representations contained in our letter of October 27, 1983, addressed to the Office of Chief Counsel, Division of Corporation Finance.

In particular, we represent that the employee pension benefit plans (the "Plans") maintained by the participants in the Foundation range in size from \$2,000,000 to \$30,000,000 in total assets, with the combined assets of the Plans exceeding \$80,000,000. The mortgage investments to be entered into by each transaction trust established by the Foundation will amount to between \$2,000,000 and \$5,000,000.

The Foundation has also determined to reduce its involvement in each transaction trust while still providing the lending institutions with an administratively convenient program. As originally contemplated, each participating Plan was to forward funds to the order of the Foundation, which would take possession of the funds, accumulate them in a transaction trust account until the transaction trust was fully funded, and deliver the funds to the lending institution in a lump sum on behalf of the trust. Income of the trust was to be delivered in a lump sum to the Foundation which would distribute the funds to the Plans.

Ms. Karen B. Burgess  
November 30, 1983  
Page 2

The Foundation now proposes to collect the investments to be made by each individual Plan in the form of checks or federal funds drafts made payable to the lending institution. Any income of the trust would be allocated among the various participating Plans by the lending institution, which would prepare checks to the individual Plans. These checks would be delivered to the Foundation, which would distribute these checks to the individual Plans. The lending institution would continue to pay directly to the Foundation the loan fee which is to be charged the borrower for expenses incurred by the Foundation. This administrative procedure would provide maximum protection of the funds of the Plans by minimizing the opportunity for and effect of any misappropriation of funds by the Foundation. At the same time, funds of the transaction trusts could be conveniently and efficiently transferred to the lending institution with a minimum of involvement by the lending institution.

In modifying the transaction as proposed, the Foundation seeks to comply with the mandate contained within Section 404(a)(1)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") that each Plan qualified thereunder must minimize the expenses which are to be charged against Plan participants. 29 U.S.C.A. § 1104(a)(1)(A) (1975). See Marshall v. Wilson, No. 3-76-373 (E.D. Tenn. 1977) (payment of unreasonable amounts or for unnecessary expenses violates Section 404(a) of ERISA).

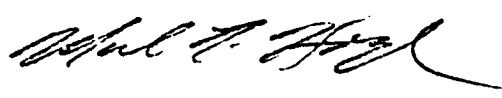
By utilizing the Foundation as trustee for each of the transaction trusts, the Foundation expects to save approximately \$5,000 per transaction trust over the cost of utilizing a bank trustee for each trust. This would result in a substantial savings to the Plans over the life of the Foundation, e.g., if the Foundation formed ten transaction trusts over the next two years, a savings of over \$50,000 could be realized by the Plans. We believe that the protections afforded by the provisions of ERISA and state common and contract law, when combined with the essentially commercial, non-securities nature of these short-term mortgage loan transactions, would provide comfort to the Staff concerning the protections provided by the broker-dealer registration provisions.

Please contact the undersigned if you have any questions.

Very truly yours,

SHUMAKER, LOOP & KENDRICK

By

  
Mark R. High

MRH/sjs

cc: John J. Gorman  
Division of Corporate Finance  
Securities and Exchange Commission  
Marc Gertner, Esq.  
George L. Chapman, Esq.

# SHUMAKER, LOOP & KENDRICK

NORTH COURTHOUSE SQUARE 1000 JACKSON TOLEDO, OHIO 43624

(419) 241-4201

ALAN B. LOOP  
FRANCIS J. GALLAGHER  
ROBERT B. GOSLINE  
MALCOLM B. RAMEY  
JOHN W. HACKETT, JR.  
THOMAS I. WEBB  
GREGORY G. ALEXANDER  
CARL V. BRUGGEMAN  
ROBERT G. CLAYTON, JR.  
MARC GERTNER  
GEORGE A. PICKNELL  
DONALD M. MEWHORT, JR.  
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BARTON L. WAGENMAN  
ROLF H. SCHEIDEL  
JOHN F. HAYWARD  
WILLIAM H. GOSLINE  
NORMAN C. HARTSEL  
WILLIAM H. HEYWOOD, III  
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THOMAS I. WEBB, JR.  
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MICHAEL G. SANDERSON  
GARY N. SALES  
MICHAEL S. MCGOWAN  
MARY ELLEN PISANELLI  
DAVID G. SQUILLANTE  
GREGORY T. LODGE  
JANET E. CATLIN  
PHILIP S. CHUBB  
THOMAS L. WOODMAN  
GREGORY J. SHIBLEY  
  
OF COUNSEL  
G. CHARLES SCHARFY  
SWIFT C. CORWIN  
JOHN C. STRAUB

March 12, 1984

Mr. Thomas Harmon  
Division of Investment Management  
Securities and Exchange Commission  
450 5th Street, N. W.  
Washington, D.C. 20549

Re: The Northwest Ohio Building and  
Construction Trades Foundation  
Our File No. N1575/16191

Dear Mr. Harmon:

Based on our conversations on behalf of the above-captioned foundation (the "Foundation"), we hereby submit additional factual representations. These representations are for your use in responding to our request that the Staff of the Securities and Exchange Commission (the "Commission") advise us that it will not recommend that the Commission take enforcement action concerning the actions of the Foundation or the Trusts to be created thereunder without registering the Foundation or the Trusts as investment companies under the Investment Company Act of 1940 (the "Investment Company Act"), and without registering the Foundation or the Trusts as investment advisers under the Investment Advisers Act of 1940 (the "Investment Advisers Act").

This letter will supplement our letters of October 27, 1983, addressed to the Office of Chief Counsel, Division of Corporation Finance, and of November 30, 1983, addressed to Ms. Karen B. Burgess, Division of Market Regulation.

On the question of whether the Foundation will be providing investment advice, we confirm that the Foundation will contact all banks and savings and loan associations located within the geographic area served by the Foundation and request that those financial institutions provide the Foundation with information concerning all construction



Mr. Thomas Harmon  
March 12, 1984  
Page 2

mortgage loan opportunities which they desire to offer participations in. The Foundation shall transmit to all participating pension plans (the "Plans") all materials received from all cooperating banks and savings and loan associations. It is then the responsibility of the individual Plans to determine whether that particular Plan desires to participate in any given loan. The Foundation will not screen in any way any proposals brought to it, and the individuals representing the Plans will take all proposals presented to them back to their respective Plans for decision.

The Foundation has determined to dispense with the holding of any reserve funds, either on its behalf or on behalf of the individual Trusts. Instead, all loan participation fees collected from the borrowers at the time that the loan is made will be immediately distributed through the Foundation directly to the Plans who are members of that particular Trust. Any expenses incurred by the Foundation will then be assessed to and paid by the individual Plans. Under this design, the Foundation will not hold any funds in reserve and thus have no investment responsibilities relating to the reserves.

In discussions with the United States Department of Labor concerning the structure of the Foundation, it was established that a Trust will not acquire more than a 50% participation in any individual construction loan. This limitation is in addition to the limitations placed upon each Plan for purposes of the exemption from certain provisions of ERISA requested of the Department of Labor, as described in our letter to the Division of Corporation Finance dated October 27, 1983. This limitation on the size of the investments which a Trust may make will not affect the ability of the Trust to effect enforcement of the loan documents, including foreclosure on the mortgage, in the event of the occurrence of an event of default under the loan documents.

Finally, as we related to you in our telephone conversation of March 9, 1984, the administrative functions of the Foundation will be performed by Northwestern Ohio Administrators, Inc., an Ohio not-for-profit corporation. Arthur Young & Company will serve as accountants to the Foundation, and it is anticipated that this firm will serve as its legal counsel. The accountants will annually review the finances of the Foundation and the Trusts which have been in existence during that year. The Foundation will either distribute copies of this report or prepare an annual review based on this report to be distributed to the Plans. In either case, the information provided will be clearly identified as factual information prepared by the Foundation's accountants, and will not be presented as providing any indication concerning future investment possibilities or projected investment results,

Based on the foregoing, we are of the opinion that neither the Foundation nor the Trusts will fall within the definition of "investment

Mr. Thomas Harmon  
March 12, 1984  
Page 3

adviser" contained in Section 202(a)(11) of the Investment Advisers Act, and that the Foundation and the Trusts will be exempted from the definition of "investment company" contained in Section 3(a) of the Investment Company Act by the provisions of Section 3(c)(5)(C) of that Act.

We trust these representations will assist you in your review process. We appreciate the time and attention which you and your colleagues have given to our letter request. If you have any further questions or concerns, please contact the undersigned.

Very truly yours,

SHUMAKER, LOOP & KENDRICK

By



Mark R. High

MRH/sjs

cc: John J. Gorman  
Division of Corporation Finance  
Karen B. Burgess  
Division of Market Regulation  
Marc Gertner, Esq.  
George L. Chapman, Esq.

**PUBLIC**

APR 20 1984

Our Ref. No. 83-373-CC  
Northwestern Ohio Building  
& Construction Trades  
Foundation  
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

The Northwestern Ohio Building and Construction Trades Council, a confederation of local building and construction trades unions representing building and construction tradesmen working in northwestern Ohio, and the Northwestern Ohio Council of Construction Employers, a confederation of employers in the same industry in the same geographic area, propose to establish a foundation for the benefit of the employee pension benefit plans they or their members sponsor. The foundation, a not-for-profit unincorporated association organized and governed by the laws of Ohio, would be administered by a board of trustees. Every plan participating in the foundation would be entitled to two trustees on the foundation's board, one appointed by the union co-sponsor of the plan, the other by the employer co-sponsor of the plan. The plans would invest in construction period mortgage loans through the medium of trusts created pursuant to trust agreements designating the foundation as trustee. A trust would never acquire more than a 50% participation in a construction period mortgage loan, but any participation it would hold would enable the foundation, as trustee for a trust, to foreclose on the mortgage securing the loan in the event of a default.

We would not recommend that the Commission take any enforcement action under the Investment Company Act of 1940 or the Investment Advisers Act of 1940 against the foundation or the trusts if they proceed with their proposal without registering as either investment companies or investment advisers. Our position is based on the facts and representations in your letters and exhibits of October 27, 1983, November 30, 1983, and March 12, 1984, and upon the statements made by Mark High and Marc Gertner of your firm to Thomas Harman of the staff on January 25, February 9, February 27, March 29, and April 2, 1984. We will first discuss, with respect to the foundation and then to a trust, the applicability of the Investment Company Act and then the Advisers Act.

Section 3(a) of the Investment Company Act defines an "investment company," in pertinent part, as any issuer which is or holds itself out as being engaged primarily in the business of investing, reinvesting, or trading in securities, or is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis. Section 2(a)(22) defines "issuer" as every person who issues or proposes to issue any security, or has outstanding any security which it has issued.

Because the foundation would not issue any security or interest to anyone, it would not be an issuer as defined by section 2(a)(22), and, therefore, it would not be an investment company as defined by section 3(a). Each trust, however, would issue equity interests to various plans, and, thus, would be an issuer. Moreover, each trust would hold assets consisting solely of participations in a construction period mortgage loan. A construction period mortgage loan is a loan secured by a short-term mortgage on an unfinished construction project. The definition of the term "security" in section 2(a)(36) of the Investment Company Act includes any note or participation in any note. A construction period mortgage loan, or any participation in such a loan, would, therefore, come within the definition of a security contained in section 2(a)(36). A trust, thus, would appear to be an investment company subject to the Investment Company Act unless excepted.

Section 3(c)(5)(C) of the Investment Company Act, in pertinent part, excepts from the definition of investment company any person who is not engaged in the business of issuing redeemable securities and who is primarily engaged in purchasing or otherwise acquiring mortgages and other liens on and interests in real estate. The participation interests in a construction period mortgage loan held by a trust would be an interest in real estate where each loan is fully secured by real property and the participation interests held by the trust are sufficient to give the foundation, as trustee for the trust, the right by itself to foreclose the mortgage securing the loan in the event of a default. MGIC Mortgage Corporation (pub. avail. August 1, 1974). Because it is represented that each loan would be fully secured by real property and that the participation interests held by a trust would give the foundation, as trustee for the trust, the right by itself to foreclose the mortgage securing the loan in the event of default, it appears that a trust would be primarily engaged in purchasing or otherwise acquiring mortgages and other liens on and interests in real estate. A trust would not appear to be issuing "redeemable securities" within the meaning of section 3(c)(5)(C) because a plan's interest in a trust would not be redeemable except upon the plan's withdrawal from the trust or liquidation of the trust and because withdrawal from a trust would be conditioned upon a plan's loss of exempt or qualified status under the Internal Revenue Code of 1954. Accordingly, a trust would be excepted from the Investment Company Act pursuant to section 3(c)(5)(C).

Section 202(a)(11) of the Advisers Act, in part, defines an "investment adviser" as

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

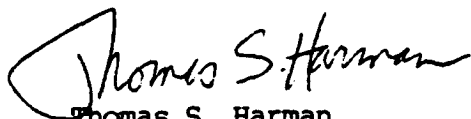
Because the foundation intends to contact lending institutions in northwestern Ohio to learn of the availability of participations in mortgage loans, and pass this information along to the plans, a question exists as to whether the foundation would be issuing or promulgating "analyses or reports concerning securities."

The foundation intends to approach every bank, savings and loan association, and insurance company in the northwestern Ohio area and ask that they provide the foundation with information concerning all construction period mortgage loan opportunities in which they desire to offer participations. The foundation would not sponsor, screen, analyze, or recommend any loan participation opportunities. Each individual plan, through its trustees or other investment manager, would determine whether to participate in a specific loan opportunity and, if it does, the amount of its participation. The foundation would transmit to all participating plans all materials received from all cooperating financial institutions. The information the foundation transmits would be prepared by the various lending institutions and would be so identified.

In Texas Newsletter (pub. avail. January 23, 1984), we stated that no action would be recommended to the Commission if a newsletter, without registering under the Advisers Act, printed information about securities where any such information about a security would be prepared by the issuer of the security and would be presented as an advertisement for the security. Because the foundation would (1) distribute only information about a participation in a construction period mortgage loan prepared by the cooperating financial institution issuing the participation, (2) identify such information as having been prepared by the cooperating financial institution, and (3) transmit all information given to the foundation without commenting on, screening, or evaluating the information in any manner, we would not consider the foundation to be engaged in the business of issuing or promulgating analyses or reports concerning securities. Thus, we would not regard the foundation's proposed service to bring the foundation within the definition of "investment adviser" contained in section 202(a)(11) of the Advisers Act.

Because a trust's sole function would be to hold participations in a particular construction period mortgage loan selected by the plans participating in the trust, a trust would neither be engaged in the business of advising others about the value of securities or the advisability of investing in securities nor issuing or promulgating analyses or reports concerning securities as part of a regular business. Accordingly, a trust would not be an investment adviser as defined by section 202(a)(11) of the Advisers Act.

We understand that the Division of Corporation Finance and the Division of Market Regulation will be writing separately to address the issues you have raised regarding the Securities Act of 1933 and the Securities Exchange Act of 1934.



Thomas S. Harman  
Attorney/Adviser

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