POWERS OF NATIONAL BANKS TO SELL INSURANCE, ANNUITIES AND SECURITIES FROM BANK PREMISES

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I. INTRODUCTION

Considering the fierce competition between the highly regulated banking industry and the insurance and securities industries, it is no wonder that an array of requirements, restrictions and limitations apply to the sale of securities, insurance and annuities by national banks. Banks have benefitted in recent years, however, from the emerging trend of eliminating and simplifying the rules regarding such sales. The banking industry is in the midst of a state of flux in its powers regarding insurance, annuities, and securities which may continue for some time and is already beginning to redefine the role banks play in the investment arena.

This Article addresses only national bank powers in the area of insurance, annuities and securities sales to national bank customers. However, it should not be overlooked that state banks have benefitted as well and in some ways have spurred the change in national banks’ powers. Many states have either eliminated or relaxed, or are now in the process of eliminating or relaxing, restrictions on state bank powers in the area of insurance, annuities, and securities sales. To an extent, powers of some state banks which were greater than national bank powers helped forge the path for expanding national banks’ powers; such expansion has, in turn, helped other states with greater restrictions on state bank powers begin reevaluating those restrictions.

Recent battles for expanded national bank powers regarding insurance, annuities and securities sales have not been won in Congress, but rather in the innovative steps of the Office of the Comptroller of the Currency (“OCC”) and in the federal judiciary system. Although congressional reaction has been to introduce legislation that would limit national bank powers, such legislation has been met with great opposition as well as additional legislation both expanding national bank powers and attempting to compromise between

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the interests of the banking industry and the insurance and securities industries.

II. POWERS AND DEVELOPMENTS REGARDING SALES OF INSURANCE, ANNUITIES AND SECURITIES

A. INSURANCE POWERS AND DEVELOPMENTS

National banks do not have the general power to sell insurance. Rather, national banks may only sell insurance pursuant to specific provisions allowing such activity. While the power to sell insurance has been extremely limited in the past, the banking industry has expanded the traditional boundaries of provisions allowing insurance sales and, as a result, national banks have been bestowed in recent years with much broader powers in connection with insurance sales.

The sale of certain types of insurance is considered incidental to the business of banking. For example, national banks may sell credit life and disability insurance, title insurance, and debt cancellation contracts in conjunction with an extension of credit because such activity is considered incidental to the business of banking, specifically to the business of making loans.\(^1\) In connection with such reasoning, the OCC has also allowed a national bank to sell vehicle service contracts as incidental to the business of banking because the contracts protected the value of vehicles securing credit extended by the bank.\(^2\)

As the trend to expand national banks’ powers continues, more liberal views of the types of activities considered incidental to banking may allow national banks to sell additional types of insurance in a more general fashion. Additionally, the expansion of national banks powers to act as general insurance agents in recent years may make such interpretations unnecessary.

Section 92 of the National Bank Act ("section 92") allows national banks located and doing business in towns with populations not ex-

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ceeding 5,000 people ("place of 5,000") to act as insurance agents. A national bank's power to act as an insurance agent pursuant to section 92 has been limited and unclear in the past. Although an office or branch of a national bank located in a place of 5,000 has had the authority for over the past thirty years to act as an agent even if the bank's principal office was located in a community exceeding 5,000 people, it has only been in recent years that banks have had the clear authority to effectively use section 92 to expand insurance sales outside of small towns. Recent court decisions and OCC interpretations have helped expand and clarify national banks' powers under section 92, but they have also been a source of controversy between the banking and insurance industries.

In 1993, the United States Court of Appeals for the District of Columbia upheld an OCC decision that national banks with offices and branches in a place of 5,000 could sell insurance to customers located anywhere across the country. Recently, the banking industry has celebrated two Supreme Court victories affecting insurance sales. The most recent United States Supreme Court decision involving sec-


5. Independent Insurance Agents of America, Inc. v. Ludwig, 997 F.2d 958, 958 (D.C. Cir. 1993). See also National Ass'n of Life Underwriters v. Clarke, 736 F. Supp. 1162 (D.D.C. 1990) (holding that § 92 does not impose a geographical limit on insurance solicitation), rev'd sub nom. Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731 (D.C. Cir. 1992), rev'd sub nom. United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 508 U.S. 439 (1993). The controversy in Independent Insurance Agents v. Ludwig stemmed from a 1983 OCC letter by Debra A. Chong, Counsel for the OCC San Francisco Office, which was later endorsed by a 1986 OCC letter by Judith A. Walter, Senior Deputy Comptroller for National Operations. The 1986 letter stated "that Ms. Chong correctly determined that a national bank or its branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers located anywhere." Ludwig, 997 F.2d at 959. The district court in Clarke, a case preceding Ludwig, referenced two OCC letters from the 1970's, stating that the OCC "has never limited insurance sales to the community in which the selling office is located." Clarke, 736 F. Supp. at 1173 n.27. Interestingly, the court's statement does not appear to be completely accurate. The OCC letter dated Dec. 29, 1978, by David H. Baris, OCC Regional Counsel, did allow an employee of a national bank's branch located in a place of 5,000 to be located at the main bank in a place exceeding 5,000. Id. And, the OCC letter dated June 9, 1971, by Thomas G. DeSNAZO, OCC Regional Counsel, did allow a mortgage loan officer of the main bank in a place exceeding 5,000 to sell insurance for the bank's insurance agency located in a place of 5,000, stating that no greater geographic restrictions apply than on any other insurance agency. Id. However, the insurance sales in the 1971 OCC letter were made in connection with the national bank's mortgage loans and might have been more properly authorized pursuant to a national bank's authority to sell insurance in connection with making loans. More significant is a contradictory OCC letter, dated October 8, 1985, by Central District Office Counsel, explaining that selling insurance outside of a place of 5,000 would be inconsistent with § 92. OCC letter by James M. Kane, District Counsel (Oct. 8, 1985) (on file with the Creighton Law Review).
tion 92, *Barnett Bank of Marion County, N.A. v. Nelson*, upheld the authority of national banks to sell insurance from places of 5,000 in states that prohibit such activity by banks. The Court held that section 92 preempted a state law which prohibited or impaired national banks from exercising their federal powers. The Court held that the McCarran-Ferguson Act's anti-preemption rule, which prohibits a federal statute from pre-empting any state law enacted "for the purpose of regulating the business of insurance," did not protect state laws from preemption because section 92 "specifically relates to the business of insurance...."

In *NationsBank v. Variable Annuity Life Ins. Co.* ("VALIC"), the Supreme Court recognized the controlling weight given to the OCC's authority to define terms and fill gaps in statutes over which it has enforcement and held that the business of banking is not limited to the powers enumerated in section 24 (Seventh) and that the OCC has reasonable discretion to authorize activities beyond the enumerated powers.

By upholding OCC interpretations regarding section 92 and considering the Supreme Court's holdings in VALIC, the courts have essentially allowed the OCC to take small loopholes and expand national banks' powers. The OCC has taken advantage of such authority. In a letter approving several national banks' requests to sell insurance through subsidiaries to customers located anywhere outside of places of 5,000 where the banks have branches as well as from offices located outside places of 5,000, the OCC has set forth its interpretation of the scope of insurance activities allowed by national banks under section 92. Pursuant to the letter, national banks now have the ability to effectively sell insurance from any of its branches, while utilizing services, such as telemarketing, payment processing and marketing services, already established at or more easily maintained at offices located outside the place of 5,000, by establishing an office in a place of 5,000 which meets relatively minimal requirements.

The comprehensive OCC letter explained the OCC's ability to determine where banks can sell insurance:

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12. VALIC, 115 S. Ct. at 813-14.
Section 92 authorizes a bank that is 'located and doing business in' a place with a population of less than 5,000 to solicit and sell insurance as agent for state-authorized insurance companies. Section 92 does not define what 'located and doing business' means. By its terms, section 92 does not require the bank's insurance solicitation and sales activities to occur within the 'place of 5,000.' Specifically, there is no restriction as to either the identity of the customers or the methodology of sale. Any such restraints were expressly delegated by Congress to the OCC.14

The OCC explained that customers may be, and insurance-related activities may occur, outside of the place exceeding 5,000 as long as the bank or branch is located in the place of 5,000.15 After a lengthy discussion of section 92's legislative history and an overview of the flexible methods and strategies used by banks and insurance agencies when section 92 was enacted in 1916, the OCC explained that the

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14. Id. at 90,223 (citing NBD Bank v. Bennett, 67 F.3d 629, 632 (7th Cir. 1995)).
15. Id. at 90,236. The OCC further explained:

It is plain from the statutory language of section 92 that the "place of 5,000" limitation applies only to the place where the bank is "located and doing business" and not where the customers are located. Similarly, 12 U.S.C. § 81, provides that a national bank must transact general business in its main office and legally established branches, yet places no restriction on the location of the bank's customers. For purposes of section 81, a "branch" includes "any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(i). In considering the language of section 81, the Supreme Court has held that the language of section 81's phrase "the general business of each national banking association" does not necessarily encompass all the business in which the bank engages, but "can plausibly be read to cover only those activities that are part of the bank's core banking functions," such as those enumerated in section 36. Clarke v. Securities Industry Assn., 449 U.S. 388, 404 (1987) . . . ("Clarke").

In Clarke, the Court considered whether the OCC's approval for two banks to offer brokerage services to the public at locations other than a branch violated the National Bank Act's branching provisions. The OCC had concluded that the offices offering brokerage services would not constitute branches because none of the statutory branching functions would occur at those offices. The Court agreed and held that the operation of the brokerage service was not a core banking function. Id. at 409. The Court concluded that the locational restriction of section 81 and section 36 was not intended "to reach all activities in which national banks are specifically authorized to engage." Id. at 406.

Similarly, the locational restriction of section 81 and section 36 does not pertain to the insurance activities authorized by section 92. Neither the language of section 92 nor its legislative history suggests that these statutes be considered together. In addition, as in Clarke, the bank agency's insurance operations permitted under Section 92 do not involve core banking functions. Moreover, even with respect to core banking functions, such as receiving deposits, paying checks, or lending money, certain activities associated with these functions may occur at nonbranch sites. See, e.g., 12 C.F.R. 7.1003 (money lent at other than banking offices); 12 C.F.R. 7.1004 (loans originating at other than banking offices); 12 C.F.R. 7.1005 (credit decisions at other than banking offices).

OCC Int. Letter No. 753, supra note 13, at 90,233-34 n.147.
Supreme Court provided further support in *Barnett* for the OCC construing section 92 as authority for national banks to sell insurance without “unique disabilities or restriction” relative to insurance agents generally.\(^{16}\) The Supreme Court’s examination in *Barnett* found that section 92 “suggests ‘a broad, not limited permission’ for national banks to act as the agent for insurance sales.”\(^{17}\) Finally, the OCC determined that a national bank located in a place of 5,000 “should be permitted the same marketing range and be able to use the same marketing tools and facilities as generally available for licensed insurance agencies in the state(s) in which the bank agency operates.”\(^{18}\)

Based on the foregoing, the OCC determined that as long as the national bank’s office located in a place of 5,000 is bona fide, few restrictions apply to the insurance sales of national banks. Offices will be considered bona fide and, therefore, located in a place of 5,000, if the insurance agents are managed through the office, the office is the business location for licensing purposes, licensing information is maintained at the office, commissions are transmitted to the office and paid through the office to the licensed sales staff, the office maintains general responsibility for processing insurance applications, delivering policies, and collecting premiums, and business records are made available at the office (such records include customer application and policy information, and licensing, customer complaint and other compliance records).\(^{19}\) Additionally, business records may be kept in electronic form at the office while hard copies are kept in off-site storage.\(^{20}\)

Based on the office’s broad and essentially non-restricted marketing abilities, meetings with customers and solicitations and sales by the office’s agents can occur anywhere outside the place of 5,000.\(^{21}\) Solicitation mailings, telemarketing and cybermarketing may originate, and information regarding the insurance sales activities may be distributed, from inside or outside the place of 5,000.\(^{22}\) Even personnel of bank branches located outside the place of 5,000 may make referrals to the office located in the place of 5,000.\(^{23}\) Third parties may also provide sales activity assistance or “back office” support, such as advertising support, various marketing services and payments processing.\(^{24}\)

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18. *Id.* at 90,236.
19. *Id.*
20. *Id.* at 90,221 n.3, 90,236 n.160.
21. *Id.* at 90,236.
22. *Id.*
23. *Id.*
24. *Id.*
The OCC has provided national banks with some flexibility in the actual set-up and dynamics of the office located in the place of 5,000 in that the OCC has not clearly defined criteria for some of the requirements. For example, the OCC has not addressed what constitutes agents being “managed through the office,” to what extent an additional office outside the place of 5,000 could actually provide “back office” support in processing insurance applications, delivering policies, and collecting premiums as a servicer on behalf of the office located in the place of 5,000, or the scope of activities that will constitute “back office” support. Theoretically, an office located in a place of 5,000 could maintain the general responsibility of processing insurance applications, delivering policies and collecting premiums, while either contracting the day-to-day operations of such activities to a third party or maintaining such operations at an office located outside the place of 5,000. Additionally, the OCC will allow commissions to be paid in accordance with the policies adopted by the insurance agency with which the office works even if such policies do not comply with the OCC’s requirements regarding commissions.25

The OCC’s overview of and references to the practices of general insurance agencies may prove helpful to national banks in analyzing the feasibility and cost-effectiveness of an insurance sales program based at an office located in a place of 5,000.26 Although the lack of specific guidelines from the OCC may prompt national banks to test the limits of the scope of activities which constitute “in a place of 5,000,” national banks should feel secure that offices in a place of 5,000 are considered bona fide if their insurance sales programs both meet the OCC requirements and reflect the practices of other general insurance agencies in the areas that the OCC requirements have not or do not clearly address.

The insurance industry has recently sought to test the validity of an additional OCC letter regarding section 92. The American Council of Life Insurers filed suit in the United States District Court for the District of Columbia in January of 1997 asserting that the OCC violated section 92 of the National Bank Act by allowing a state bank to switch its charter to a national charter while keeping its ownership interest in insurance operations located in places exceeding 5,000.27

25. Id. The office located in the place of 5,000 is responsible for the collection and distribution of the commissions. Id.
26. OCC Int. Letter No. 753, supra note 13, at 90,236.
The OCC, however, relied on section 35 of the National Bank Act.\(^{28}\) Upon conversion from a state bank and at the Comptroller's discretion, section 35 permits national banks to retain assets otherwise not permitted.\(^{29}\) The OCC explained that the bank's ability to maintain its insurance operations in places of more than 5,000 was based upon the plain meaning of section 35 as well as the legislative history of section 35 and related case law.\(^{30}\) In light of the controlling weight of OCC decisions set forth in VALIC, it does not seem likely that this latest test will be decided in the insurance industry's favor.

The recent court decisions and OCC interpretations do not answer all the questions regarding national banks' sales of insurance and, in some cases, they raise new questions. For example, Barnett did not bar all state regulation, and it is unclear to what extent states can regulate a national bank's insurance activities. Other regulatory agencies may also restrict insurance products. For example, the Federal Deposit Insurance Corporation (FDIC) could restrict insurance sales that it finds adversely affect the safety and soundness of national banks. And, as has been the case with retirement certificate of deposits, the Internal Revenue Service could restrict national banks pursuant to tax issues. Legislation has also been introduced in Congress by Representative Jim Leach (R-Iowa), House Banking Committee Chairman, that would limit national banks' insurance powers.\(^{31}\) Although the legislation recognizes the preemption principles of Barnett, the legislation also places a moratorium on any further insurance powers.

### B. Annuities Powers and Developments

Unlike national banks' restricted, albeit expanding, power to sell insurance, national banks have a broad power to sell annuities. The OCC has consistently permitted national banks to sell annuities.\(^{32}\)

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\(^{28}\) OCC Corporate Decision 95-55, supra note 27, at 2.

\(^{29}\) Id. Section 35 provides that:

> The Comptroller of the Currency may, in his discretion and subject to such conditions as he may prescribe, permit such converting bank to retain and carry at a value determined by the Comptroller, such assets of such converting bank as do not conform to the legal requirements relative to assets acquired and held by national banking associations.

\(^{30}\) Id.

\(^{31}\) H.R. 10, 105 Cong. § 301 (1997).

and the United States Supreme Court has upheld such OCC decisions.\textsuperscript{33}

In \textit{VALIC}, the Supreme Court upheld the OCC's position that annuities are considered investment products, not insurance products.\textsuperscript{34} Section 24 (Seventh) of the National Bank Act authorizes national banks to "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . . ."\textsuperscript{35} National banks have the power to broker a wide variety of financial investment instruments in their traditional role as financial intermediaries pursuant to their incidental powers to conduct the business of banking.\textsuperscript{36} Therefore, national banks may sell annuities under the "incidental powers" clause of the National Bank Act.\textsuperscript{37}

States have sought to enforce state legislation which functionally bars the sale of annuities by national banks despite the clear authority of national banks to sell annuities and the Supreme Court's decision in \textit{Barnett Bank of Marion County, N.A. v. Nelson}.\textsuperscript{38} The \textit{Barnett} decision has been viewed as effectively barring states from denying licenses to national banks to sell annuities, presumably pursuant to the Supreme Court's statement that the history of national banking legislation interprets "grants of both enumerated and incidental 'powers' to national banks . . . as grants of authority not limited by, but rather ordinarily pre-empting, contrary state law."\textsuperscript{39}

In October of 1996, the Texas Bankers Association filed a suit in the United States District Court for the Western District of Texas, which the OCC has requested to join, asserting that the Texas Department of Insurance cannot enforce state laws denying national banks

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  \item \textsuperscript{33} \textit{VALIC}, 115 S. Ct. at 817 (addressing both variable and fixed annuities). In the Supreme Court's opinion for a unanimous Court, Justice Ruth Bader Ginsburg explained that:
  \begin{quote}
    Annuities are contracts under which the purchaser makes one or more premium payments to the issuer in exchange for a series of payments, which continue either for a fixed period or for the life of the purchaser or a designated beneficiary. When a purchaser invests in a "variable" annuity, the purchaser's money is invested in a designated way and payments to the purchaser vary with investment performance. In a classic "fixed" annuity, in contrast, payments do not vary.
  \end{quote}
  \textit{Id.} at 812.
  
  \item \textsuperscript{34} \textit{VALIC}, 115 S. Ct. at 814-15 (citations omitted).
  
  \item \textsuperscript{35} 12 U.S.C. § 24 (Seventh) (1994).
  
  \item \textsuperscript{36} \textit{VALIC}, 115 S. Ct. at 813-14 (citing the OCC Letter by J. Michael Shepard, \textit{supra} note 32).
  
  \item \textsuperscript{37} 12 U.S.C. § 24 (Seventh).
  
  \item \textsuperscript{38} 116 S. Ct. 1103 (1996).
  
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licenses to sell annuities.\textsuperscript{40} The Texas Insurance Code requires a license to sell annuities, but a license is only available to corporations, professional corporations and limited liability companies which are organized under the laws of Texas and for which each officer, director and shareholder is individually licensed as well.\textsuperscript{41} National banks are federally chartered and, therefore, cannot obtain licenses to sell annuities either directly or as a shareholder through a subsidiary organized under the laws of Texas.

The OCC issued an Interpretative Letter specifically addressing Texas' licensing laws.\textsuperscript{42} The OCC reasoned that the McCarran-Ferguson anti-preemption rule does not override the preemption effect of section 24 (Seventh) both because annuities are not insurance for purposes of the McCarran-Ferguson Act and because the Texas laws are not regulating the "business of insurance" but "the powers of a particular class of entity..."\textsuperscript{43} The OCC recognized that under the McCarran-Ferguson Act:

\textsuperscript{40} See Olaf de Senerpont Domis, OCC Seeking to Join Suit by Texas Bank Group to end ban on Annuity Sales, \textsc{Am. Banker}, Jan. 9, 1997, at 3. Please note that the article states that the OCC and the Texas Bankers Association are accusing the Texas Department of Insurance of ignoring the VALIC decision in which "the Supreme Court said national banks may sell annuities without interference from state regulators." \textit{Id.} This statement is not entirely accurate. Rather, the VALIC decision upheld the OCC's interpretations that annuities are not insurance and, therefore, not subject to the restrictions of § 92 of the National Bank Act regarding insurance sales, and that national banks have the power to sell annuities pursuant to § 24 (Seventh). The decision did not specifically address whether state laws may preempt such power to sell annuities.


\textsuperscript{42} OCC Int. Letter No. 749, by Julie L. Williams, Chief Counsel, Fed. Banking L. Rep. ¶ 81,114, at 90,256 (Sept. 13, 1996) [hereinafter OCC Int. Letter No. 749]. The OCC states in Interpretive Letter No. 749 that similar conclusions were made to the Commission of the Texas Insurance Department in a letter dated August 9, 1996, in response to the Commissioner's request for an opinion submitted to the Texas Attorney General. \textit{Id.} at 90,256 n.1.

\textsuperscript{43} 15 U.S.C. § 1012(b) (1994); OCC Int. Letter No. 749, \textit{supra} note 42, at 90,257. The OCC recognized the distinction between variable and fixed annuities for purposes of being considered insurance under the McCarran-Ferguson Act, but explained:

The Supreme Court has already explicitly held in \textit{SEC v. Variable Annuity Life Ins. Co. of America}, 359 U.S. 65 (1959) ("SEC") that variable annuities are not insurance for purposes of the McCarran-Ferguson Act. Although the Supreme Court has not specifically addressed whether fixed annuities are insurance for purposes of the McCarran-Ferguson Act, Supreme Court decisions in other contexts, and numerous other authorities, lead to a similar negative conclusion.

\textit{Id.} at 90,257 & 90,260.
Licensing of agents could constitute regulation of the business of insurance if the licensing standards have the end result, intention or aim of adjusting, managing or controlling the relationship between insurer and insured, the types of policies issued, or their reliability, interpretation, and enforcement. The Texas state law provisions at issue here simply do none of that. They regulate neither the ‘transferring or spreading [of] a policyholder’s risk,’ nor any other practice that is ‘an integral part of the policy relationship between the insurer and the insured.’ Rather, they deprive an entire category of entity — national banks — of the capacity to exercise a corporate power they possess under Federal law.\textsuperscript{44}

However, in \textit{American Deposit Corp. v. Schacht}\textsuperscript{45} which was decided prior to the above-mentioned OCC interpretive letter, the United States Court of Appeals for the Seventh Circuit in 1996 determined that Illinois regulators could deny the sale and underwriting of Blackfeet National Bank’s Retirement CD. The court explained that the Retirement CD was simply a fixed annuity.\textsuperscript{46} Under Illinois law, annuities are classified as life insurance.\textsuperscript{47} A company must obtain a certificate of authority from the Illinois Director of Insurance in order to sell or underwrite life insurance in Illinois.\textsuperscript{48}

As is the case in Texas regarding obtaining licenses, a national bank cannot obtain a certificate of authority in Illinois. Certificates of authority are only issued to domestic, foreign or alien companies that do not engage in any business other than life insurance.\textsuperscript{49} Being chartered under the National Bank Act, national banks do not fall within the definitions of domestic, foreign or alien companies set forth in Illinois Insurance Code, because national banks engage in businesses other than life insurance. Unlike Texas licensing laws, however, national banks would not be prohibited from forming a subsidiary which could obtain a certificate of authority to sell annuities.\textsuperscript{50}

The court in \textit{American Deposit} distinguished the selling and brokering of the Retirement CD from the United States Supreme Court’s decision in \textit{VALIC}, which held that annuities are not insurance and,

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  \item \textsuperscript{44} OCC Int. Letter No. 749, supra note 42, at 90,261 (citing Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982); United States Dept. of Treasury v. Fabe, 508 U.S. 491 (1993)).
  \item \textsuperscript{45} 84 F.3d 834 (7th Cir.), cert. denied, 117 S. Ct. 185 (1996).
  \item \textsuperscript{46} American Deposit Corp. v. Schacht, 84 F.3d 834, 836 (7th Cir.), cert. denied, 117 S. Ct. 185 (1996).
  \item \textsuperscript{47} 215 ILL. COMP. STAT. ANN. 5/4(a) (West 1993).
  \item \textsuperscript{48} \textit{American Deposit}, 84 F.3d at 836; 215 ILL. COMP. STAT. ANN. 5/24 (West 1993).
  \item \textsuperscript{49} \textit{American Deposit}, 84 F.3d at 836-37; 215 ILL. COMP. STAT. ANN. 5/2(f), (g), (h), and 5/111(c) (West 1993).
  \item \textsuperscript{50} \textit{American Deposit}, 84 F.3d at 837.
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therefore, not subject to state law regarding the sale of insurance.\textsuperscript{51} The court stated that the VALIC holding was limited to: (a) selling annuities, rather than underwriting annuities, and (b) federal law not precluding a national bank from selling annuities, rather than national banks not being subject to state regulation.\textsuperscript{52} Apparently, therefore, Illinois law can regulate annuity sales even to the extent that national banks cannot sell or underwrite annuities.

What about the preemption principles set forth in \textit{Barnett}? The court in \textit{American Deposit} acknowledged the proposition set forth by the Supreme Court in \textit{Barnett} that federal law preempts conflicting state law.\textsuperscript{53} However, the court held that, unlike insurance sold pursuant to section 92 of the National Bank Act, the McCarran-Ferguson Act’s anti-preemption rule applies to selling and underwriting the Retirement CD.\textsuperscript{54} Consequently, it prohibits federal law from preempting the ability of Illinois to regulate the sale and underwriting of the Retirement CD and effectively bars national banks from selling and underwriting the Retirement CD. For the rule to apply, the Retirement CD must be considered insurance, the National Bank Act provisions enabling national banks to sell annuities must “specifically relate to the business of insurance,” and the Illinois laws purporting to govern the sale the Retirement CD must have been enacted “for the purpose of regulating the business of insurance.”\textsuperscript{55}

Additionally, the court disregarded the Supreme Court’s holding in VALIC that both variable and fixed annuities are not insurance, setting forth instead that, unlike variable annuities, fixed annuities are “the business of insurance.”\textsuperscript{56} National banks may sell annuities pursuant to their powers “to receive deposits” under section 24 (Seventh) and “to enter into contracts” under section 24 Third.\textsuperscript{57} Unlike section 92, the section 24 provisions governing the sale and underwriting of the Retirement CD do not “specifically relate to the business of insurance.”\textsuperscript{58} Finally, the court found that the Illinois laws purportedly governing the sale and underwriting of annuities were enacted “for the purposes of regulating the business of insurance” because they have the “end, intention, or aim of adjusting, managing or controlling

\textsuperscript{51} Id. at 838-42.
\textsuperscript{52} Id. at 839.
\textsuperscript{53} Id. at 842-43.
\textsuperscript{54} Id. at 843.
\textsuperscript{55} Id. at 838.
\textsuperscript{56} See id. at 839-41. Variable annuities are not insurance because they do not involve "a guarantee that at least some fraction of the benefits will be payable in fixed amounts. . . ." Id. at 841 (citing SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 71 (1959)).
\textsuperscript{57} American Deposit, 84 F.3d at 837.
\textsuperscript{58} Id.
the business of insurance." Despite the court's contention that the Illinois laws regulate the insurer and insured relationship and are necessary to monitor such relationship, the laws actually appear to regulate "the powers of a particular class of entity" in the same manner as the Texas licensing laws. Therefore, the Illinois laws should not be considered to regulate insurance.

Initially, the American Deposit decision appeared to be a severe setback for national banks' powers to sell annuities, powers which many believed had already been firmly established. Soon after the American Deposit decision, however, OCC Deputy Chief Counsel Robert Serino stated that the OCC was not as concerned about the American Deposit decision as it was at first, explaining that the holding appeared to at least be limited to situations where banks both underwrite and sell fixed annuities and that it does not cover situations where banks only sell fixed annuities.

The court in American Deposit did not address whether its decision would have differed had the scenario consisted of simply selling the Retirement CD. The Supreme Court in VALIC did make the distinction between selling and underwriting annuities as opposed to simply selling annuities. The Court noted, in response to the argument that the OCC's contradictory letters should eliminate the deference given to the OCC, that the activities proposed in the letter describing annuities as insurance involved the national bank as an underwriter of the annuities rather than as an agent selling the annuities. Additionally, the Court noted that the Comptroller assured the Court that the activities would consist of acting as agent only and "would not deviate from traditional bank practices...."

Despite the distinction that could be made between selling and underwriting annuities as opposed to simply selling annuities, the American Deposit decision relied on the broad reasoning that fixed annuities are insurance. Such reasoning could play a part in stretching the extent to which states attempt to regulate only the sale of fixed annuities as well as prove detrimental in determining whether underwriting annuities can be considered incidental to the business of banking and a possible expansion of national bank powers in the future.

In the same letter in which the OCC specifically addressed Texas' licensing laws, the OCC also criticized the American Deposit holding

59. Id. at 838 (citing SEC v. National Sec., Inc., 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969)).
60. Id. at 838.
61. VALIC, 115 S. Ct. at 815-16.
62. Id. at 815.
63. Id. at 815 n.4.
64. See id. at 840-42.
that fixed annuities are insurance. The OCC stated that the court's decision that annuities are insurance under the McCarran-Ferguson Act "fundamentally mistook [the] essential distinctions between annuities and insurance." The OCC went on to discuss the court's flawed reasoning that annuities should be considered insurance because they involve a mortality risk such as life insurance, and they protect against the risk of the insured running out of money and against the "single, contingent event" of a decline in the market.

The OCC pointed out that in VALIC the Supreme Court "rejected the notion that mortality risk is a determinative indicator that a product is insurance." The Court stated a mortality risk does not transform an investment into insurance, recognizing that even some debt instruments impose a mortality risk. The OCC also rationalized that fixed annuities should not be termed insurance simply because they protect against loss of income. Under such an analysis, bank accounts, mutual funds or other long-term income streams should also be considered insurance, which they most definitely are not considered. In fact, the Supreme Court likened an annuity's aspect of ex-

65. OCC Int. Letter No. 749, supra note 42, at 90,259.
66. Id.
67. Id.; American Deposit, 84 F.3d at 841. The court stated that the Retirement CD was actually "the 'mirror image' of life insurance policies." American Deposit, 84 F.3d at 840. The court further explained:

That typical life insurance involves payment "upon" a death, while a lifetime annuities involve payment "until" a death is a distinction without a difference: a company selling either the typical insurance policy or the lifetime annuity uses exactly the same actuarial tables to calculate its mortality risk and to set the price of its product.
Id. at 841.
68. OCC Int. Letter No. 749, supra note 42, at 90, 259; American Deposit, 84 F.3d at 841. The court explained that:

the purpose of purchasing a life insurance policy on a family's breadwinner and of purchasing a lifetime annuity is essentially the same. The individual who purchases the life insurance policy insures against no longer having the money produced by the breadwinner, and the person who purchases a lifetime annuity insures against no longer having sufficient money produced by his assets.
Id. The court also used American Deposit Corporation's distinction that insurance "involves a loss caused by a single, contingent event" against the corporation when it stated that the Retirement CD:

provid(es) a guaranteed minimum return on investment, the Retirement CD insures the purchaser against a decline in the market — a single, contingent event. The purchaser is given the comfort that should a depression occur in the market, causing rates of interest to fall significantly, he will not suffer a "loss" of future income, but will continue to receive the rate of interest guaranteed in his Retirement CD contract.
Id.
69. OCC Int. Letter No. 749, supra note 42, at 90,259.
70. Id. (citing VALIC, 115 S. Ct. at 815).
71. See id. at 90,260.
changing an initial payment for a future income stream to depositing money in a bank account.\textsuperscript{73} Rather than protecting against risk of loss, insurance indemnifies or guarantees against risk of loss.\textsuperscript{74} The OCC explained that the court in American Deposit also mistook indemnifying against risk of loss for protecting against other types of risk, such as investment risk, in its contention that a fixed annuity insures against the "single, contingent event" of a decline in the market.\textsuperscript{75} Annuities shift the investment risk, such as bank accounts and treasury bonds, but such a shift does not make them, or any other guaranteed obligation, insurance.\textsuperscript{76}

C. Securities Powers and Developments

The Glass-Steagall Act of 1933 prohibits national banks and their employees from participating in the securities industry as well as prohibiting individuals in the securities industry from participating in the banking industry.\textsuperscript{77} A strong effort has been aimed at reforming the Glass-Steagall Act. However, such effort hit a standstill in Congress during 1996 with advocates on both sides of the issue unwilling to compromise. Additionally, provisions limiting national bank insurance powers contributed to the standstill. Representative Jim Leach (R-Iowa), House Banking Committee Chairman, has once again introduced Glass-Steagall Act reform legislation during the 1997 Congressional Session in hopes that parties on both sides will be able to compromise on issues.

Subject to some exceptions, a national bank cannot purchase and sell securities for or on the account of itself or underwrite securities.\textsuperscript{78} However, under legislation introduced by Rep. Jim Leach, national

\textsuperscript{73} VALIC, 115 S. Ct. at 815.
\textsuperscript{74} Id. at 817.
\textsuperscript{75} OCC Int. Letter No. 749, supra note 42, at 90,260.
\textsuperscript{76} Id.
\textsuperscript{77} The Glass-Steagall Act is codified in sections of 12 U.S.C. and 18 U.S.C. This Article does not attempt to address prohibited affiliations and interlocks by national banks.
\textsuperscript{78} 12 U.S.C. § 1.140 (1994); 12 C.F.R. §§ 1.3, 337.4 (1996). Additionally, this Article does not attempt to address such exceptions to national banks' powers to purchase and sell securities for or on the account of itself, asset securitization activities of national banks, or national banks' powers to purchase and sell government and municipal securities. Please note, however, that a Proposed Interagency Rule was published in the Federal Register on April 25, 1996, which would implement rules for national banks that are substantially similar to the NASD's Business Conduct and Suitability Rules regarding the sale of government securities. The proposed rule would require national banks to: (1) adhere to the same general standards of conduct as government securities brokers or dealers, and (2) have reasonable grounds for believing a recommendation to a customer to purchase, sell or exchange a government security is suitable (making reasonable efforts to obtain specific information from non-bank customers). Government Securities Sales Practices, 61 Fed. Reg. 18,470, 18,470-71 (April 25, 1996).
bank operating subsidiaries could, pursuant to the bank operating subsidiary rule discussed below, "[u]nderwrite, deal in, broker, place, or distribute securities of any type, provide investment advice regarding securities of any type, and engage in other securities activities." National banks may also conduct private placement of commercial paper pursuant to their powers to purchase and sell securities without recourse and solely upon the order of and for the account of customers. Exceptions to the current Glass-Steagall Act do allow national banks to purchase and sell securities without recourse and solely upon the order of and for the account of customers, in other words as agents for customers. The OCC has also authorized national banks to broker numerous types of securities as an agent for customers. Additionally, national banks may also provide investment advice in connection with purchasing and selling securities on an agency basis.

If won, the battles national banks are fighting to expand their securities powers would be giant strides in expanding national bank powers. Fortunately, such battles should not have to address a national bank's ability to sell securities upon the order of and for the account of national bank customers.

III. OPPORTUNITIES TO REVISE AND EXPAND INSURANCE, ANNUITIES AND SECURITIES SALES UNDER THE OPERATING SUBSIDIARY RULE

One of the OCC's more controversial actions recently was the issuance of revised corporate activities regulations regarding national banks' operating subsidiaries. These revised regulations could significantly affect national banks' powers to sell insurance and securities as well as expand national banks' powers in general. Much of the controversy surrounding the new operating subsidiary rule stemmed from possible securities activities that operating subsidiaries could be allowed to conduct under the rule. However, the new operating sub-

82. OCC Int. Letter No. 562, supra note 81, at 71,436.
83. Id.
85. The OCC initially proposed revisions to Part 5 in November 1994 as part of the OCC's Regulation Review Program, which was implemented to ease the regulatory bur-
sidiary rule has also raised controversy over its potential to allow national banks to sell insurance generally as agents through operating subsidiaries without section 92 restrictions as well as the possibility of operating subsidiaries being allowed to underwrite insurance generally.

Under the rule, an operating subsidiary of a national bank has the opportunity to apply for the authority to conduct activities that the subsidiary's parent bank could not conduct. Such activities could include the ability to sell insurance generally as agents without having an office located in a place of 5,000, to conduct additional insurance activities beyond selling insurance as agents, or to expand securities activities.

The operating subsidiary rule does not authorize any particular new activities for operating subsidiaries that national banks themselves cannot conduct. Rather, the rule allows a national bank to file an application with the OCC requesting approval for the national bank's operating subsidiary to conduct an activity that the parent bank otherwise could not conduct. The rule permits national bank operating subsidiaries to engage in "activities that are part of or incidental to the business of banking, as determined by the Comptroller of the Currency, pursuant to Title 12 of the United States Code Section 24 (Seventh), and other activities permissible for national banks or their subsidiaries under other statutory authority" but which are different from activities permissible for national banks themselves to conduct.

Although the OCC has permitted national banks to own operating subsidiaries for quite some time, several commentators to the proposed operating subsidiary rule asserted that the OCC does not have the authority to permit national banks to own operating subsidiaries based on the impermissibility of national banks to own stock under section 24 (Seventh) and, therefore, the OCC does not have the authority to permit operating subsidiaries to conduct activities different from activities the parent national banks can conduct even if such ac-

den on national banks and streamline procedures for applications and transactions regarding corporate activities while at the same time protecting the national banking system's safety and soundness. See Rules, Policies, & Procedures for Corporate Activities, 59 Fed. Reg. 61,034 (1994) (proposing revisions to 12 C.F.R. Part 5). However, issuance of the final amendments to Part 5 were stalled pending outcome of legislation introduced in Congress affecting the Glass-Steagall Act. Final amendments to Part 5 were issued soon after Representative Jim Leach (R-Iowa), House Banking Committee Chairman, withdrew the legislation.

86. 12 C.F.R. § 5.34 (1997).
87. 12 C.F.R. §§ 5.34(e), (f) (1997).
activities are part of or incidental to the business of banking. The OCC addressed such assertions in a separate legal opinion.

While the operating rule gives national banks the possibility to indirectly conduct activities that they could not otherwise directly conduct, the process of obtaining approval for such different activities could be lengthy and involved. Additionally, although the generalization of the operating subsidiary rule gives the OCC a broader and more flexible approach to considering and approving activities, it leaves unclear the types of activities that national banks can expect to have approved and the applicable restrictions and conditions that the OCC will impose.

The OCC determined that applications to conduct such different activities must be evaluated by the OCC on a case-by-case basis because operating subsidiaries may only conduct such different activities “if, in the circumstances presented, the reason or rationale for restricting the parent bank’s ability to conduct the activity . . . would not frustrate a congressional purpose of preventing the activity from being undertaken by its parent bank.” Therefore, in evaluating applications to conduct such different activities, the OCC will weigh the form and specificity of the parent national bank’s restriction, the reason the restriction applies to the parent national bank and whether permitting the activity in the operating subsidiary would frustrate the purposes underlying the restriction. The OCC’s evaluation will also consider the safety and soundness of the activity, regulatory safeguards which apply to both the operating subsidiary and the activity,

89. Rules, Policies and Procedures for Corporate Activities, 61 Fed. Reg. at 60,351. Interestingly, the OCC noted, in response to additional commentators’ allegations that the OCC lacked authority to issue the operating subsidiary rule because the OCC’s authority to prescribe rules and regulations under 12 U.S.C. § 93a specifically does not apply to national banks’ securities activities under the Glass-Steagall Act, that the Securities and Exchange Commission did not object to the operating subsidiary rule subject to understandings that:

(1) the OCC intended that securities activities conducted in operating subsidiaries are subject to regulation under the Federal securities laws, and (2) the OCC’s proposal was not intended as a steppingstone to permit activities previously not permitted for a bank to conduct itself to be shifted from an operating subsidiary to the bank.

Id. at 60,351 n.1. The OCC stated that the understandings set forth by the SEC will be correct if securities activities are approved for an operating subsidiary. Id.


conditions the OCC could impose in approving the activity, and any
additional action the national bank or operating subsidiary has taken
to address the foregoing factors.  

In addition to addressing the foregoing factors, the application to
the OCC must include: (a) a complete description of (i) the operating
subsidiary’s proposed activity or activities, (ii) the national bank’s in-
vestment in the operating subsidiary, (iii) the operating subsidiary’s
organizational structure and management, (iv) the relations between
the national bank and the operating subsidiary, and (v) any additional
information necessary to sufficiently describe the proposal to establish
or acquire the operating subsidiary to or have an existing subsidiary
perform a new activity; (b) a statement of whether any of the operat-
ing subsidiary’s activities will be conducted at a location other than a
previously approved branch or the main office; and (c) a legal analysis,
if required by the OCC, for a novel or unusually complex proposal or a
proposal that involves substantial unresolved legal issues (in such
cases, the OCC encourages a pre-filing meeting with the OCC). The
OCC may also request additional information and analysis if neces-
sary for the OCC to determine whether the operating subsidiary’s pro-
posed activity or activities are legally permissible, the proposal is
consistent with safety and soundness practices and OCC policy and
the proposal endangers the parent national bank’s safety and soundness.

Although the operating subsidiary rule does not specify that a
legal analysis is required in an application to engage in activities dif-
ferent from those activities permissible for national banks, the appli-
cation should include a legal analysis that addresses areas the OCC
will weigh and review in considering the application, such as the re-
striction placed on the parent national bank, the purposes underlying
such restriction and the reasons the activity should be considered not
to endanger the parent national bank’s safety and soundness, inciden-
tal to banking, and consistent with safety and soundness practices
and OCC policy.

A national bank considering approval to expand its insurance or
securities activities through an operating subsidiary beyond the activ-
ities permissible for the national bank itself should also consider pos-
sible conditions the OCC could impose on the operating subsidiary and
the requirements set forth in the rule.

OCC Legal Opinion, supra note 91, at 95,897.
The OCC set forth corporate and supervisory requirements for operating subsidiaries that conduct activities different from activities permissible for their parent national banks. The operating subsidiary rule sets forth the requirements more specifically than the rule sets forth the types of activities an operating subsidiary may be able to conduct. The specificity assists national banks in determining whether prospective plans for operating subsidiaries are able to meet the requirements while still allowing national banks the flexibility necessary for a particular national bank’s unique needs.

The operating subsidiary must be separate and distinct from the parent national bank: (a) physically in its operations (though they may share facilities if the operating subsidiary’s public business area is as distinguishable as practical from the areas in which the parent national bank conducts business with its customers), including having the operating subsidiary compensate its own employees and follow independent policies and procedures intended to inform the operating subsidiary’s customers that it is a separate organization from the parent national bank; (b) in its corporate activities and formalities, including separate board meetings, maintaining separate accounting and corporate records, and maintaining a board of directors of which at least is not directors of the parent national bank; and (c) in written materials and direct contact with third parties, including clearly stating in written marketing materials that the operating subsidiary is a separate entity and its obligations are not those of its parent national bank. Additionally, contract terms and conditions between the operating subsidiary and the parent national bank must be substantially comparable to terms and conditions available to or from third parties. The operating subsidiary and its parent national bank must not have the same name and, if their names are similar, shall reduce the risk of customer confusion regarding whether or not funds are insured by the Federal Deposit Insurance Corporation. The operating subsidiary must maintain adequate capitalization which is standard for the applicable industry, supports its activities and covers reasonably anticipated expenses and losses. Finally, appropriate internal controls shall be implemented in the operating subsidiary and parent national bank to manage the operating subsidiary’s financial and operational risks.

The parent national bank itself must meet certain supervisory requirements. The national bank must deduct an amount equal to the

equity investment made in the operating subsidiary from both its capital and total assets.\textsuperscript{101} After such deduction, the parent national bank must continue to qualify as an eligible bank.\textsuperscript{102} While the operating subsidiary's and national bank's assets and liabilities may not be consolidated, the OCC can require the national bank to calculate its capital on a consolidated basis to determine if the national bank is adequately capitalized.\textsuperscript{103} The operating subsidiary rule specifically states that transactions between the operating subsidiary and the parent national bank are subject to the restrictions between affiliates set forth in sections 23A and 23B of the Federal Reserve Act.\textsuperscript{104}

Currently, the operating subsidiary rule appears to be one of the best resources for national banks to attempt to expand their powers regarding insurance and securities sales, as well as other activities that could be considered incidental to the business of banking. However, while national banks could use the rule to compete directly and on a much broader and more effective level with the insurance, securities and additional industries, the banking industry may initially shy away from utilizing the rule to its fullest potential. For example, unlike section 92 authority to sell insurance as agents, the new operating subsidiary rule has not been tested in the courts. Although under VALIC, the OCC has been given the authority to grant additional powers,\textsuperscript{105} and the trend has been to allow national banks greater powers, the rule likely will be subject to attack from the insurance and securities industries and could have some difficulty surviving completely intact.

Although the operating subsidiary rule has some support in Congress, restrictions are involved. House Banking Committee Chairman

\footnotesize{101. 12 C.F.R. § 5.34(f)(3)(i) (1997). The operating subsidiary rule explains that for purposes of risk-based capital, the deduction must be made equally from Tier 1 and Tier 2 capital.}

\footnotesize{102. 12 C.F.R. § 5.34(f)(3)(iii) (1997). A national bank qualifies as an eligible bank if the national bank:

(1) Is well capitalized as defined in 12 CFR 6.4(b)(1);
(2) Has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System (CAMEL);
(3) Has a Community Reinvestment Act (CRA), 12 U.S.C. 2901 et. seq., rating of "Outstanding" or "Satisfactory"; and
(4) Is not subject to a cease and desist order, consent order, formal written agreement, or Prompt Corrective Action directive (see 12 CFR part 6, subpart B) or . . . directive, is informed in writing by the OCC that the national bank may be treated as an "eligible bank" for purposes of this part.

12 C.F.R. § 5.3(g) (1997). The parent national bank must submit an acceptable plan to become well capitalized if, for two consecutive quarters after the activity's commencement, it ceases to be well capitalized as defined in 12 C.F.R. § 6.4(b)(1).


Jim Leach introduced a bill in January of 1997, specifically allowing bank operating subsidiaries to be created and to perform activities part of or incidental to the business of banking, including activities national banks cannot directly conduct. However, bank operating subsidiaries would not be able to underwrite insurance or engage in merchant banking or real estate investment. National banks may be unwilling to invest the initial time and resources involved in the process of obtaining OCC approval for operating subsidiaries to engage in activities different from those permissible for the parent national banks until they have some assurances that the operating subsidiaries will be allowed to conduct such activities without burdensome restrictions on the activity, the operating subsidiary and the parent national banks.

IV. REGULATORY GUIDELINES AND ALTERNATIVES TO SELLING INSURANCE, ANNUITIES AND SECURITIES DIRECTLY

A. ALTERNATIVES TO DIRECTLY PROVIDING INSURANCE, ANNUITIES AND SECURITIES

Providing insurance, annuities and securities directly to customers can be a costly venture for national banks. Such programs involve determining the products a national bank is authorized to provide, training employees, obtaining, installing and maintaining the necessary technology to handle such programs, instituting adequate policies and procedures, obtaining and maintaining proper registrations and licenses, providing customer disclosures, maintaining adequate records and ensuring compliance with applicable federal and state laws and regulations. Certain programs simply would not be cost-effective for some national banks, such as having to establish an office in a place of 5,000 or obtaining approval for an operating subsidiary in order to sell insurance generally as an agent.

Alternatives to providing insurance, annuities and securities directly to customers exist for national banks. Such alternatives include entering various arrangements with registered broker-dealers to provide such products to customers of national banks. Such arrangements assist national banks in limiting their own investment in the establishment of programs suitable to their customers’ needs, while providing an additional revenue source, increased customer base and necessary experience for national banks to obtain the abilities to provide such programs directly to customers in the future.

107. Id.
An arrangement can be as simple as a national bank providing information to its customers about the products of other companies, or "act[ing] as a finder in bringing together a buyer and a seller." 108 For example, a national bank could enter an arrangement with a broker-dealer in which the national bank receives a fee for simply providing information about the insurance or securities products available through the broker-dealer, such as in the form of brochures. Although a national bank could not conduct any activities that would classify the national bank itself as a broker, it could identify potentially interested customers, make inquiries about the interest of such customers in the broker-dealer's products, and arrange meetings between or otherwise bring together its customers and the broker-dealer so that they can negotiate and consummate the transaction themselves. 109

Another arrangement can involve the sale of insurance, annuities and securities products at the actual premises of a national bank by dual employees of the national bank and a registered broker-dealer. A national bank may share space with another business by either leasing excess space on its premises to another business, sharing space jointly with another business or offering its own services in space owned by or leased to another business. 110 If a national bank shares space, it may also share employees with the other business. 111

Providing insurance, annuities and securities products pursuant to sharing space and employees increases customer service by providing a full array of financial investment products to customers of the national bank, potentially keeps its customers from visiting competitors for additional financial services not otherwise available at the national bank, and helps expand the national bank's customer base to include people entering its premises due to the availability of the insurance, annuities and securities products. This arrangement can also prove more profitable than a simple "finder" arrangement. Rather than receiving a service fee for bringing together its customers and another company, the national bank can lease space on the premises of the national bank to the broker-dealer under a percentage lease and share a percentage of the commissions or income from the actual sales of the insurance, annuities and securities products. 112

111. 12 C.F.R. § 7.3001(b) (1997).
ally, using employees of the national bank can help reduce costs as well as provide familiarity to existing customers of the national bank.

B. REGULATORY GUIDELINES

1. OCC Approval

The OCC has specifically approved a corporation's proposal to share employees with and lease space from a national bank to conduct its insurance, annuities and securities programs.\textsuperscript{113} The OCC explained that national bank employees may generally be employed by more than one employer and that limitations on a national bank's powers do not apply to activities the employee performs for another business as that business' employee or agent and while under its exclusive control.\textsuperscript{114} The employee's proximity to the national bank does not transform the employee into the national bank's agent when working for the other business.\textsuperscript{115} However, written agreements should clearly set forth the employment and agency relationship, causing the "employee to be the agent of only one employer at a given time when the employee's actions are on a particular employer's behalf and under its exclusive control."\textsuperscript{116} Such a relationship should be consistently adhered to by the parties and fully and accurately disclosed to customers and other third parties dealing with the employee.\textsuperscript{117}

Under the proposal, the corporation would: (a) pay the national bank rent based on a percentage of the revenues derived from the products offered at the national bank, (b) employ national bank employees on a part-time basis and assume exclusive control over the portion of the employees work in which the employees act as the corporation's agents, (c) compensate the employees for work performed for and under its exclusive control, (d) assume exclusive responsibility for licensing and training the employees to work in its business, and (e) set forth a number of other safeguards to identify and maintain the corporation and national bank as separate businesses.\textsuperscript{118} Such safeguards, however, were not specifically discussed in the letter.

\textsuperscript{113} OCC Int. Letter No. 680, \textit{supra} note 112, at 71,857.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id. at} 71,857-58.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id. at} 71,858.
\textsuperscript{118} \textit{Id. at} 71,857-58.
The OCC did not object to the proposal provided that the corporation and the involved national banks complied with the same requirements and restrictions found in 12 C.F.R. section 7.3001 and the Interagency Statement on Retail Sales of Nondeposit Investment Products.\footnote{119}{Id. at 71,858. Please note that various state laws may apply to arrangements with third parties and that securities sales may also subject to additional requirements and restrictions of the Securities and Exchange Commission and the National Association of Securities Dealers.}

2. \textit{12 C.F.R. section 7.3001}

National banks must comply with 12 C.F.R. section 7.3001 when sharing space and employees. A written agreement or agreements are required between the bank, the broker-dealer and the employees.\footnote{120}{12 C.F.R. § 7.3001(b) (1997).} The broker-dealer must be “conspicuously, accurately and separately identified” from the national bank and the employees must disclose their agency relationship to customers so customers know whether the national bank or the broker-dealer is providing the products.\footnote{121}{12 C.F.R. § 7.3001(c) (1997).} The national bank must also ensure that the arrangement does not constitute a joint venture or partnership, the broker-dealer’s activities do not affect the national bank’s safety and soundness, and that employees are duly licensed or meet applicable qualifications.\footnote{122}{12 C.F.R. § 7.3001 (1997).}

To ensure the arrangement does not constitute a joint venture or partnership, the OCC has suggested a clause in the agreement or agreements between the national bank and broker-dealer expressly negating the bank’s liability for the broker-dealer’s debts and liabilities and obtaining a counsel’s opinion that the specific arrangement does not constitute a joint venture or partnership under state law.\footnote{123}{OCC Int. Letter No. 680, supra note 112, at 71,858.} Finally, the national bank must conduct business with the broker-dealer at arm’s length, address security issues which arise from selling the products on bank premises, and segregate its assets and records from those of the broker-dealer.\footnote{124}{12 C.F.R. § 7.3001 (1997).}

3. \textit{Interagency Statement and OCC Advisory Letter Guidelines}

The Interagency Statement on Retail Sales of Non-Deposit Investment Products (“Interagency Statement”) applies to retail recommendations or sales of non-deposit investment products, such as annuities, mutual funds and securities, made by a national bank’s employees, made by a third party’s employees on the premises of a national bank
or resulting from a national bank's referral to a third party when the national bank receives a benefit from the referral.\textsuperscript{125} The Joint Interpretation on Retail Sales of Non-Deposit Investment Products ("Joint Interpretation") verifies that the Interagency Statement applies to sales activities occurring in or adjacent to the national bank's lobby and explains that it may also apply to sales activities in locations other than the lobby area depending on the facts and circumstances.\textsuperscript{126} Therefore, not only should national banks comply with the Interagency Statement when selling non-deposit investment products through an arrangement with a broker-dealer, but also when selling such products directly.

The Interagency Statement does not, however, apply to sales of non-deposit investment products to non-retail customers, such as to fiduciary accounts which the national bank administers.\textsuperscript{127} However, a national bank should provide disclosures to nonbank customers who direct investments for their fiduciary accounts, such as IRA's.\textsuperscript{128} The Joint Interpretation also exempts from the Interagency Statement sales of government and municipal securities made from the national bank's dealer department located away from the lobby area.\textsuperscript{129}

The Interagency Statement also does not address the sale of insurance products by national banks. Therefore, the OCC issued Advisory Letter No. 96-8 ("Advisory Letter") specifically addressing national banks' sales of insurance and annuities.\textsuperscript{130} The Advisory Letter sets forth issues that national banks should evaluate and address in insurance and annuities sales.\textsuperscript{131} As with the Interagency Statement, national banks should comply with the Advisory Letter when selling insurance and annuities through an arrangement with a broker-dealer as well as when selling such products directly.

Although the Interagency Statement and the Advisory Letter address requirements and restrictions for different types of investment products, many of the requirements and restrictions are similar. In


\textsuperscript{127} Interagency Statement, supra note 125, at 3.628.1; Joint Interpretation, supra note 126, at 3.628.6.

\textsuperscript{128} Id.

\textsuperscript{129} Joint Interpretation, supra note 126, at 3.628.5.


\textsuperscript{131} OCC Advisory Letter No. 96-8, supra note 130, at 35,755.
the areas where they differ, typically one simply explains a similar requirement or restriction in more detail.

Since insurance, annuities and securities programs are often developed as a single program and the Interagency Statement and the Advisory Letter both address annuities sales, a national bank may find it easier and more cost-effective to simply comply with both the Interagency Statement and the Advisory Letter for its entire program. Additionally, when the appropriate guideline does not specifically address an issue but the other does, regulatory authorities could rely on the guideline that otherwise would not apply if the reasoning for such requirement or restriction for the type of product the guideline does address is similar for the type of product in question.

a. Written Agreements

Under the Interagency Statement, a national bank should appropriately review the broker-dealer prior to entering into an arrangement with the broker-dealer to sell investment products from the national bank's premises. The national bank should enter a written agreement with the broker-dealer approved by the national bank's board of directors and should periodically monitor compliance with the agreement. The written agreement should: (a) describe each party's duties of the national bank, the broker-dealer and the dual employees, including the permissible activities on the national bank's premises, compensation arrangements for the employees selling the products, and terms regarding use of the national bank's space, personnel and equipment, (b) specify that the broker-dealer will comply with applicable laws and regulations, specifically the Interagency Statement's provisions relating to customer disclosures, (c) authorize the national bank to monitor the broker-dealer and periodically review and verify that it and its employees comply with the agreement, (d) give the national bank and appropriate banking agencies access to the broker-dealer's records as necessary or appropriate to evaluate compliance with applicable laws and regulations and the agreement, (e) require the broker-dealer to indemnify the national bank for potential liability resulting from actions of the broker-dealer with regard to selling the products, and (f) provide for employment contracts in writing satisfactory to the national bank for personnel who are employees of both the national bank and the broker-dealer.

The Advisory Letter reflects most of the Interagency Statement's requirements regarding items that should be addressed in the written

132. Interagency Statement, supra note 125, at 3-628.1.
133. Id.
134. Id. at 3-628.1-.2.
agreement with the broker-dealer. Additionally, the Advisory Letter requires the written agreement to require the broker-dealer to forward customer complaints to the national bank as well as the appropriate state insurance authorities. In connection with the preceding requirement, the Advisory Letter recommends that national banks maintain a process to assess and address customer complaints and to resolve compliance issues. National banks appear to have flexibility in setting up an appropriate complaint system. However, national banks clearly should ensure that management receives complaint information so that corrective measures can be implemented and that the complaint system which a national bank puts in place must be capable of monitoring compliance with the national bank's policies, applicable federal and state laws and the OCC's guidance. The Advisory Letter also requires management to develop policies on the use of confidential customer information and implement appropriate internal safeguards to protect such information. National banks should specifically address customer complaint and confidential information issues with the broker-dealer to ensure such issues are appropriately handled.

b. Policies and Procedures

Under the Interagency Statement, a national bank should adopt a written statement addressing any risks associated with selling the products pursuant to the arrangement the national bank has put in place. This statement should summarize the policies and procedures and outline the arrangement's features and address the broker-dealer's activities and the national bank's procedures for monitoring the broker-dealer's compliance with the Interagency Statement. The scope and detail of the written statement will depend on the national bank's involvement in selling the products. For example, a national bank selling such products directly should address how it will meet and maintain licensing and registration requirements. On the other hand, a national bank that has entered an arrangement with a broker-dealer to sell such products should address that the broker-dealer will meet and maintain licensing and registration requirements and set forth procedures that the national bank will follow in order to periodically review the broker-dealer's licensing and registration records to ensure such requirements are being met. Additionally,

135. OCC Advisory Letter No. 96-8, supra note 130, at 35,760.
136. Id. at 35,758-59.
137. Id.
138. Id. at 35,759.
139. Interagency Statement, supra note 125, at 3-628.1.
140. Id.
the national bank's board of directors should adopt and periodically review the written statement.\textsuperscript{141}

The national bank's policies and procedures set forth in its written statement should include: (a) procedures for ensuring compliance with all applicable laws and regulations, including the Interagency Statement, (b) the individuals responsible for supervising each activity set forth in the policies and procedures, (c) requirements governing the selection and review of product types sold or recommended, (d) procedures for using information regarding the national bank's customers in connection with the program, (e) responsibilities of personnel authorized to sell the products and others who may have contact with retail customers regarding the program, (f) acceptable and unacceptable referral activities, and (g) training requirements and compensation arrangements.\textsuperscript{142}

Compliance procedures under the Interagency Statement "should identify any potential conflicts of interest" and how those conflicts should be addressed.\textsuperscript{143} The procedures should also provide a monitoring system for customer complaints and the resolution of such complaints, verify that the broker-dealer is conducting sales of the products consistently with applicable written agreements, and be incorporated into the national bank's audit program.\textsuperscript{144} Compliance personnel may determine the scope and frequency of the reviews and periodically report the results to the board of directors or a designated board committee.\textsuperscript{145}

As with the Interagency Statement, the depth of the national bank's practices and policies regarding insurance and annuities sales depends upon the national bank's involvement and the complexity of the products offered. To prevent anti-tying violations, national banks should include provisions in their policies and procedures regarding the sale of insurance and annuities.\textsuperscript{146} National bank management maintains first responsibility for ensuring that a national bank's insurance and annuities sales are conducted safely and soundly according to applicable law.\textsuperscript{147} Active oversight of senior management,

\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 3-628.4. Regulations exist regarding restrictions on a national bank's use, as a fiduciary, of its brokerage services or other entity's services with which it has a conflict of interest. 12 C.F.R. § 9.12 (1996).
\textsuperscript{144} Interagency Statement, supra note 125, at 3-628.4-.5
\textsuperscript{145} Id. at 3-628.5.
\textsuperscript{146} OCC Advisory Letter No. 96-8, supra note 130, at 35,755. This Article does not address the anti-tying restrictions placed on national banks, except to point out that national banks may not tie credit availability to their customers' purchase of insurance, annuities or securities offered for sale by national banks or their affiliates. 12 U.S.C. § 1972 (1994).
\textsuperscript{147} OCC Advisory Letter No. 96-8, supra note 130, at 35,757.
competent personnel and internal controls which identify, monitor and control significant aspects of the insurance and annuities sales all demonstrate sound management practices.\textsuperscript{148} While national banks should implement such practices, the written agreement in a national bank's arrangement with a broker-dealer need only address the national bank's ability to monitor the broker-dealer's activities and to take necessary action to ensure the broker-dealer's compliance the national bank's policies and procedures.

The Advisory Letter does place more emphasis than the Interagency Statement on national banks ensuring the quality of the insurance and annuities that national banks sell. The Interagency Statement basically requires national banks to set forth criteria governing the selection and review of each type of non-deposit product sold or recommended in their policies and procedures.\textsuperscript{149} Whereas, the Advisory Letter specifically states that the company issuing the insurance and annuities sold by national banks should be in good standing and maintain the licenses required to operate as an insurance company.\textsuperscript{150} The Advisory Letter also requires national banks to periodically evaluate the company's rating by nationally recognized rating services, other historical performance information and current financial and managerial strength, complaints filed against the company and any criminal judgements against the business or its senior management, the products available from various companies, the pricing offered on the products and similar products, the sales support provided by the company and any information regarding first hand experience of other national banks with the company's products.\textsuperscript{151}

C. DISCLOSURES AND ADVERTISING

The Interagency Statement sets forth various requirements to ensure that national bank customers are not confused regarding the FDIC-insured status of the non-deposit investment products. The sale of non-deposit investment products "should be conducted in a physical location distinct from the area where retail deposits are taken" to avoid the impression that the products are FDIC-insured or the national bank's obligations.\textsuperscript{152} Signs or other appropriate means should be used to distinguish the sales area from the deposit area and a heightened responsibility exists to ensure the national bank takes appropriate measures to minimize customer confusion where physical

\textsuperscript{148} Id.
\textsuperscript{149} Interagency Statement, supra note 125, at 3.628.1.
\textsuperscript{150} OCC Advisory Letter No. 96-8, supra note 130, at 35,757-58.
\textsuperscript{151} Id.
\textsuperscript{152} Interagency Statement, supra note 125, at 3-628.3.
considerations prevent sales of the products from being conducted in a
distinct area.\textsuperscript{153}

Tellers and other employees may not, even if unsolicited, make
recommendations regarding the products, sell the products or qualify
customers as eligible to purchase the products while in the deposit
area.\textsuperscript{154} However, tellers and other employees not authorized to sell
the products may refer customers to designated individuals trained to
assist such customers.\textsuperscript{155} If the products are insured by an entity
other than the FDIC, clear and accurate disclosures of such coverage
should be made which do not suggest that the insurance is the same or
similar to FDIC insurance.\textsuperscript{156} Additionally, the products should not
contain the same name as the national bank's and, if a product's name
is similar to the national bank's name, the national bank should mini-
mize any customer confusion regarding the FDIC-insured status and
ensure that the product's issuer has complied with the Securities and
Exchange Commission's requirements regarding the use of similar
names.\textsuperscript{157}

The Interagency Statement also sets forth specific disclosure re-
quirements for the sale of the non-deposit investment products in ad-
dition to disclosures required by other laws and regulations, such as
those required by the Securities and Exchange Commission.\textsuperscript{158} The
conspicuous, clear and concise disclosures should specify that the
products are not FDIC-insured, are not deposits or obligations of or
guaranteed by the national bank, and are subject to risk, including
potential loss of the principal amount invested.\textsuperscript{159} Such disclosures
should be provided orally during all sales presentations or when any
advice regarding the products is provided, and "orally and in writing
prior to or at the time" an account to purchase the products is
opened.\textsuperscript{160} A signed statement by the customer acknowledging receipt
and understanding of the disclosures should be obtained when an ac-
count is opened.\textsuperscript{161}

Confirmation and product account statements should contain the
disclosures if they also contain the national bank's name or logo.
However, a broker-dealer would not need to provide the disclosures on

\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Please note that various state laws regarding disclosures and advertising may
also apply. This Article does not attempt to address all applicable disclosure require-
ments regarding the sale of non-deposit investment products, insurance and annuities.
\textsuperscript{159} Interagency Statement, \textit{supra} note 125, at 3.628.2.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
product confirmations and product account statements that contain the national bank's name incidentally if a valid business purpose exists.162 Neither the Interagency Statement nor the Joint Interpretation gives examples of or defines situations which would constitute valid business purposes. In arrangements between the national bank and a broker-dealer, promotional materials should not suggest that the national bank itself is the seller of the products.163

The Joint Interpretation explains that disclosure requirements do not apply in “radio broadcasts of thirty seconds or less,” on “signs . . . used only as location indicators” and on electronic signs such as electronic billboard-type signs and time and temperature signs, but not including “television, on-line services or ATM's.”164 Additionally, abbreviated disclosures may be used in visual media and on ATM's, billboards, signs, posters and written promotional materials such as brochures.165 Abbreviated disclosures must be boxed, boldfaced and conspicuous and contain the following statements: (a) not FDIC-Insured, (b) no bank guarantee, and (c) may lose value.166

The Advisory Letter does not address customer disclosures and advertising in quite the detail as does the Interagency Statement. Under the Advisory Letter, a national bank should also minimize customer confusion regarding the FDIC-insured status of an insurance product when physical considerations prevent sales of the products from being conducted in a distinct area from the deposit area.167 Additionally, national banks should also disclose to customers and display on conspicuous signage that insurance products sold by or through the national bank are not FDIC-insured, are not deposits or obligations of or guaranteed by the national bank, and are subject to risk, including potential loss of the principal amount invested.168

Unlike the Interagency Statement, disclosures are required during any customer contact unless the national bank affirmatively determines that such disclosures in relation to specific products would not reasonably benefit or might confuse customers. Advertising of available insurance and annuities should not misrepresent the nature, terms or conditions of the products or the financial condition of any party related to the products.169 Advertising also should identify that the company underwriting the insurance or annuities is not the na-

162. Joint Interpretation, supra note 126, at 3-628.6.
163. Interagency Statement, supra note 125, at 3.628.3.
164. Joint Interpretation, supra note 126, at 3.628.6 & n.1.
165. Id at 3.628.6.
166. Id.
167. OCC Advisory Letter No. 96-8, supra note 130, at 35,760-61.
168. Id. at 35,761.
169. Id. at 35,769.
tional bank and clarify that the insurance and annuities products are not guaranteed by the bank and are not FDIC-insured. Such clarification can occur through disclosures, prominent and distinct signage and promotional materials and separate business cards and by avoiding the use of words usually associated with FDIC-insured products, such as "deposit" and "account."

d. Employee Training

National banks should provide employee training on an ongoing basis with periodic updates, either directly or by ensuring that the broker-dealer provides adequate training. If the broker-dealer provides training, the national bank should address training specifics in written agreements with the broker-dealer. Training of employees authorized to sell or provide advice regarding the products should be equivalent to training required for individuals qualified to sell securities as registered representatives, including sales methods and thorough education regarding the available products, applicable restrictions and customer-protection requirements. Background checks of such employees should also include disciplinary actions of other investment-industry regulators. Supervisory employees should also receive appropriate supervisory training. National bank employees with direct customer contact should receive basic training regarding the national bank's sales activities and limits placed on employees not authorized to sell the products.

The Advisory Letter recommends timely and regularly scheduled training but does not set forth specific requirements other than providing that national banks should clearly define the responsibilities of employees authorized to sell insurance or annuities and the scope of a broker-dealer's activity, verify employees are licensed and in good standing under applicable state and federal law and whether such employees have been subject to disciplinary action and limit the activities of employees not authorized to sell insurance or annuities only to directing customers to authorized employees. Employee responsibilities should include not engaging in high pressure sales tactics, not selling duplicative or unnecessary insurance and annuities products

170. Id.
171. Id.
172. Interagency Statement, supra note 125, at 3-628.4.
173. Id.
174. Id.
175. Id.
176. Id.
177. OCC Advisory Letter No. 96-8, supra note 130, at 8-9.
and not recommending insurance and annuities products based on commissions rather than the product’s benefits.178

e. Employee Compensation

National banks should strictly adhere to the compensation requirements set forth in the Interagency Statement. Employees not authorized to sell the products who refer customers to employees authorized to sell the products may receive a one-time nominal fee for each referral, but such fees cannot depend on whether the referral results in a transaction.179 Employees authorized to sell the products “may receive incentive compensation, such as commissions, for transactions entered into by customers.”180 However, such compensation may not be structured “so as to result in unsuitable recommendations or sales being made to customers.”181 Additionally, compliance and audit personnel should not receive incentive compensation directly related to the results of product sales.182

The Advisory Letter also states that insurance and annuities sales should not be driven by commission, but otherwise does not address employee compensation.183

f. Additional Advisory Letter Issues

The Advisory Letter also discusses the applicability of state insurance laws to national banks.184 The OCC explained that state laws pertaining to insurance and annuities sales generally will apply to national banks unless such laws prevent or significantly impair a national bank’s ability to exercise its powers to sell insurance and annuities.185 The OCC expects to address state law applicability to national bank insurance and annuities sales on a case-by-case basis because the variety of state laws which could apply would require a factual analysis of each such law’s impact on national bank operations and a legal analysis.186

However, the OCC anticipates that state laws which would not be preempted include generally applicable, nondiscriminatory requirements such as licensing requirements which establish character, experience, and educational qualifications, testing and continuing

178. Id. at 9.
179. Interagency Statement, supra note 125, at 3-628.4.
180. Id.
181. Id.
182. Id.
183. OCC Advisory Letter No. 96-8, supra note 130, at 35,758.
184. Id. at 35,756.
185. Id.
186. Id. at 35,757 n.8.
education mandates, licensing requirements regarding the types of insurance that apply to agents, and market conduct and unfair trade practices standards which prohibit unfair and deceptive statements, falsification of financial statements, defamation, boycotting, coercion, intimidation, unfair discrimination, improper rebating, improper disclosure of confidential information and engaging in inequitable claims and settlement practices.187

4. NASD PROPOSED RULES REGARDING SECURITIES SALES CONDUCTED ON NATIONAL BANK PREMISES

In addition to the Interagency Statement applying to the sale of securities by national banks, several proposed rules may soon apply to the recommendation or sale of securities by national bank employees or on national bank premises.

The OCC issued a proposed rule that establishes testing and qualification requirements for bank employees who recommend or sell securities to or purchase securities for retail customers.188 The proposed rule would require national bank employees who recommend or sell securities (and their supervisors) to pass the National Association of Securities Dealers Inc. ("NASD") Series 6 and Series 7 examinations, and to register with the NASD.189 Such employees will also be required to participate in certain continuing education programs.190 National banks would be required to register with the OCC as a "sponsoring bank" unless the bank has entered into an arrangement with a third party broker-dealer, and provide appropriate training to employees who recommend or sell securities to or purchase securities for retail customers.191

The NASD has also proposed rules regarding securities activities conducted by broker-dealers on the premises of national banks where retail deposits are accepted.192 The rules would not apply to a broker-dealer operating on another floor or in another part of the national bank building if the entrance to the broker-dealer's office is through the national bank building's lobby and not through the national bank's retail facility.193

187. Id. at 35,757.
189. Id. at 68,825, 68,832.
190. Id. at 68,826, 68,834-35.
191. Id. at 68,827.
193. Id. at 11,916.
The proposed rules require that, wherever possible, the brokerage services must be conducted in a location distinct from where deposits are accepted. Some areas, such as a kiosk or supermarket branch, may be unacceptable settings for securities services unless the broker-dealer exercises “exceptional caution” and implements specific operational controls to prevent consumer confusion and distinguish the broker-dealer's operations from the national bank's operations.

The proposed rules would require that the written agreement between a national bank and a broker-dealer provide that: (a) supervisory personnel and the SEC and NASD have access to the national bank facilities to inspect books and records of the broker-dealer; (b) unregistered bank employees will not receive compensation based upon whether referrals result in transactions; and (c) the broker-dealer will notify the national bank if any dual employee is terminated for cause.

The proposed rules conflict with the Interagency Statement by prohibiting the broker-dealer from providing compensation to unregistered national bank employees in connection with locating, introducing, or referring customers. The Interagency Statement allows a nominal referral fee if such fee is not based on whether the referral results in a transaction. Although the proposed rules do not address whether the national bank can compensate its employees for referrals to the broker-dealer, comments to the proposed rules suggest that the national bank itself would be prohibited from providing such compensation.

Upon opening a securities account, the broker-dealer must disclose orally and in writing that the securities products are not FDIC-insured, are not deposits or obligations of or guaranteed by the national bank, and are subject to risk, including potential loss of the principal amount invested. Also in conflict with the Interagency Statement is the requirement regarding written acknowledgments. The broker-dealer is not required to obtain a written acknowledgment of the disclosures from the customer, but must simply make a reasonable effort to do so.

The proposed rules prohibit the broker-dealer from using confidential financial information provided by the national bank unless a

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194. Id. at 11,914.
195. Id. at 11,916.
196. Id. at 11,914.
197. Id.
198. Id. at 11,925.
199. Id. at 11,914.
200. Id.
customer has given prior approval.201 "Confidential financial information" does not include customers' names, addresses, and telephone numbers, unless a customer specifies otherwise, and information that can be obtained from an unaffiliated credit bureau.202 However, the broker-dealer must verify that the customer has authorized release of the information either by obtaining a copy of the written release or by obtaining approval directly from the customer.203

As with the Interagency Statement, communications regarding the securities transactions must clearly indicate that the broker-dealer is providing the securities services.204 Promotional materials issued by the broker-dealer relating exclusively to the securities services may reference the national bank non-prominently for locational identification purposes.205 Promotional materials issued jointly by the broker-dealer and the national bank must clearly distinguish the national bank's products and services from those of the broker-dealer.206

V. CONCLUSION

National bank powers have expanded greatly in the areas of insurance, annuities and securities sales, as well as other related areas, due in great part to the OCC's aggressiveness and the Supreme Court's willingness to support the OCC's actions. Although Congress has attempted to compromise between the banking industry and the insurance and securities industries, proposed legislation would succeed in somewhat limiting the recent expansion of national bank powers. It is really unclear to what extent Congress will manage to limit such powers given the recent trends allowing national banks to expand their activities and the standstill Congress has experienced in the past. The banking industry should also expect a fight regarding the new operating subsidiary rule.

While the extent of national bank powers to sell insurance, annuities and securities are being debated and tested, national banks possess alternatives to testing the boundaries of their powers. Selling insurance, annuities and securities through a third party on national bank premises has proven a viable option for national banks that cannot cost-effectively establish or test the boundaries of their own programs directly. It also provides national banks an opportunity to

201. Id.
202. Id. at 11,917.
203. Id. at 11,914.
204. Id.
205. Id. at 11,915.
206. Id.
obtain the expertise required to compete in the insurance, annuities and insurance markets while maintaining some limitations on their investments and liabilities. National banks will benefit from such expertise when more banks are adequately equipped to test the boundaries.

Although the trend has been to expand national bank powers, no shortage of regulatory involvement exists. Federal regulatory agencies have responded to the recent trends with rules and regulations designed to protect consumers and maintain the safety and soundness of national banks. While most of those rules and regulations effectively coexist, national banks need to be aware that some may conflict. State regulatory agencies also will most certainly respond with rules and regulations of their own. One of the banking industry's next battles may very well be with states that testing their own authority regarding acceptable regulation affecting national banks.