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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 limited 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 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 Securities 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 under which the bank would be responsible for managing Account's investments, have custody of its assets, and maintain its books and records. The management agreement would be renewed annually if approved by the committee, including a ''majority'' of the independent members, or by a vote of participants having a majority of the units of participation. The agreement would be terminable on 60 days' notice by the committee, by such a majority of the participants, or by the bank, and would terminate automatically if assigned by the bank.

(g) It was understood also that the bank would receive as annual compensation for its services one-half of one percent of Account's average net assets. Account would also pay for its own independent professional services, including legal, auditing, and accounting services, as well as the cost of maintaining its registration and qualification under the Federal securities laws.

(h) Initially, the assets of Account would be divided into units of participation of an arbitrary value, and each customer would be credited with a number of units proportionate to his investment. Subsequently, the assets of Account would be valued at regular intervals, and divided by the number of units outstanding. New investors would receive units at their current value, determined in this way, according to the amount invested. Each customer would receive a receipt evidencing the number of units to which he was entitled. The receipts themselves would be nontransferable, but it would be possible for a customer to arrange with Account for the transfer of his units to someone else. A customer could terminate his participation at any time and withdraw the current value of his units.

(i) Section 32 of the Banking Act of 1933 provides in relevant part 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 [at] the same time as an officer, director, or employee of any member bank * * *.

(j) The Board concluded, based on its understanding of the proposal and on the general principles that have been developed in respect to the application of section 32, that the bank and Account would constitute a single entity for the purposes of section 32, at least so long as the operation of Account conformed to the representations made by the bank and outlined herein. Accordingly, the Board said that section 32 would not forbid officers of the bank to serve on Account's committee, since Account would be regarded as nothing more than an arm or department of the bank.

(k) In conclusion, the Board called attention to section 21 of the Banking Act of 1933 which, briefly, forbids a securities firm or organization to engage in the business of receiving deposits, subject to certain exceptions. However, since section 21 is a criminal statute, the Board has followed the policy of not expressing views as to its meaning. (1934 Federal Reserve Bulletin 41, 543.) The Board, therefore, expressed no position with respect to whether the section might be held applicable to the establishment and operation of the proposed ''Commingled Investment Account.''

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

[30 FR 12836, Oct. 8, 1965. Redesignated at 61 FR 57289, Nov. 6, 1996]

§ 250.411 Interlocking relationships between member bank and variable annuity insurance company.

(a) The Board has recently been asked to consider whether section 32 of the Banking Act of 1933 (12 U.S.C. 78) and this part prohibit interlocking service between member banks and (1) the board of managers of an accumulation fund, registered under the Investment Company Act of 1940 (15 U.S.C. 80), that sells variable annuities and (2) the board of directors of the insurance company, of which the accumulation fund is a ''separate account,'' but as to which the insurance company is the sponsor, investment advisor, underwriter, and distributor. Briefly, a variable annuity is one providing for annuity payment varying in accordance with the changing values of a portfolio of securities.

(b) Section 32 provides in relevant part 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 [at] the same time as an officer, director, or employee of any member bank * * *.

(c) For many years, the Board's position has been that an open-end investment company (or mutual fund) is ''primarily engaged in the issue * * * public sale, or distribution * * * of securities'' since the issuance and sale of its stock is essential to the maintenance of the company's size and to the continuance of its operations without substantial contraction, and that section 32 of the Banking Act of 1933 prohibits an officer, director, or employee of any such company from serving at the same time as an officer, director, or employee of any member bank. (1951 Federal Reserve Bulletin 645; § 218.101.)

(d) For reasons similar to those stated by the U.S. Supreme Court in Securities and Exchange Commission *v.* Variable Annuity Life Insurance Company of America, 359 U.S. 65 (1959), the Board concluded that there is no meaningful basis for distinguishing a variable annuity interest from a mutual fund share for section 32 purposes and that, therefore, variable annuity interests should also be regarded as ''other similar securities'' within the prohibition of the statute and regulation.

(e) The Board concluded also that, since the accumulation fund, like a mutual fund, must continually issue and sell its investment units in order to avoid the inevitable contraction of its activities as it makes annuity payments or redeems variable annuity units, the accumulation fund is ''primarily engaged'' for section 32 purposes. The Board further concluded that the insurance company was likewise ''primarily engaged'' for the purposes of the statute since it had no significant revenue producing operations