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the Board that Rule 321.15 would apply to the remaining partners. Moreover, other paragraphs of the rule forbid transfers of the stock, except under certain circumstances to limited classes of persons, such as employees of the organization or estates of decedent partners, without permission of the Exchange.

(h) The information supplied to the Board clearly indicated that Corporation was formed in order to provide Partnership with an "underwriting arm". Under Rule 321 of the Exchange, the partners (other than X) are required to own stock in Corporation because of their partnership interest, would be required to surrender that stock on leaving the partnership, and incoming partners would be required to acquire such stock. Furthermore, Rule 321 speaks of a corporate affiliate, such as Corporation, as a part of the "entire business" of a member organization.

(i) On the basis of the foregoing, the Board concluded that Partnership and Corporation must be regarded as a single entity or enterprise for purposes of section 32.

(j) The remaining question was whether the enterprise, as a whole, should be regarded as "primarily engaged" in section 32 business. The Information presented stated that the total dollar volume of section 32 business of Corporation during the first eleven months of its operation was \$89 million. The gross income from section 32 business was less than half a million, and represented about 7.9 percent of the income of Partnership. The Board was advised that the relatively low amount of income from section 32 business of Corporation as due to special costs, and to the condition of the market for municipal and State bonds during the past year, a field in which Corporation specializes. Corporation is listed in a standard directory of securities dealers, and holds itself out as having separate departments to deal with the principal underwriting areas in which it functions.

(k) In view of the above information, the Board concluded that the enterprise consisting of Partnership and Corporation was "primarily engaged" in section 32 business. Accordingly, the Board stated that the partners in Part-

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nership, including X, were forbidden by that section and by this part 218 (Reg. R), issued pursuant to the statute, to serve as officers, directors, or employees of any member banks.

[29 FR 5315, Apr. 18, 1964. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.408 Short-term negotiable notes of banks not securities under section 32, Banking Act of 1933.

(a) The Board of Governors has been asked whether short-term unsecured negotiable notes of the kinds issued by some of the large banks in this country as a means of obtaining funds are "other similar securities" within the meaning of section 32, Banking Act of 1933 (12 U.S.C. 78) and this part.

(b) Section 32 forbids certain interlocking relationships between banks which are members of the Federal Reserve System and individuals or organizations "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities * * *." Therefore, if such notes are securities similar to stocks or bonds, any dealing therein would be an activity covered in section 32 and would have to be taken into consideration in determining whether the individual or organization involved was "primarily engaged" in such activities.

(c) The Board has concluded that such short-term notes of the kind described above are not "other similar securities" within the meaning of section 32 and this part.

[29 FR 16065, Dec. 2, 1964. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.409 Investment for own account affects applicability of section 32.

(a) The Board of Governors has been presented with the question whether a certain firm is primarily engaged in the activities described in section 32 of the Banking Act of 1933. If the firm is so engaged, then the prohibitions of section 32 forbids a limited partner to serve as employee of a member bank.

(b) The firm describes the bulk of its business, producing roughly 60 percent of its income, as "investing for its own account." However, it has a seat on the

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local stock exchange, and acts as specialist and odd-lot dealer on the floor of the exchange, an activity responsible for some 30 percent of its volume and profits. The firm's "off-post trading," apart from the investment account, gives rise to about 5 percent of its total volume and 10 percent of its profits. Gross volume has risen from \$4 to \$10 million over the past 3 years, but underwriting has accounted for no more than one-half of 1 percent of that amount.

(c) Section 32 provides that

No officer, director, or employee of any corporation or unincorporated association, no partner, or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale, or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time (sic) as an officer, director, or employee of any member bank * * *

(d) In interpreting this language, the Board has consistently held that underwriting, acting as a dealer, or generally speaking, selling, or distributing securities as a principal, is covered by the section, while acting as broker or agent is not.

(e) In one type of situation, however, although a firm was engaged in selling securities as principal, on its own behalf, the Board held that section 32 did not apply. In these cases, the firm alleged that it bought and sold securities purely for investment purposes. Typically, those cases involved personal holding companies or small family investment companies. Securities had been purchased only for members of a restricted family group, and had been held for relatively long periods of time.

(f) The question now before the Board is whether a similar exception can apply in the case of the investment account of a professional dealer. In order to answer this question, it is necessary to analyze, in the light of applicable principles under the statute, the three main types of activity in which the firm has been engaged, (1) acting as specialist and odd-lot dealer, (2) off-post trading as an ordinary dealer, and (3) investing for its own account.

(g) On several occasions, the Board has held that, to the extent the trading of a specialist or odd-lot dealer is lim-

ited to that required for him to perform his function on the floor of the exchange, he is acting essentially in an agency capacity. In a letter of September 13, 1934, the Board held that the business of a specialist was not of the kind described in the (unamended) section on the understanding that

* * * in acting as specialists on the New York Curb Exchange, it is necessary for the firm to buy and sell odd lots and * * * in order to protect its position after such transactions have been made, the firm sells or buys shares in lots of 100 or multiples thereof in order to reduce its position in the stock in question to the smallest amount possible by this method. It appears therefore that, in connection with these transactions, the firm is neither trading in the stock in question or taking a position in it except to the extent made necessary by the fact that it deals in odd lots and cannot complete the transactions by purchases and sales on the floor of the exchange except to the nearest 100 share amount.

(h) While subsequent amendments to section 32 to some extent changed the definition of the kinds of securities business that would be covered by the section, the amendments were designed so far as is relevant to the present question, to embody existing interpretations of the Board. Accordingly, to the extent that the firm's business is described by the above letter of the Board, it should not be considered to be of a kind described in section 32.

(i) Turning to the firm's off-post trading, the Board is inclined to agree with the view that this is sufficient to make the case a borderline one under the statute. In the circumstances, the Board might prefer to postpone making a determination until figures for 1965 could be reviewed, particularly in the light of the recent increase in total volume, if it were not for the third category, the firm's own investment account.

(j) While this question has not been squarely presented to it in the past, the Board is of the opinion that when a firm is doing any significant amount of business as a dealer or underwriter, then investments for the firm's own account should be taken into consideration in determining whether the firm

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is “primarily engaged” in the activities described in section 32. The division into dealing for one’s own account, and dealing with customers, is a highly subjective one, and although a particular firm or individual may be quite scrupulous in separating the two, the opportunity necessarily exists for the kind of abuse at which the statute is directed. The Act is designed to prevent situations from arising in which a bank director, officer, or employee could influence the bank or its customers to invest in securities in which his firm has an interest, regardless of whether he, as an individual, is likely to do so. In the present case, when these activities are added to the firm’s “off-post trading”, the firm clearly falls within the statutory definition.

(k) For the reasons just discussed, the Board concludes that the firm must be considered to be primarily engaged in activities described in section 32, and that the prohibitions of the section forbid a limited partner in that firm to serve as employee of a member bank.

(12 U.S.C. 248(i))

[30 FR 7743, June 16, 1965. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.410 Interlocking relationships between bank and its commingled investment account.

(a) The Board of Governors was asked recently whether the establishment of a proposed “Commingled Investment Account” (“Account”) by a national bank would involve a violation of section 32 of the Banking Act of 1933 in view of the interlocking relationships that would exist between the bank and Account.

(b) From the information submitted, it was understood that Account would comprise a commingled fund, to be operated under the effective control of the bank, for the collective investment of sums of money that might otherwise be handled individually by the bank as managing agent. It was understood further that the Comptroller of the Currency had taken the position that Account would be an eligible operation for a national bank under his Regulation 9, “Fiduciary Powers of National Banks and Collective Investment Funds” (part 9 of this title). The bank had advised the Board that the Securi-

ties and Exchange Commission was of the view that Account would be a “registered investment company” within the meaning of the Investment Company Act of 1940, and that participating interests in Account would be “securities” subject to the registration requirements of the Securities Act of 1933.

(c) The information submitted showed also that the minimum individual participation that would be permitted in Account would be \$10,000, while the maximum acceptable individual investment would be half a million dollars; that there would be no “load” or payment by customers for the privilege of investing in Account; and that:

The availability of the Commingled Account would not be given publicity by the Bank except in connection with the promotion of its fiduciary services in general and the Bank would not advertise or publicize the Commingled Account as such. Participations in the Commingled Account are to be made available only on the premises of the Bank (including its branches), or to persons who are already customers of the Bank in other connections, or in response to unsolicited requests.

(d) Such information indicated further that participations would be received by the bank as agent, under a broad authorization signed by the customer, substantially equivalent to the power of attorney under which customers currently deposit their funds for individual investment, and that the participations would not be received “in trust.”

(e) The Board understood that Account would be required to comply with certain requirements of the Federal securities laws not applicable to an ordinary common trust fund operated by a bank. In particular, supervision of Account would be in the hands of a committee to be initially appointed by the bank, but subsequently elected by participants having a majority of the units of participation in Account. At least one member of the committee would be entirely independent of the bank, but the remaining members would be officers in the trust department of the bank.

(f) The committee would make a management agreement with the bank