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solely clerical or ministerial and any person who is required under the laws of any State to register as a broker or dealer in that State solely because such person is an issuer of securities or associated person of an issuer of securities shall not be included in the meaning of such term for purposes of this section.

[50 FR 27946, July 9, 1985]

§ 240.3a4-2 Exemption from the definition of “broker” for bank calculating compensation for effecting transactions in fiduciary accounts.

(a) A bank that meets the conditions for exception from the definition of the term “broker” under Section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)), except for the “chiefly compensated” condition in Section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I)), is exempt from the definition of the term “broker” under Section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely for effecting transactions in securities pursuant to Section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)) if:

(1) The bank can demonstrate that sales compensation, as defined in §240.3b-17(j), received during the immediately preceding year is less than 10% of the total amount of relationship compensation, as defined in §240.3b-17(i), received during that year;

(2) The bank maintains procedures reasonably designed to ensure compliance with the “chiefly compensated” condition in Section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I)) with respect to a trust or fiduciary account:

(i) When the account is opened;

(ii) When the compensation arrangement for the account is changed; and

(iii) When sales compensation, as defined in §240.3b-17, received from the account is reviewed by the bank for purposes of determining an employee’s compensation; and

(3) The bank complies with Section 3(a)(4)(C) of the Act (15 U.S.C. 78c(a)(4)(C)).

(b) For purposes of this section, the term *year* means either a calendar year or other fiscal year consistently used

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by the bank for recordkeeping and reporting purposes.

[66 FR 27796, May 18, 2001]

§ 240.3a4-3 Exemption from the definition of “broker” for bank effecting transactions as an indenture trustee in a no-load money market fund.

A bank that meets the conditions for exception from the definition of the term “broker” under Section 3(a)(4)(B)(ii) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)), except for the “chiefly compensated” condition in Section 3(a)(4)(B)(ii)(I) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(I)), is exempt from the definition of the term “broker” under Section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely for effecting transactions as an indenture trustee in a no-load money market fund, as defined in §240.3b-17(f) and §240.3b-17(e), respectively.

[66 FR 27796, May 18, 2001]

§ 240.3a4-4 Exemption from the definition of “broker” for small bank effecting transactions in investment company securities in a tax-deferred custody account.

(a) A small bank is exempt from the definition of the term “broker” under Section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)) solely for effecting transactions in securities of an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) in a tax-deferred account for which the bank acts as custodian under Section 3(a)(4)(B)(viii) of the Act (15 U.S.C. 78c(a)(4)(B)(viii)) if:

(1) The bank is not associated with a broker or dealer and does not have an arrangement with a broker or dealer to effect transactions in securities for the bank’s customers;

(2) Any bank employee effecting such transactions:

(i) Is not an associated person of a broker or dealer;

(ii) Primarily performs duties for the bank other than effecting transactions in securities for customers; and

(iii) Does not receive compensation for such transactions from the bank, the executing broker or dealer, or any other person related to:

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(A) The size, value, or completion of any securities transaction;

(B) The amount of securities-related assets gathered; or

(C) The size or value of any customer's securities account;

(3) The bank complies with Section 3(a)(4)(C) of the Act (15 U.S.C. 78c(a)(4)(C));

(4) The bank makes available to the tax-deferred account the securities of investment companies that are not affiliated persons, as defined in Section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3)), of the bank and that have similar characteristics to the securities of investment companies made available that are affiliated persons;

(5) The bank does not solicit securities transactions except through the following activities:

(i) Delivering advertising and sales literature for the security that is prepared by the registered broker-dealer that is the principal underwriter of an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), or prepared by an open-end management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) that is not an affiliated person, as defined in Section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(3)), of the bank;

(ii) Responding to inquiries of a potential purchaser in a communication initiated by the potential purchaser; provided, however, that the content of such responses is limited to information contained in a registration statement for the security of an investment company filed under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) or sales literature prepared by the investment company security's principal underwriter that is a registered broker-dealer;

(iii) Advertising of trust activities, if any, permitted under Section 3(a)(4)(B)(ii)(II) of the Act (15 U.S.C. 78c(a)(4)(B)(ii)(II)); or

(iv) Notifying its existing customers that it accepts orders for investment company securities in conjunction with solicitations related to its other activi-

ties concerning tax-deferred accounts; and

(6) The bank's annual compensation related to effecting transactions in securities pursuant to this exemption is less than 3% of its annual revenue.

(b) *Definitions.* For purposes of this section:

(1) The phrase *compensation related to effecting transactions in securities pursuant to this exemption* means the total annual compensation received for effecting transactions in securities pursuant to this exemption, including fees received from investment companies for distribution.

(2) The term *networking arrangement* means a contractual or other written arrangement with a broker or dealer to effect transactions in securities for the bank's customers.

(3) The term *principal underwriter* has the meaning given in Section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

(4) The term *revenue* means the total annual net interest income and non-interest income from the bank's most recent Consolidated Reports of Condition and Income (Call Reports) or any successor forms the bank is required to file by its appropriate Federal banking agency (as defined in Section 3 of the FDIA (12 U.S.C. 1813)).

(5) (i) The term *small bank* means a bank that:

(A) Had less than \$100 million in assets as of December 31 of both of the prior two calendar years; and

(B) Is not, and since December 31 of the third prior calendar year has not been, an affiliate of a bank holding company or a financial holding company that as of December 31 of both of the prior two calendar years had consolidated assets of more than \$1 billion.

(ii) For purposes of this paragraph (b)(5) the terms *affiliate*, *bank holding company*, and *financial holding company* have the same meanings as given in the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*).

(6) The term *tax-deferred account* means those accounts described in Sections 401(a), 403, 408, and 408A under Subchapter D and in Section 457 under Subchapter E of the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*).

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