

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

June 13, 2017

Opinion No. 17-33

Impact of FOCUS Act on Tennessee Board of Regents' 403(b) Plan

Question

Are employees of state universities in Tennessee's state university and community college system still eligible to participate in the board of regents' 403(b) plan following the passage of the Focus on College and University Success ("FOCUS") Act?

Opinion

Yes.

ANALYSIS

Tennessee's state university and community college system contains six state universities¹ and forty community colleges and state colleges of applied technology. *See* Tenn. Code Ann. § 49-8-101(a); <https://www.tbr.edu/institutions/our-institutions>. Prior to the recent passage of the FOCUS Act,² the General Assembly provided, for many years, that the "government, management and control" of the system was "vested in the board of regents." *See* Tenn. Code Ann. § 49-8-101(b) (2013); Tenn. Code Ann. § 49-8-101(b) (1983). The General Assembly further vested in the board of regents the power to assume general responsibility for the operation of the institutions in the system, as well as the power to select and employ a chief executive officer for each institution and to confirm the appointment of administrative personnel, teachers, and other employees of each state institution and to fix their salaries and terms of office. *See* Tenn. Code Ann. §§ 49-8-203(a)(1)(A), (E) (2013); Tenn. Code Ann. §§ 49-8-203(a)(1)(A), (E) (1983).

With the passage of the FOCUS Act in 2016, the General Assembly restructured the board of regents. First,

[t]here is established a state university and community college system to be called the board of regents. The state university and community college system is

¹ The six state universities in the system are Austin Peay State University, East Tennessee State University, Middle Tennessee State University, Tennessee State University, Tennessee Technological University, and the University of Memphis. Tenn. Code Ann. § 49-8-101(a)(2)(A).

² 2016 Tenn. Pub. Acts ch. 869 (amending Tenn. Code Ann. § 12-3-102 [Public Purchases]; Title 49, Chapter 7 [Postsecondary and Higher Education Generally]; Title 49, Chapter 8 [State University and Community College System]; and Title 49, Chapter 9 [University of Tennessee], relative to the structure and organization of state higher education).

composed of state universities, community colleges, and state colleges of applied technology.

See 2016 Tenn. Pub. Act ch. 869, § 1(a)(1) (codified at Tenn. Code Ann. § 49-8-101(a)(1)). The “board of regents state universities” shall be composed of the same six universities that have been traditional members of the system. *See id.*, § 1(a)(2)(A) (codified at Tenn. Code Ann. § 49-8-101(a)(2)(A)).

The FOCUS Act then diverts from prior law by enlarging the governing structure of the state university and community college system. Instead of one governing board, the Act provides for seven governing boards – the board of regents plus a board of trustees for each of the six state universities in the system. *See* 2016 Tenn. Pub. Acts ch. 869, § 1 (codified at Tenn. Code Ann. § 49-8-101(a)). Under the new structure, the governance and management of the community colleges and colleges of applied technology remain vested in the board of regents, and the governance and management of the system’s state universities are now vested in each university’s respective board. *Id.* Thus, the Act transfers to each university’s governing board the power previously held by the board of regents to operate the state universities and to select and employ a chief executive officer for each of the universities, as well as its power to confirm the appointment of administrative personnel, teachers, and other employees of each state university and to fix their salaries and terms of office. *See* 2016 Tenn. Pub. Acts ch. 869, §§ 21(a)(1)(A), (E) (codified at Tenn. Code Ann. §§ 49-8-203(a)(1)(A), (E)).

For the reasons explained below, the restructuring of the system under the FOCUS Act does not preclude employees of state universities in Tennessee’s state university and community college system from participating in the board of regents’ 403(b) plan,³ assuming that they otherwise meet applicable eligibility requirements.⁴

The Government Employees Deferred Compensation Plan Act, codified at Tenn. Code Ann. §§ 8-25-101 to -114, authorizes State and local government employees to participate in deferred compensation plans, and specifically addresses 403(b) plans. The General Assembly has provided that “[t]he chancellor of the board of regents shall serve as trustee for *any* § 403(b) plan maintained on behalf of employees of *institutions thereunder*[,]” Tenn. Code Ann. § 8-25-103(e) (emphasis added). Commensurate with this delegation, the General Assembly has provided that “[t]he responsibility of approving any company providing investment or administrative services under any such § 403(b) plan shall rest with the chancellor of the board of regents for any § 403(b) plan maintained on behalf of employees of *institutions thereunder*”; “§ 403(b) plans shall be operated under the terms and conditions set out in contracts entered into by the chancellor of the

³ Section 403(b) of the Internal Revenue Code provides for a special type of tax-favored retirement arrangement that is available to only three types of employers: (1) organizations that are tax-exempt under section 501(c)(3) of the Internal Revenue Code; (2) public educational institutions; and (3) ministers of religion. *See* 26 U.S.C. § 403(b)(1). These arrangements are commonly referred to as “403(b) plans.”

⁴ For purposes of this opinion, we assume you are inquiring with respect to employees who meet the federal eligibility requirements. For example, an individual occupying an elective or appointed office at a public educational institution is not eligible to participate in a 403(b) plan unless that individual has received training, or is experienced, in the field of education. *See* 26 C.F.R. § 1.403(b)-2(b)(10).

board of regents for any § 403(b) plan maintained on behalf of employees of *institutions thereunder*”; and “[t]he chancellor of the board of regents for any § 403(b) plan maintained on behalf of employees of *institutions thereunder* . . . shall be responsible for investing the monies held pursuant to any such plan in investment options that meet the applicable requirements of the Internal Revenue Code.” *Id.*; Tenn. Code Ann. § 8-25-104(a)(4)(B); Tenn. Code Ann. § 8-25-105(c) (emphasis added).

The General Assembly’s provision for the chancellor of the board of regents to serve as trustee of “any 403(b) plan maintained on behalf of employees of institutions thereunder,” as well as the other provisions regarding the chancellor’s duties and responsibilities for these plans, was enacted *before* the FOCUS Act. And, as discussed above, the law before the FOCUS Act clearly vested in the board of regents the government, management, and control of all institutions in the system – community colleges, state colleges of applied technology *and* the six state universities. Therefore, the phrase “institutions thereunder” that appears in all of these provisions refers to all institutions in the system. *See Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 4 (Tenn. 1986) (the legislature is presumed to know the state of the law on the subject under consideration at the time it enacts legislation); *Lee v. Franklin Special Sch. Dist. Bd. Of Educ.*, 237 S.W.3d 322, 332 (Tenn. Ct. App. 2007) (courts assume that the General Assembly selected its words deliberately).

When the General Assembly enacted the FOCUS Act, it was similarly aware of the Government Employees Deferred Compensation Plan Act. *See Neff*, 704 S.W.2d at 4. While the FOCUS Act expressly amended several provisions of the Tennessee Code,⁵ it did not amend the Government Employees Deferred Compensation Plan Act. Accordingly, the question is whether an “implied amendment” occurred: Did the FOCUS Act’s transfer of governance and management powers to state university boards effectively usurp the power and duty of the chancellor of the board of regents under the Government Employees Deferred Compensation Plan Act to administer and serve as trustee of 403(b) plans for employees of the system’s state universities.

[A]n “implied amendment” has been defined as an act which purports to be independent of, but which in substance, alters, modifies, or adds to a prior act, or an act which creates an addition, omission, modification, or substitution and changes the scope or effect of an existing statute. An amendment by implication occurs when the legislation does not in express terms undertake to amend a statute’s specific terms, but the amendment still had an effect of amending the latter.

82 C.J.S. Statutes § 291 (2017).

Amendments of statutes by implication are not favored, and will not be upheld in doubtful cases. *Hayes v. Gibson Cnty.*, 288 S.W.3d 334, 337 (Tenn. 2009); *Jenkins v. Loudon Cnty.*, 736 S.W.2d 603, 607 (Tenn. 1987); *State, Dep’t of Revenue v. Moore*, 722 S.W.2d 367, 374 (Tenn. 1986). An amendment by implication can occur only when the terms of a later statute are so repugnant to an earlier statute that they cannot stand together. *See Hayes*, 288 S.W.3d at 337; *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995). If the two enactments are capable of being construed so that they both may stand, the court should so construe them. *Kentucky-Tennessee Clay Co. v. Huddleston*, 922 S.W.2d 539, 542 (Tenn. Ct. App. 1995). Courts have a duty to attempt

⁵ *See* note 2, *supra*.

to arrive at a reasonable interpretation that will effectuate the intent of the General Assembly, as well as provide for harmonious operation of the laws. *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013); *Cronin*, 906 S.W.2d at 912.

In this instance, a reasonable construction exists that allows the Deferred Compensation Act and the FOCUS Act to stand together. The FOCUS Act revises the governance structure of the institutions in Tennessee's state university and community college system, and it addresses the operation of these institutions going forward. While the FOCUS Act now gives university boards the power to govern and manage their respective state universities in the system, as well as the power to confirm the appointment of administrative personnel, teachers and other employees and to fix their salaries and terms of office, the FOCUS Act does not address retirement and deferred compensation plans for employees of state universities in the system.

In fact, the very section of the FOCUS Act that grants powers and duties to university boards, including the power to set salaries and terms of office, contains the following caveat:

Notwithstanding any provision of this act or any other provision of law to the contrary, the state university boards and their respective institutions shall continue to be participating employers in the Tennessee consolidated retirement system and utilize such claims administration services, risk management programs, investment funds and trusts, and retirement and deferred compensation programs, or any successor programs and services in the same fields, as are provided or administered by the department of treasury to any of the state universities on the effective date of the act until the effective date of any subsequent legislation authorizing procurement from another provider.

See 2016 Tenn. Pub. Acts ch. 869, § 21(j) (codified at Tenn. Code Ann. § 49-8-203(j)). While this section does not specifically mention plans administered by the board of regents, this provision illustrates that the General Assembly did not intend for the FOCUS Act to change the law with respect to deferred compensation matters. *See* 82 C.J.S. Statutes § 291 (2017) (“Generally speaking, the intent of the legislature to amend a statutory provision by implication must be clear and manifest[.]”). *See, e.g., Sharp v. Richardson*, 937 S.W.2d 846, 850 (Tenn. 1996) (finding no repeal by implication when legislature did not state that intention).

Furthermore, the FOCUS Act's own terms indicate that the system's state universities remain under the auspices of the board of regents for some purposes. The Act states that “[t]here is established a state university *and* community college system *to be called the board of regents.*” *See* 2016 Tenn. Pub. Acts ch. 869, § 1(a)(1) (codified at Tenn. Code Ann. § 49-8-101(a)(1)) (emphasis added). And the Act still refers to the state universities as “board of regents state universities.” *See id.* § 1(a)(2)(A) (codified at Tenn. Code Ann. § 49-8-101(a)(2)(A)).

Accordingly, the FOCUS Act does not amend or alter the Government Employees Deferred Compensation Plan Act with respect to the eligibility of employees of state universities in Tennessee's state university and community college system to participate in the board of regents' 403(b) plan. A reasonable construction of the FOCUS Act permits the system's state universities to be “institutions []under” the board of regents for the purposes of the Government Employees

Deferred Compensation Plan Act. *See* Tenn. Code Ann. § 8-25-103(e); Tenn. Code Ann. § 8-25-104(a)(4)(B); Tenn. Code Ann. § 8-25-105(c). There is no indication that the General Assembly intended for the FOCUS Act to disturb the power and duty of the chancellor of the board of regents to administer and serve as trustee of 403(b) plans for employees of the system's state universities.

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