

RESCINDED

TBC - 19

BANKING ISSUANCE

Comptroller of the Currency
Administrator of National Banks

Type: Trust Banking Circular

Subject: Fiduciary Purchases of Bonds when
Bank Participates in Underwriting
Syndicates

Outdated - See OCC
Bulletin 2015-3

TO: Regional Administrators, Presidents of National Banks with Trust Powers (Attention: Senior Trust Officer), and All Examining Personnel.

This circular sets forth the position of the Comptroller of the Currency concerning national banks purchasing for trust accounts securities which have been underwritten by bond syndicates of which the bank was a member.

Background

National banks are authorized to deal in and to underwrite certain types of securities such as general obligations of a state or political subdivision thereof. Underwriting of such securities frequently is done through syndicates. These syndicates may take the form of an "undivided account" or a "divided account." In an undivided account, each syndicate member is responsible for a specified share of any loss incurred by the syndicate, regardless of the amount of bonds that each syndicate member sells. In a divided account, each syndicate member is responsible only for the sale of the bonds allocated to it. The member of a divided account syndicate who sells all its allocation will not be responsible for any loss experienced if other syndicate members fail to sell their allocations.

Policy

It has been a basic principle of the law of trusts that a trustee exercising discretionary powers violates its duty to the trust estate if it sells to itself as a trustee property which it owns individually. This is called self-dealing. The corporate trustee violates this duty to its beneficiary if it purchases property for the trust from one of its own departments, as where it purchases for the trust securities owned by it in its securities or banking department. Thus, this duty would prohibit a corporate trustee from purchasing for its trust accounts securities that are being underwritten by the commercial department of the bank, either individually or as a member of a syndicate. This would preclude a corporate trustee from purchasing securities from the commercial department when the bank is a member of a divided syndicate. It would also preclude the purchase of securities from an affiliate of the corporate fiduciary when the affiliate is a member of a divided syndicate, even though the corporate fiduciary is not also a member.



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An exception to this principle would occur when such purchases are specifically authorized by local law or the provisions of the governing trust instrument or directed, in writing, by an authorized power holder.

In addition, the purchase of securities by the corporate trustee from other members of a divided account is not precluded, so long as there is no agreement, tacit or express, between syndicate members to purchase each others commitments.

In the case of a syndicate in the form of an undivided account where the corporate trustee is a member, the corporate trustee would also be violating its duty of undivided loyalty to its fiduciary accounts by purchasing securities from other members of the syndicate. Our examiners will criticize any direct purchases from members of an undivided member syndicate made while the syndicate is open. Examiners will also criticize the purchase of securities from affiliates of the corporate trustee when the affiliate is a member of an undivided syndicate, even though the corporate trustee is not also a member.

In addition to the foregoing, the purchase of securities which the bank or an affiliate has underwritten as a member of an undivided syndicate, either from another syndicate member or another intermediary, within sixty days of the close of a syndicate will create a rebuttable presumption of self-dealing. Among factors which are relevant to rebut this presumption are evidence establishing: the ultimate fairness of the price as established by market quotations or independent appraisals; the absence of other securities which would serve to the same degree the needs of the trust accounts; the absence of a pattern of purchasing securities immediately after the syndicate has closed; or the fact that numerous purchases of this security were made by parties independent of members of the syndicate at the time the purchase was made. Documentation establishing such factors should be obtained at the time of the transaction. As is the case with purchases from syndicate members during the life of the syndicate, this presumption of self-dealing arising from the purchase of securities within sixty days of the close of the syndicate would not apply when such purchases are specifically authorized by local law or the provision of the governing trust instrument or are directed in writing by an authorized power-holder.



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Should a corporate fiduciary purchase securities for fiduciary customers in violation of the foregoing principles, the bank must take appropriate corrective action. Such appropriate action includes sale of the securities at no loss to the trust estate; obtaining beneficiary consent, if all beneficiaries are sui juris; or obtaining court approval after full and complete disclosure of the facts and circumstances.

When the purchase is made by a common trust fund full disclosure, subject to the review of this Office, may be an appropriate remedy of the self-dealing transaction. In these circumstances, the Office of the Comptroller of the Currency will generally require:

(1) disclosure to every ascertainable holder of a vested beneficial interest in a trust account having an interest in the common trust fund during the period the fund held the securities; (2) disclosure that the bank's trust department violated federal regulations prohibiting self-dealing; (3) complete disclosure of the facts and events which occurred, the parties or entities involved, and the terms of the syndicate agreement in relation to the securities purchased; and (4) disclosure of the amount of depreciation, if any, as a percentage of the purchase price of the securities on the date of disclosure.

National banks should adopt written policies and implement procedures to ensure that self-dealing transactions as outlined in this Circular do not occur. Examiners will criticize those situations where it is determined that adequate controls are not in place. Further, this Office will require that self-dealing syndicate transactions are remedied in a manner described above.

Questions concerning the contents of this issuance should be directed to Donald R. Johnson, Director for Trust Examinations, at (202) 447-0445.

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for Bank Supervision