



The proposed policy and procedure would allow the Banks to purchase securities from third party members of underwriting syndicates of which an affiliate of the Banks is a member after complying with certain conditions and guidelines established by each Banks' Board of Directors.<sup>4</sup> Both TBC 19 and 12 U.S.C. § 371c-1(b) address the ability of a national bank to purchase, as fiduciary, securities underwritten by a syndicate of which a bank affiliate is a member. According to TBC 19, a bank breaches its fiduciary duty of undivided loyalty when it purchases, as fiduciary and while the syndicate is open, securities from a third party member of an undivided syndicate that has the bank or a bank affiliate as a member, unless such transaction is authorized by local law, court order, or the governing trust instrument. TBC 19 also restricts securities purchases after an "undivided" syndicate closes. According to the Circular, a rebuttable presumption of self-dealing arises if a bank purchases, within sixty days of the syndicate's closing, securities underwritten by an undivided syndicate of which a bank or its affiliate is a member. A bank can rebut this presumption with the types of documentation listed in the proposed policy and procedure.<sup>5</sup>

In 1987, Congress enacted 12 U.S.C. § 371c-1, thereby amending the Federal Reserve Act to include a prohibition similar to that found in TBC 19. Under 12 U.S.C. § 371c-1(b)(1)(B), a member bank or its subsidiary

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<sup>4</sup> Those conditions and guidelines are as follows:

1. All securities must be investment grade or better.
2. When a bank affiliate's participation in a syndicate is 10% or less, purchases from third parties will be permitted without further evidence to rebut the presumption of self-dealing.
3. In cases where the affiliate's liability participation in a syndication is greater than 10%, the fiduciary will maintain documentation with respect to each purchase to rebut the presumption of self-dealing, including the following:
  - a. Data about contemporaneously available issues demonstrating why they were less attractive, including comparisons of price, yield, structure (e.g., term, call features or options), size of lots available and investment ratings.
  - b. Account data demonstrating why the purchase was prudent under individual account circumstances, including investment objectives, tax exempt income targets, maturity targets, duration convexity and diversification.

<sup>5</sup>TBC 19 provides that, while a bank may not purchase, as fiduciary, securities underwritten by an undivided syndicate while the syndicate is open, a bank may purchase, during the syndicate's existence, securities for its trust customers from other members of a divided syndicate so long as there is no agreement between the bank and the syndicate member to purchase securities from each other's allocation. TBC at 1. Banks must, however, comply with the prohibitions of Section 23B which do not differentiate between divided and undivided syndicates but instead limit a bank's ability to purchase securities from a syndicate that has a bank affiliate as a principal underwriter of the security.

whether acting as principal or fiduciary, shall not knowingly purchase or otherwise acquire, during the existence of any underwriting or selling syndicate, any security if a principal underwriter<sup>6</sup> of that security is an affiliate of such bank.

While the statute's prohibition is similar to TBC 19's, 12 U.S.C. § 371c-1 creates an exception to the purchase prohibition that TBC 19 does not offer. Under 12 U.S.C. § 371c-1(b)(2), a bank may purchase, during a syndicate's existence, securities underwritten by the syndicate of which an affiliate is a principal underwriter "if the purchase or acquisition of such securities has been approved, before such securities are initially offered for sale to the public, by a majority of the directors of the bank who are not officers or employees of the bank or any affiliate thereof."

Because TBC 19 does not state a similar exception, you asked if the OCC would criticize a national bank that purchased securities underwritten by an undivided syndicate that has a bank affiliate as a member even if the bank obtained advance approval for the purchase from a majority of its outside directors. Given the protection provided trust beneficiaries through the enactment of 12 U.S.C. § 371c-1(b)(2), it is our opinion that a bank that purchases, as fiduciary, securities underwritten by an undivided syndicate that has a bank affiliate as a member need not observe any additional requirements of TBC 19 if the bank complies with Section 23B in purchasing the securities. Therefore, we would not object to the Banks' proposed procedure as long as it is in conformity with 12 U.S.C. § 371c-1(b)(2) and all other applicable laws and regulations, including 12 U.S.C. 371c-1(a).

We are unable to determine from the information provided if the proposed policy and procedure complies with the 12 U.S.C. § 371c-1(b)(2) requirement that the securities' purchases be approved by a majority of the banks' non-employee directors prior to the securities initial offer to the public. If the proposed procedure complies with 12 U.S.C. § 371c-1 and other applicable laws and regulations, this office will not object to purchases made pursuant to this procedure.

Sincerely,

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Lisa J. Lintecum  
Director, Fiduciary Activities

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<sup>6</sup>The statute defines a "principal underwriter" as an underwriter who is "in privity of contract" with the securities issuer or an affiliate of the issuer, "initiates or directs" the syndicate's establishment, or is allowed a commission or profit greater than the rate allowed another syndicate member. 12 U.S.C. § 371c-1(b)(3)(B).