STATE OF TENNESSEE
DEPARTMENT OF FINANCIAL INSTITUTIONS

BULLETIN

NO. B-88-1 January 6, 1988

The Tennessee State Attorney General has issued an Opinion dated November 9, 1987, which opines that state law prohibits a bank from purchasing certain securities itself, under all circumstances, whether or not the bank has been involved in underwriting the securities.

A copy of OPINION NO. 87-176 is attached.

OFFICE OF THE ATTORNEY **GENERAL** OF THE STATE OF TENNESSEE

87-176

1987 Tenn. AG LEXIS 23

November 9, 1987

CORE TERMS: underwriting, affiliate, fiduciary, participated, purchasing, condition precedent, legislative intent, interpreting, plainly, fiduciary capacity, syndicate, axiomatic, arrive, time to time, serving, invest

REQUESTBY:
[*1]

W. J. MICHAEL CODY, Attorney **General** and Reporter JOHN KNOX WALKUP, Chief Deputy Attorney **General;** AL COCKE, Assistant Attorney **General)**

OPINION:
LIMITATIONS ON BANKS' TRUST DEPARTMENTS' PURCHASES OF SECURITIES UNDER T.C.A. § 35-3-121

QUESTION

Whether T.C.A. § 35-3-121(1) prohibits a bank from purchasing securities from itself absolutely in all events or whether the prohibition contained in that statutory provision is applicable only if the bank has participated in the underwriting of the security in question.

ANSWER

It is the opinion of this Office that T.C.A. § 35-3-121(1) prohibits a bank from purchasing securities from itself under all circumstances, whether or not the bank has been involved in underwriting the security in question.

BACKGROUND

The specific question involved in this case assumes the following information. A bank purchases for its investment portfolio from time to time securities of the type described in Chapter 3, Title 35 of Tennessee Code Annotated. In addition, the bank's trust department purchases such securities from time to time as investments for certain of its trust accounts. The question arises as to whether the trust department can purchase **[*2]** such securities from the bank itself. The bank does not and has not underwritten these securities and is not a member of a syndicate underwriting these securities.

ANALYSIS

The statute in question was enacted in 1983 pursuant to the Public Acts of 1983, Chapter No. 60. That Act is currently codified in T.C.A. § 35-3-121 and reads as follows:

Investments in securities by banks or trust companies. -- Unless the governing instrument, court order, or a statute specifically directs otherwise, a bank or trust company serving as trustee, guardian, agent, or in any other fiduciary capacity may invest in any security authorized by this chapter even if such fiduciary or any affiliate thereof, as defined in section 35-3-117(d), participates or has participated as a member of a syndicate underwriting such security, if:

(1) The fiduciary does not purchase the security from itself or its affiliate; and

(2) The fiduciary does not purchase the security from another syndicate member or an affiliate, pursuant to an implied or express agreement between the fiduciary or its affiliate and a selling member or its affiliate, to purchase all or part of each other's underwriting commitments. **[*3]** (Emphasis added).

Pursuant to T.C.A. § 35-3-117(d) the term "affiliate" means "any corporation controlling, controlled by, or under common control with such corporation, or any corporation formed as a result of or for the purpose of effectuating any merger, consolidation, or reorganization of such corporation."

In interpreting statutes, it is axiomatic that the courts will construe a statute so that no part will be inoperative, superfluous, void or insignificant and the courts will give effect to every word, phrase, clause and sentence of an act in order to carry out the legislative intent. See, **General** Care Corporation v. Olsen, 705 S.W.2d 642, 646 (Tenn. 1986). Specific words used by the **General** Assembly are not to be given a forced or subtle construction. Id. at 648. If the words of a statute plainly mean one thing, they cannot be given another meaning by judicial construction. See, Bandy v. Duncan, 665 S.W.2d 387, 391 (Tenn. App. 1983). See also, Brooks v. Fisher, 705 S.W.2d 135, 137 (Tenn. App. 1985).

It is also axiomatic regarding statutory construction that the courts should arrive at the legislative intent by only looking to the four **[*4]** corners of the statute, as a **general** rule. See Pless v. Franks, 202 Tenn. 630, 308 S.W.2d 402 (1957). Only if the language of a statute is ambiguous and the legislative intent is unclear is it permissible for the courts to look behind the statute to the legislative history for guidance in interpreting the statute. See Chapman v. Sullivan County, 608 S.W.2d 580 (Tenn. 1980).

In applying these rules of statutory construction to T.C.A. § 35-3-121, the proper construction becomes evident. The statute states plainly that a bank or trust company serving in a fiduciary capacity is allowed to invest in any security authorized by law "even if" such fiduciary has participated in underwriting the security. The use of the term "even if" in its normal, everyday meaning indicates that the condition to follow is one of a number of alternatives that is not absolutely necessary as a condition precedent.

As defined in the Random House College Dictionary (Random House, Revised Edition, 1975) the word "even" is given the following definition: "([U]sed to suggest that something mentioned as a possibility constitutes an extreme case or an unlikely instance) . . . Even **[*5]** if he attends, he may not participate."

Thus, the natural and unstrained reading of this statute leads one to the conclusion that "even if," in the unlikely event, that a bank has participated in the underwriting

of a particular security, the subsequent conditions must still be met. Therefore, it is not a condition precedent for the bank to have participated in underwriting the security in order for the subsequent conditions to apply.

As the statute plainly reads, the subsequent conditions include subparagraph (1) which prohibits the fiduciary (i.e., a bank or its trust department) from purchasing any securities from itself or any of its affiliates.

This interpretation becomes more readily apparent if one attempts to read the statute in such a way that a bank or its trust department could be allowed to purchase securities from the bank itself when it has not participated in underwriting the particular security. The only way to arrive at this result would be to reword the statute to state that a bank or trust company operating in a fiduciary capacity could purchase securities from itself "only if" the fiduciary or its affiliate did not participate in the underwriting **[*6]** of such security. The statute would further have to be amended to state that if the fiduciary did participate in the underwriting of the security "then and only then" would the provisions in subparagraphs (1) and (2) apply. The statute, however, is not written in this fashion and it would take a strained and unnatural construction to interpret it in this manner.

No Tennessee cases have been found that specifically interpret the term "even if." Other courts, however, in other jurisdictions have had little problem in interpreting the term "even if" as denoting an unnecessary condition precedent. See Piatkowski v. Mok, 29 Mich.App. 426, 185 N.W.2d 413 (1971). See also, Troutman v. Modlin, 353 F.2d 382 (8th Cir. 1965).

It is therefore the opinion of this Office that the meaning of this statute is apparent by looking at the four corners of the statute and that the statute prohibits a bank from purchasing securities from itself under all circumstances, whether or not the bank has been involved in underwriting the security in question.

Requested by: Representative Barton A. Hawkins, State **[*7]** Representative, 205 War Memorial Building, Nashville, TN 37219