

## § 250.401

Accordingly, it is the opinion of the Board that if such a company is issuing or offering its redeemable stock for sale, it is "primarily engaged in the issue \* \* \* public sale, or distribution, \* \* \* of securities" and that section 32 of the Banking Act of 1933, as amended, 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. It is the Board's view that this is true even though the shares are sold to the public through independent organizations with the result that the investment company does not derive any direct profit from the sales.

If, however, the company has ceased to issue or offer any of its stock for sale, the company would not be engaged in the issue or distribution of its stock, and, therefore, the prohibition contained in section 32 would be inapplicable unless the company were primarily engaged in the underwriting, public sale or distribution of securities other than its own stock.

[16 FR 4963, May 26, 1951. Redesignated at 61 FR 57289, Nov. 6, 1996]

### **§ 250.401 Director serving member bank and closed-end investment company being organized.**

(a) The Board has previously expressed the opinion (§218.101) that section 32 of the Banking Act of 1933 (12 U.S.C. 78) is applicable to a director of a member bank serving as a director of an open-end investment company, because the more or less continued process of redemption of the stock issued by such company makes the issuance and sale of its stock essential to the maintenance of the company's size and to the continuance of operations, with the result that the issuance and sale of its stock constitutes one of the primary activities of such a company. The Board also stated that if the company had ceased to issue or offer any of its stock for sale, the company would not be engaged in the issuance or distribution of its stock and therefore the prohibitions of section 32 would not be applicable. Subsequently, the Board expressed the opinion that section 32 would not be applicable in the case of a closed-end investment company.

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(b) The Board has recently stated that it believed that a closed-end company which was in process of organization and was actively engaged in issuing and selling its shares was in the same position relative to section 32 as an open-end company, and that the section would be applicable while this activity continued.

[25 FR 3464, Apr. 21, 1960. Redesignated at 61 FR 57289, Nov. 6, 1996]

### **§ 250.402 Service as officer, director, or employee of licensee corporation under the Small Business Investment Act of 1958.**

(a) The Board of Governors has been requested to express an opinion whether §218.1 would prohibit an officer, director, or employee of a member bank from serving at the same time as an officer, director, or employee of a Licensee corporation under the Small Business Investment Act of 1958 (15 U.S.C. 661 *et seq.*). It is understood that a Licensee would be authorized to engage only in the activities set forth in the statute, namely, to provide capital and long-term loan funds to small business concerns.

(b) In the opinion of the Board, a corporation engaged exclusively in the enumerated activities would not be "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." Accordingly, the prohibition of §218.1 would not apply to serving as an officer, director, or employee of either a small business investment company organized under the Small Business Investment Act of 1958, or an investment company chartered under the laws of a State solely for the purpose of operating under the Small Business Investment Act of 1958.

[25 FR 4427, May 19, 1960. Redesignated at 61 FR 57289, Nov. 6, 1996]

### **§ 250.403 Service of member bank and real estate investment company.**

(a) The Board recently considered two inquiries regarding the question whether proposed real estate investment companies would be subject to the provisions of sections 20 and 32 of the Banking Act of 1933 (12 U.S.C. 377

and 78). These sections relate to affiliations between member banks and companies engaged principally in the issue, flotation, underwriting, public sale or distribution of stocks, bonds, or similar securities, and interlocking directorates between member banks and companies primarily so engaged. In both instances the companies, after their organization, would engage only in the business of financing real estate development or investing in real estate interests, and not in the type of business described in the statute. However, each of the companies, in the process of its organization, would issue its own stock. In one instance, it appeared that the stock would be issued over a period of from 30 to 60 days; in the other instance it was stated that the stock would be sold by a firm of underwriters and that distribution was expected to be completed in not more than a few days.

(b) On the basis of the facts stated, the Board concluded that the companies involved would not be subject to sections 20 and 32 of the Banking Act of 1933, since they would not be principally or primarily engaged in the business of issuing or distributing securities but would only be issuing their own stock for a period ordinarily required for corporate organization. The Board stated, however, that if either of the companies should subsequently issue additional shares frequently and in substantial amounts relative to the size of the company's capital structure, it would be necessary for the Board to reconsider the matter.

(c) Apart from the legal question, the Board noted that an arrangement of the kind proposed could involve some dangers to an affiliated bank because the relationship might tend to impair the independent judgment that should be exercised by the bank in appraising its credits and might cause the company to be so identified in the minds of the public with the bank that any financial reverses suffered by the company might affect the confidence of the public in the bank.

(d) Because of the foregoing conclusion that the companies would not be subject to sections 20 and 32, it seems advisable to clarify §218.102, in which the Board took the position that a

closed-end investment company which was in process of organization and was actively engaged in issuing and selling its shares was subject to section 32 as long as this activity continued. That interpretation should be regarded as applicable only where the circumstances are such as to indicate that the issuance of the company's stock is a primary or principal activity of the company. For example, such circumstances might exist where the initial stock of a company is actively issued over a period of time longer than that ordinarily required for corporate organization, or where, subsequent to organization, the company issues its own stock frequently and in substantial amounts relative to the total amount of shares outstanding.

[26 FR 868, Jan. 28, 1961. Redesignated at 61 FR 57289, Nov. 6, 1996]

**§250.404 Serving as director of member bank and corporation selling own stock.**

(a) The Board recently considered the question whether section 32 of the Banking Act of 1933 (12 U.S.C. 78) would be applicable to the service of a director of a corporation which planned to acquire or organize, as proceeds from the sale of stock became available, subsidiaries to operate in a wide variety of fields, including manufacturing, foreign trade, leasing of heavy equipment, and real estate development. The corporation had a paid-in capital of about \$60,000 and planned to sell additional shares at a price totaling \$10 million, with the proviso that if less than \$3 million worth were sold by March 1962, the funds subscribed would be refunded. It thus appeared to be contemplated that the sale of stock would take at least a year, and there appeared to be no reason for believing that, if the venture proved successful, additional shares would not be offered so that the corporation could continue to expand.

(b) The Board concluded that section 32 would be applicable, stating that although §218.102, as clarified by §218.104, related to closed-end investment companies, the rationale of that interpretation is applicable to corporations generally.

[26 FR 2456, Mar. 23, 1961. Redesignated at 61 FR 57289, Nov. 6, 1996]