



Office of the Comptroller of the Currency

Interpretive Letter #753 - Contents

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Letter Approving First Union National Banks Notification of Intent to Establish Operating Subsidiaries to Engage in Insurance Activities

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This letter is in response to your operating subsidiary notification dated April 25, 1996. The notification was filed on behalf of eight national bank subsidiaries (collectively, the "Banks" and, individually, the "Bank") of First Union Corporation, Charlotte, North Carolina. Each Bank proposes to establish an operating subsidiary (collectively, the "Subsidiaries" and, individually, the "Subsidiary") to engage in certain general insurance agency activities pursuant to 12 U.S.C. § 92 and to act as agent for the sale of fixed and variable annuities pursuant to 12 U.S.C. § 24(Seventh). For the reasons discussed below, and based upon the analysis and conclusions set forth herein, the Office of the Comptroller of the Currency (OCC) hereby approves the Banks' notification.

PROPOSAL

The notification was filed on behalf of the First Union National Banks of North Carolina, South Carolina, Georgia, Florida, Tennessee, Virginia, Maryland, and First Union National Bank, Pennsylvania, a multi-state bank with branches in Pennsylvania, New Jersey and New York. **NOTE:** The OCC separately approved the operating subsidiary notification of the First Union National Bank, formerly of Elkton, Maryland, now of Avondale, Pennsylvania, by letter dated June 27, 1996. That subsidiary may engage in insurance and annuity agency sales activities to the extent permissible under 12 U.S.C. § 92 and 12 U.S.C. § 24(Seventh), respectively, as discussed herein.) The Banks intend to establish operating subsidiaries in each of the states where they are located. The Banks intend and expect that the Subsidiaries, and/or the Subsidiaries' employees engaged in selling insurance, will be appropriately licensed under applicable state law. The Subsidiaries will engage in general insurance agency activities pursuant to section 92 for all kinds of insurance, including life, health, property and casualty insurance. The Banks have not at this time requested authority for the Subsidiaries to act as agent for the sale of title insurance. The Subsidiaries also may sell as agent fixed and variable annuities pursuant to 12 U.S.C. § 24(Seventh).

Each Subsidiary engaged in general insurance agency activities pursuant to section 92 will be located in a place of less than 5,000 inhabitants where the parent Bank has a branch. Licenses obtained by a Subsidiary will list the "place of 5,000" as the agency's business location, and appropriate licensing documentation will be maintained at that location. All agents will be managed through the agency, and the "place of 5000" will be their business location for licensing purposes. **NOTE:** Some of these licensed agents also may be employees of the parent Bank or its affiliates. Agents also will be appropriately licensed to sell annuities.) Commissions from the various insurance companies whose products the agencies sell will be transmitted to the Subsidiary's location in the "place of 5,000," and paid to the Subsidiary's licensed sales staff. The agency also generally will be responsible for the appropriate processing of insurance applications, delivery of insurance policies, and collection of premiums, where consistent with the insurance companies' procedures for nonbank affiliated agents. Business records of the insurance agency, including copies of customer application and policy information, and licensing, customer complaint, and other compliance records, will be available at the "place of 5,000" location.

1>(NOTE: Records may be maintained and available at the agency in electronic form while the hardcopies of original documents are kept in an off-site storage facility.)

Contacts and meetings with customers may occur both inside and outside the “place of 5,000,” and each agency may use mailings, telemarketing, distribution of brochures, leaflets and other literature, and referrals of customers from other Bank branches, to reach customers outside the “place of 5,000.” Affiliated or unaffiliated third parties may be used to assist these sales activities, for example, by providing advertising support, direct mail marketing services, telemarketing services, or other types of “back office” support, subject to appropriate contractual relationships and oversight by the bank agency. In all cases, these solicitation and sales activities will be consistent with what would be generally allowed under state law for a licensed insurance agency or licensed agent, not affiliated with a bank, with its offices in the “place of 5,000.”

The Banks represent that the Subsidiaries will conduct their insurance and annuity sales activities in compliance with applicable state laws, the *Interagency Statement on Retail Sales of Nondeposit Investment Products* (Feb. 15, 1994), where applicable, and other applicable national banking laws, rulings, and regulations. The Banks will provide the OCC with the names and addresses of the Subsidiaries as soon as they are chartered.

ANALYSIS

Because of the scope of activities described in the Banks’ notification, it is appropriate to provide a full analysis of whether the Banks’ insurance solicitation and sales activities are permissible under 12 U.S.C. § 92. (NOTE: In addition to national banks’ authority to engage in insurance activities pursuant to section 92, the OCC previously has permitted national banks to engage in the sale of credit-related types of insurance as an activity incidental to banking under the authority of 12 U.S.C. § 24(Seventh) without any geographic limitations. See e.g., Interpretive Letter No. 671 (July 10, 1995), *reprinted in* [1994-95 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,619; Interpretive Letter No. 283 (Mar. 16, 1984), *reprinted in* [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447; see also 12 C.F.R. Part 2 (credit life insurance). A federal court of appeals has upheld national banks’ ability to sell credit-related life insurance as agent. See *IBAA v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).) Accordingly, Part I of this section discusses section 92 and its legislative history. Parts II and III provide context for construing the scope of solicitation and sales activity permissible under section 92. Part II examines how banks operated in 1916, when section 92 was enacted. Part III examines how insurance agents operated in 1916. Part IV then discusses the OCC’s interpretive ruling (12 C.F.R. § 7.1001) on this issue and relevant case law. Part V analyzes the application of section 92 in the modern context based on the historical banking and insurance operations and provides guidance for applying section 92 today. This letter does not address and is not intended to express any opinion on any state law preemption issues. (NOTE: The application of state law would need to comply with recognized preemption standards. See generally

Barnett Bank of Marion County, N.A. v. Nelson, 134 L. Ed. 2d 237 (1996), and the cases cited therein. See also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *MacDonald v. Mansanto Co.*, 27 F.3d 1021 (5th Cir. 1994).

Separately, under the authority of 12 U.S.C. § 24(Seventh), the OCC previously has approved national banks engaging in the sale of fixed and variable annuities. **NOTE:** See e.g., Interpretive Letter No. 499 (Feb. 12, 1990), reprinted in [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090; Interpretive Letter No. 331 (Apr. 4, 1985), reprinted in [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501.) Section 24(Seventh) provides that national banks have the power “[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking.” The Supreme Court has upheld the OCC’s position that national banks and their operating subsidiaries may sell annuities, as agent, as an activity incidental to banking under 12 U.S.C. § 24(Seventh). **NOTE:** *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 130 L. Ed. 2d 740 (1995) (“VALIC”). In VALIC, the Court reviewed the OCC’s decision to permit a national bank operating subsidiary to act as agent in the sale of annuities. The Court expressly held that “the ‘business of banking’ is not limited to the enumerated powers in § 24(Seventh) and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated.” **NOTE:** *Id.* at 749, n.2.) The Court found the OCC reasonably concluded that selling annuities qualifies as part of, or incidental to, the business of banking. **NOTE:** See *id.* at 749.) The Court also found that for these purposes the OCC properly classified annuities by their functional characteristics as financial investment instruments and not as “insurance.” **NOTE:** See *id.* at 750-51; see also *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959) (variable annuities are not contracts of insurance.) Thus, the Court concluded that the OCC’s determination that section 92 was not implicated because annuities were not insurance within the meaning of section 92 was a reasonable one. **NOTE:** See *id.* at 752.)

In contrast to section 92, section 24(Seventh) contains no geographic limitation on the location of the bank or branch selling annuities. Thus the “place of 5,000” component of national banks’ insurance authority under section 92 does not apply to annuities sales conducted by national banks under the authority of section 24(Seventh). Consistent with previous OCC approvals and the Supreme Court’s conclusions in VALIC, the Banks’ request to engage in annuities activities does not require further discussion. **NOTE:** The Subsidiaries are subject to, and must be operated within the constraints of all national banking laws, rulings, and regulations. In particular, the Banks and the Subsidiaries should be mindful of the *Interagency Statement on Retail Sales of Nondeposit Investment Products* (Feb. 15, 1994), which provides guidance to banks and their operating subsidiaries on the sale of retail nondeposit investment products. The OCC expects the Banks and the Subsidiaries to comply with the *Interagency Statement* as well as applicable national banking laws,

rulings, and regulations.)

I. 12 U.S.C. § 92

A. Statutory Language

Section 92 provides,

In addition to the powers now vested by law in national banking associations . . . any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent. . . .

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 customer or the methodology of sale. Any such restraints were expressly delegated by Congress to the OCC. NOTE: See *NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 632 (7th Cir. 1995).

Congress, however, clearly knew how to impose a geographic limitation on activities if that was the desired result. Section 92, in addition to the insurance powers, originally permitted banks to “act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located.” NOTE: Act of Sept. 7, 1916, 39 Stat. 753. Congress subsequently deleted this loan brokerage provision. See 96 Stat. 1511 (Oct. 15, 1982). Banks could provide an important service by placing real estate and farm loans in their respective communities. NOTE: See *Broadening the Powers of National Banks*, 93 Bankers Mag. 9 (Jul. 1916) (small town bankers have the knowledge of men and property that enables them to transact real estate loans with the highest degree of safety). One court recently pointed to the geographic restriction in the loan brokerage provision to support the contention that Congress understood how to place geographic restrictions with regard to customers’ locations. NOTE: See *NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 630 (7th Cir. 1995). Yet Congress, unlike when it authorized the loan brokerage activities, did not place any geographic restrictions on the location of customers or on the location of a bank’s solicitation and sales activities when

it authorized national bank insurance agencies under section 92.

As discussed below, the absence of such a restriction is particularly telling given the geographic flexibility with which insurance agents operated in 1916, when section 92 was enacted. Congress could have, and knew how to, require bank insurance agencies to operate in a more confined fashion than other insurance agencies, but it did not do so. Accordingly, the fundamental plain meaning rule of statutory construction compels the conclusion that there are no special limitations on the customers to whom a national bank may sell insurance or the resources and methods employed in that activity. NOTE: See *National Ass'n. of Life Underwriters v. Clarke*, 736 F. Supp. 1162, 1168 (D.D.C. 1990) (“NALU”), *rev'd on other grounds sub nom. Independent Ins. Agents v. Clarke*, 955 F.2d 731 (D.C. Cir.), *reh'g en banc denied*, 965 F.2d 1077 (D.C. Cir. 1992), *rev'd and remanded sub nom. United States Nat'l Bank v. Independent Ins. Agents*, 124 L. Ed.2d 402 (U.S. 1993), *aff'd on remand, Independent Ins. Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). See generally *Garcia v. U.S.*, 469 U.S. 70, 75 (1984) (“When we find the terms of a statute unambiguous, judicial inquiry is complete, except in ‘rare and exceptional circumstances.’”); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1977) (“When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning.”); *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 133 L. Ed. 2d 635, 647 (1996) (Scalia, J., concurring) (“The law is what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.”).

B. Legislative History

The only substantive legislative history on the grant of insurance powers in section 92 is a June 8, 1916 letter from Comptroller of the Currency John Skelton Williams to Senator Robert L. Owen of the Senate Banking and Currency Committee. NOTE: See *NALU*, 736 F. Supp. at 1169 (Comptroller Williams' letter is the only substantive legislative history on section 92's insurance provision). The letter is included in the Congressional Record at 53 Cong. Rec. 11001. In the letter, Comptroller Williams expressed concern about the difficulty of running a profitable bank in a small town and stated,

For some time I have been giving careful consideration to the question as to how the powers of . . . small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks and trust companies which are sometimes authorized under the law to do a class of business not strictly that of commercial banking.

Thus, Comptroller Williams' purpose in recommending section 92 was to enhance the profitability of certain national banks. Comptroller Williams' letter went on to explain why he did not want banks outside of small towns to have insurance powers:

It seems desirable from the standpoint of public policy and banking

efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to make a fair return to their shareholders, while the new business is not likely to assume such proportions as to distract the officers of the bank from the principal business of banking. Furthermore, in many small places the amount of insurance policies written . . . is not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others.

I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where the legitimate business of banking offers ample scope for the energies of trained and expert bankers.

It could be argued that the Comptroller's letter envisioned limited sales of insurance by national banks in a manner that did not compete with other insurance agents. NOTE: The lower court which was reversed in the case of *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995), relied on this legislative history to conclude that the power of national banks under section 92 was confined to the "place of 5,000." See *NBD Bank, N.A. v. Bennett*, 874 F. Supp. 927 (S.D. Ind. 1994) (*Order on a Motion for Summary Judgement*). This reading has been rejected, however, by the highest courts to have considered the issue. NOTE: See *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995) ("*Bennett*"); *Independent Ins. Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993) ("*USNB Oregon*").

Courts generally have given Comptroller Williams' letter little weight in considering the geographic scope of section 92 because, as an "isolated remark" it is only entitled to "limited deference;" NOTE: *USNB Oregon*, 997 F.2d at 961. because technical innovations and economic changes have changed the effect of section 92, regardless of the original intentions of its drafters; NOTE: *USNB Oregon*, 997 F.2d at 961; *Bennett*, 67 F.3d at 633; *NALU*, 736 F. Supp. at 1170. and because Comptroller Williams' remarks about confining the insurance powers to small town banks were predictions about the likely effects of section 92 rather than explanations of its terms. NOTE: *NALU*, 736 F. Supp. at 1170. Where courts have relied on Comptroller Williams' letter, they generally have relied on the letter as evidence that banks did not have general insurance powers apart from section 92. NOTE: See *Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010, 1013 (5th Cir. 1968); *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 155 (2nd. Cir. 1992).

This legislative history is entirely consistent with the Congressional purpose evident from the literal language of section 92. Banks soliciting and selling insurance under the authority of section 92 were subject to no unique disabilities that distinguished them

from other insurance agencies. To the contrary, Congress was urged to enact section 92 so that certain banks could be more profitable. Handicapping bank insurance agencies relative to other insurance agencies would have been fundamentally inconsistent with that goal.

III. Overview of How Insurance Agents Sold Insurance in 1916

As with the operations of banks generally, the way in which insurance agents operated in 1916 provides a compelling insight on the scope of what Congress was permitting when it authorized national banks to sell insurance pursuant to section 92. The clear picture that emerges from this analysis is that nonbank insurance agents sought business through all effective means available to them. Congress did nothing to -- and evidenced no intent to -- prevent national banks from operating in the same way.

By 1916, **NOTE:** This discussion relies mostly on materials from the late 1800's to approximately 1925 to establish a picture of the insurance environment of 1916. To provide a better understanding of the 1916 environment, a brief historical summary is included. Although some materials refer to the year 1916, mostly a composite picture is presented.) life insurance marketing in the United States had undergone many changes since the early 1800's. Before the 1840's, life insurance men engaged in a passive mode of selling and merely waited for business to walk in the door or arrive through the mail. **NOTE:** J. Owen Stalson, *Marketing Life Insurance* 156 (1969). Nothing was done to attract business. Thereafter, modest life insurance marketing began with the use of announcement advertising and all business was transacted by mail or in person at the head office of a company. **NOTE:** *Id.* at 574.)

The original agents of life companies were lawyers, bankers, **NOTE:** “Banks or bank employees have been agents for life companies for generations, selling the usual forms of policies and getting the usual commissions.” *Id.* at 643.) or others who continued to earn their major income from other professional or business services performed for their clients. **NOTE:** *Id.* In 1842, the traditional American “life” company was a large trust company with a life department and a huge capital stock. *Id.* at 110. Thereafter came the development of mutual insurance companies and the idea of insurance at cost. *Id.* at 103-04. With the development of the mutuals began the modern day aggressive selling methods of insurance agents. *Id.*) Agents were expected to operate from their usual place of business -- the law office, bank or store. **NOTE:** *Id.* at 193.) The companies would grant most agents a small allowance for local advertising. **NOTE:** *Id.* at 193.) During the 1840's the birth of personal solicitation occurred and so began the practice of agents calling at the home or business of a prospective insurance buyer. **NOTE:** *Id.* at 156.) Since then, face-to-face selling of life insurance has remained the most important marketing method and the life insurance agent serves as the pivotal factor in the life insurance marketing organization. **NOTE:** *Id.* at 353.)

A. Organizational Structure - The General Agency System

By 1865, the “general agency system” had developed for organizing and managing insurance salesmen. The system lent itself to the development of national selling organizations. **NOTE:** *Id.* at 575.) Although changes in responsibilities and in terminology have occurred through the years, the general framework of the agency system has remained the same. **NOTE:** The agency system was and is the predominant method of organization for life insurance sales, however, in the early 1900's another organizational system, the “branch office system,” came into being. *Id.* at 599. The branch office system abandoned the general agency method and installed salaried managers from the company in the local offices. Thus the company would manage the field directly, making contracts with sub-agents and having salaried cashiers or managers in charge of various offices. See Pacific Mutual Life Ins. Co. of Calif., “Efficiency” *Pacific Mutual School for Salesmen, Course of Instruction* 101 (1924). Typically, an insurance company has an agency department at the company's home office. **NOTE:** In the early 1900's this often was one or two people. The majority of the sales efforts took place in the field. Stalson, *supra* at 596-97. In more recent years, personnel in the home office agency department has grown substantially. *Id.* The backbone of the system, however, are the “general agents” who respectively are in charge of some portion of the whole territory served by the insurance company. **NOTE:** *Id.* at 469. For the company, the desirability of a wide distribution of risks encouraged operations over the greatest extent of territory, including a large number of states. See Pacific Mutual Life Ins. Co. of Calif., “Efficiency” *Pacific Mutual School for Salesmen, supra* at 101.) The general agents hire the “soliciting agents” who actually solicit and sell insurance to customers.

Generally, many agents were assigned to a single large territory, such as a city, county, state, or group of states. **NOTE:** An insurance territory might encompass one state or several states, depending on state licensing requirements. As early as the 1840's life companies expanded their operations into many states, not only larger cities, but also into small isolated villages. There were vast differences in compensation plans and expense allowances for agents in small towns versus the larger metropolitan areas. Often part-time agents worked in the rural areas, while full-time agents were necessary in the larger cities. *Id.* at 185-86. The general agents would set up agencies throughout the territory and act as local sales managers. **NOTE:** Stalson, *supra* at 596. From early on out-of-state insurance companies commonly were required to appoint someone in the state who was authorized to accept legal service of summons and complaint. The common practice became to give this authority to the company's principal selling representative, i.e. the general agent, in each state where business was transacted. *Id.* at 379. Thus, state lines often became the boundaries for an agent's selling activities. *Id.* at 380.) By 1916, most insurance companies had contracts with their general agents providing them various compensation arrangements. **NOTE:** Often the general agent had risen from the rank of solicitor and would give up profitable personal production to undertake the career of agency management. *Id.* at 609. Some companies would offer a transition stage

between soliciting agent and general agent with jobs as an assistant to the general agent, having the title of supervisor, assistant manager, production manager, or associate general manager. *Id.* General agents usually received some combination of salary and commission; their profit was based on renewal business rather than the sale of new business. *Id.* at 599-600.)

The general agents recruited, trained, and developed the soliciting agents. Often the company would supply company forms, sales booklets, and certain instructions. A whole movement toward improved selection and training of agents occurred during this time.

NOTE: *Id.* at 607.)

While the home office agency department was interested in these developments, it was the local agency offices that took an active role in making these changes.

The soliciting agent sold insurance to prospective buyers.

NOTE: State licensing requirements applied to individual soliciting agents. *See id.* at 626.)

The company supplied most new agents with a printed course of instruction and they received personal instruction from the general agent or someone appointed to act for him.

NOTE: Insurance companies issued instruction booklets and manuals for managers and agents that contained specific operating rules but the general agent had primary responsibility for handling the agents. *See generally* The Prudential Ins. Co. of America, *Instructions Regarding the Care of Ordinary Policies, Premiums, and Office Details* (Oct. 1914); The Prudential Ins. Co. of America, *Manual of Instructions to Superintendents and Ass't Superintendents, Instructions to Agents* (July 1908); *Manual for Superintendents and Ass't Superintendents of the Metropolitan Life Ins. Co. of N.Y.* (1889).

After 1910, selling life insurance became more than just selling policies and the thrust was to sell insurance for business, tax, estate, and income purposes.¹

NOTE: Stalson, *supra* at 583.)

Insurance agents could provide local, special, or traveling services.

NOTE: *Id.* at 359.)

Local agents frequently served as the company's sole representative in a small community. The local agent also might employ subagents. Special agents apparently engaged in full-time soliciting under the local agent. Traveling agents visited many communities and sometimes assisted the local or special agents.

NOTE: *Id.* at 359.)

B. Industrial Life Insurance Sales

Another aspect of insurance selling in 1916 was the existence of industrial life insurance. Insurance companies distinguished between "ordinary" life insurance and "industrial" life insurance.

NOTE: "Ordinary" life insurance was the traditional form of life insurance. Generally it was available to men of certain occupations, in larger amounts, with annual or semi-annual premiums. *See "Efficiency" Pacific Mutual School for Salesmen, Course of Instruction, supra* at 121. Industrial life insurance began in England in 1854 and subsequently became popular

among some American insurance companies. See Stalson, *supra* at 462-63.)

Industrial life insurance was a marketing development designed to meet the needs and circumstances of working class individuals and to open up insurance opportunities to people who may not have been eligible before.

NOTE: *Id.* at 462. The features of industrial life insurance typically included: (1) available in small units; (2) open to all members of a family; (3) sold by house-to-house, person-to-person soliciting efforts; (4) agents called each week to collect premiums; and (5) issued without a medical examination. *Id.* These were departures from the ordinary life policy.)

Industrial life agents, however, also sold the traditional ordinary life insurance. Because industrial life often required the collection of premium every week,

NOTE: The usual weekly duties of the industrial life agent included three days of collecting premiums and other days spent on securing new business, acting as an underwriter in helping the home office write new risks, and personally seeing all applicants. *Id.* at 472-73.)

the territory for an agent's industrial life business may have been only a few city blocks.

NOTE: In contrast, for ordinary life insurance companies would assign many agents to a single, large territory, such as a city, county, state, or group of states. *Id.* at 469.)

There was no overlap of collection areas between agents.

NOTE: *Id.* at 469. The agent's total amount of weekly premium collection was known as his "debit." This term also was used to describe the agent's territory. *Id.* at 470.)

From an organizational standpoint, an assistant manager supervised, educated, and trained the industrial agent. Each assistant manager had from six to thirteen agents.

NOTE: Ordinary companies might have had one general agent or assistant general agent for thirty to forty agents. *Id.* at 612.)

Several assistant managers were responsible to a superintendent of a district. A district was comprised of a number of debits.

NOTE: *Id.* at 473.)

C. Methods of Selling Insurance

The methods and day-to-day activities of the soliciting agents selling insurance around 1916 were of a wide variety.

NOTE: In introducing a new man to the business in 1904, one general agent from a midwest company wrote: In starting a new agent my plan is to carefully go over the subject of insurance with him, . . . I then furnish him names of the leading policyholders in his community, caution him against the pitfalls he is likely to encounter . . . He is then sent out to solicit. After a week or ten days I visit him by appointment, and spend some time with him as the number of prospects may warrant. While riding from prospect to prospect I will answer, and explain such questions and difficulties as may have arisen in his mind and then after listening to my talk to his several prospects he soon learns the rudiments of the business. I impress on him that I am always ready to come to his aid when needed . . . Many of my agents from time to time send me a list containing the names of five or ten of their best prospects together with a brief explanation of the situation. I then write a personal letter and send them literature. . . . Furnish your agent with all the help you can-- you cannot do too much of it. Watch the papers and you will find many good prospects in their columns. Both marriage license and transfer of real estate lists are

good. Even the obituary record can be watched with profit. All these and many more avenues for fine prospects are open to the wide awake general agent, who in turn furnishes the names to his agents, and in the long run is amply repaid for his trouble. . . .*Id.* at 518.)

To a certain degree a soliciting agent engaged in different selling methods depending on whether the agent worked in the city or in the country.

NOTE: See *600 Ways to Sell Life Ins.* 28 (W. W. Mack ed. 1925) (“small town or country salesman must work differently from the city man”). In 1920 one commentator indicated that in New York City there were as many as 3,000 men devoting their entire time to selling life insurance and at least as many part-time agents. See Forbes Lindsey, *The Day’s Work and Other Matters of More or Less Interest to the Life Insurance Man* 83 (1920). One’s methods also varied depending on whether the agent sold only ordinary life insurance or both ordinary and industrial life. The actual steps involved in selling insurance in 1916 appear similar to those of today, including activities such as prospecting for business, applying for coverage, delivery of the policy, continued servicing and policy review, collecting commissions, and assisting in claims handling. See e.g., Gary Schulte, *Successful Life Insurance Selling* (1995); Terry O’Neill, *The Life Insurance Kit* (1993); *Life and Health Insurance Principles and Practices* (Dearborn R & R Newkirk) (2d ed. 1991).

Agents’ efforts generally were restricted to their own territory.

NOTE: See William Miller, *The Art of Canvassing* 53 (1913).

The layout of a city lent itself to door-to-door selling.

NOTE: The “straight canvass” was one way of soliciting insurance. Agents would work their way through an office building or make a list of substantial business and professional men from a directory and then contact those who seemed likely prospects. See e.g., Forbes Lindsey, *Practical Pointers* 34-35 (1916); *600 Ways to Sell Life Ins.*, *supra* at 59 (making of night calls and straight canvassing).

In the city, it appears the agent relied on walking, the streetcar, and perhaps to some degree the automobile to get around.

NOTE: By 1916 the automobile was gaining in popularity and there are various references implying the general use of the auto. See e.g., *600 Ways to Sell Life Ins.*, *supra* at 31, 37, and 40.

Agents were encouraged to find prospects everywhere-- at the office, the club, the garage, the shop, the express office, and on the street.

NOTE: See *Nat’l Ins. J.* 3 (Apr. 1927); see also Dingman, *supra* at 99 (lodge or church); *600 Ways to Sell Life Ins.*, *supra* at 115, 190 (in city park).

In the country presumably the transportation for reaching prospects included the automobile and the train.

NOTE: See e.g., Miller, *supra* at 67-68 (one idea was to canvass progressively, going from one town or village to the next and the next; not to go randomly to remote parts of your territory); Stalson, *supra* at 626 (agent held up as an example shown to have made 700 sales in his country territory in 1917); *600 Ways to Sell Life Insurance*, *supra* at 31 (while on a trip agent stopped at farmhouse and walked away with an application, a check for the premium, and three references for prospects).

One active agent describing his work in 1886 stated:

During the year I traveled 8,000 miles in all kinds of railroad cars. My mind was all the time on the whirl as to whether I could write another risk. I succeeded in averaging over one new risk per day for each working day

of the year, 313 days, each risk averaging about \$3,333 and each premium about \$110, and in collecting and transmitting the money without clerical aid. This was done in new territory, introducing one of the very best companies. **NOTE:** Stalson, *supra* at 536-37.)

Numerous materials describing canvassing strategies, finding prospects, and organizing work encouraged agents to get out and employ all available methods to find prospects. **NOTE:** See e.g., Dingman, *supra* at 93 (from 2:00 to 4:30 should call on the big businessmen); Miller, *supra* at 53 (the agent should thoroughly familiarize himself with every part of his territory and so arrange his schedule so that every part will be industriously and systematically canvassed). Most calls were made at the home or business of the prospect, not at the agent's office. **NOTE:** See Dingman, *supra* at 93-101; *600 Ways to Sell Life Ins.*, *supra* at 28.) As one commentator noted: "[t]he day of the typical agent is haphazard, if not actually chaotic. He has no regular time for reaching the office or going upon the street." **NOTE:** Lindsey, *The Day's Work*, *supra* at 72.)

Face-to-face contact remained the most effective means of selling within one's territory in 1916. While an agent might check in at the office, mostly agents were out of the office scouring the city or town for prospects. Agents also would travel to other towns looking for business. **NOTE:** See e.g., *600 Ways to Sell Life Ins.*, *supra* at 31, 37, and 67.) In addition to personal solicitation, the insurance agent used various other methods to reach prospective customers and to conduct business. In particular, agents used the mails, the telegraph, and advertising. **NOTE:** See e.g., *600 Ways to Sell Life Ins.*, *supra* at 42-45. Although there was some mention of the telephone in the materials reviewed, it does not appear it was used very much in 1916. See Dingman, *supra* at 95 (use of phone at office of one prospect to call next prospect); *600 Ways to Sell Life Ins.*, *supra* at 231-32 (one method by 1925 was to use the telephone for one hour each day as a sales aid to secure appointments). Use of the mails included sending form letters, **NOTE:** See e.g., Lindsey, *Practical Pointers*, *supra* at 37 (form letter effective in securing prospects provided good judgment is exercised in its use); *600 Ways to Sell Life Ins.*, *supra* at 151-54 (mail solicitation supplemented with the personal touch; home office sends out letters and agent does follow-up). introduction letters, **NOTE:** See e.g., Lindsey, *Practical Pointers*, *supra* at 38 (letter as means of introduction and creating preliminary interest may be effective). or personal letters. **NOTE:** See e.g., *600 Ways to Sell Life Ins.*, *supra* at 151 (direct mail solicitation and canvassing); *7 Nat'l Ins. J.* 8 (June 1927) (agent writes personal letters to new prospect and mails one day before the agent makes his call). Letters often might be sent to home addresses with a follow-up call at the prospect's place of business. **NOTE:** See Lindsey, *Practical Pointers*, *supra* at 37.) Agents also provided prospects with sales booklets, leaflets, circulars, **NOTE:** See e.g.,

600 Ways to Sell Life Ins., *supra* at 37 (circularized twenty professional men of city before making trip to visit).) and other literature through the mails as well as in person. **NOTE:** See e.g., 600 Ways to Sell Life Ins., *supra* at 145-56 (use of “literature-distributing” plan for six weeks, distributing items titled *The Cookbook, The Child, Child Health, Save For Your Old Age*); William Alexander, *The Prosperous Agent* 20 (1921) (essential for the agent to get in touch with his customers). Most companies supplied all the necessary literature to the agents and did not allow circulation of these materials unless supplied or authorized by the home office. See The Prudential Life Ins. Co. of America, *Manual of Instructions to Superintendents and Ass’t. Supt. and Instructions to Agents, supra* at 12; Pacific Mutual Life Ins. Co. of Calif., “Efficiency” *Pacific Mutual School for Salesmen, supra* at 109 (abundance and variety of literature provided); Lindsey, *Practical Pointers, supra* at 51.) One suggested method for use of the telegraph was to send a night collection letter instead of the usual series of collection letters. **NOTE:** See 6 *The Local Agent* 17 (Feb. 1934.) Insurance agents advertised the availability of insurance from early on. **NOTE:** As early as the 1840's, most agents were granted a small allowance for local advertising and were sent a copy of an advertisement that the company had used elsewhere. See Stalson, *supra* at 193; see also *id.* at 268-272 (advertising through the 1850's). In 1923, Phoenix Mutual Life Insurance Company started its program of national advertising. See *id.* at 603.) Advertisements for life insurance appeared in trade papers, newspapers, magazines, office window displays, and streetcar windows. **NOTE:** See e.g., The Insurance Advertising Bureau, *Greater Efficiency in Insurance Advertising* (1913) (discussing various types of advertising); 600 Ways to Sell Life Ins., *supra* at 42-44 (advertising appeared in the *Saturday Evening Post, Collier's, and American*).

General agents functioned as local sales managers. **NOTE:** Stalson, *supra* at 596.) They managed the personnel and activities of the local agency. Insurance applications were reviewed by the agency office before being sent to the home office and policies were sent to the agency office for delivery to the insured. **NOTE:** See The Prudential Life Ins. Co. of America, *Manual of Instructions to Superintendents and Ass’t. Supt. and Instructions to Agents, supra* at 14-15, 20-21.) Managers were responsible for the delivery of policies, collection of premiums, and payment of commissions to agents. **NOTE:** See The Prudential Life Ins. Co. of America, *Instructions Regarding the Care of Ordinary Policies, Premiums, and Office Details, supra* at 17.) While once a very independent operation, as time went on the home office agency exerted more control over marketing activities and reduced the independence of the general agent. **NOTE:** Stalson, *supra* at 617.)

IV. OCC Interpretive Ruling and Relevant Cases

A. Interpretive Ruling

Twelve C.F.R. § 7.1001 provides,

Pursuant to 12 U.S.C. 92, a national bank may act as an agent for any fire, life, or other insurance company in any place the population of which does not exceed 5,000 inhabitants. This provision is applicable to any office of a national bank when the office is located in a community having a population of less than 5,000, even though the principal office of such bank is located in a community whose population exceeds 5,000. **NOTE:** 12 C.F.R. § 7.1001 (formerly 12 C.F.R. § 7.7100). As part of its regulation review project, the OCC recently renumbered and made nonsubstantive stylistic edits to the interpretive ruling. See 61 Fed. Reg. 4849 (1996).

The OCC interpreted the reach of section 92 more broadly in 1963 by permitting a branch office of a bank to act as agent for insurance companies if the branch was located in a community with a population of less than 5,000, even if the main office of the bank was located elsewhere. See 12 C.F.R. § 7.1001. As one court noted: “now, heavily capitalized corporations with faraway headquarters could share [section 92's] benefits, including those deriving from technological innovations undreamed of in the early years of this century.” **NOTE:** *Independent Ins. Agents v. Ludwig*, 997 F.2d 958, 961 (D.C. Cir. 1993) (“*USNB Oregon*”). A challenge to the 1963 OCC ruling was rejected on the grounds of *laches*. **NOTE:** *National Ass’n. of Life Underwriters v. Clarke*, 736 F. Supp. 1162, 1165 (D.D.C. 1990), *rev’d on other grounds sub nom. Independent Ins. Agents v. Clarke*, 955 F.2d 731 (D.C. Cir.), *reh’g en banc denied*, 965 F.2d 1077 (D.C. Cir. 1992), *rev’d and remanded sub nom. United States Nat’l Bank v. Independent Ins. Agents*, 124 L. Ed. 2d 402 (U.S. 1993), *aff’d on remand, Independent Ins. Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993).

B. Cases

The Supreme Court recently offered further support for construing section 92 as authority for national banks to sell insurance without being subject to unique disabilities or restrictions. **NOTE:** See *Barnett Bank of Marion County, N.A. v. Nelson*, 134 L. Ed. 2d 237 (1996) (“*Barnett*”). The Court held that section 92 pre-empts a state statute that otherwise would prevent a national bank from selling insurance in a small town. **NOTE:** See *id.* at 242.) *Barnett Bank* had bought a state-licensed insurance agency to conduct its insurance sales through a small town bank branch. The Florida State Insurance Commissioner challenged *Barnett*’s insurance activities under Florida’s anti-affiliation statute and *Barnett* brought an action for declaratory judgment claiming that section 92

pre-empted the restrictive state statute. The Court examined the language of section 92 and found that section 92 suggests “a broad, not limited permission” for national banks to act as the agent for insurance sales. **NOTE:** *Id.* at 244.)

Two Courts of Appeal have followed a fundamentally similar approach in establishing that section 92 does not place any geographic restrictions on the customers to whom a bank or branch may sell insurance pursuant to section 92. **NOTE:** See *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995) (“*Bennett*”); *Independent Ins. Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993) (“*USNB Oregon*”). Under these decisions, while the bank or branch must be “located” in the “place of 5,000,” potential or existing insurance customers may be located anywhere. **NOTE:** See *id.*)

In *Bennett*, the court held that section 92 “permits small town banks to act as insurance agents without regard to the location of customers.” **NOTE:** *Id.* at 632) NBD Bank, a large bank with operations in several states, also operated a branch in Corydon, Indiana, a place of less than 5,000 inhabitants. Relying on the OCC’s interpretive ruling that section 92 authority extends to bank branches, NBD believed the Corydon branch could sell insurance to residents throughout the state of Indiana. NBD filed an action for declaratory relief in response to the Indiana Commissioner of Insurance’s issuance of a geographically limited license restricting the bank’s insurance sales to the inhabitants of Corydon.

The Seventh Circuit considered the question of “to whom” the bank branch could sell insurance. The court reasoned that section 92 identifies insurance as a line of business that banks may engage in and, hence, the court compared the location of insurance customers to customers of other lines of business engaged in by banks. **NOTE:** See *id.* at 631. The court inquired “[w]hat of their other lines of business? May banks take deposits from persons located outside of their home bases? Make loans to residents of other cities and states? If the answer is “yes,” then the absence of any customer limitations in § 92 implies equal freedom; but if banks may do deposit-and-loan business only close to home, then the absence of a reference to customers in § 92 implies that banks are similarly confined when acting as insurance agents.” *Id.*) The court found that banks long have transacted business across state lines and local borders for other activities, such as taking deposits and making loans. **NOTE:** See *id.* The court noted that today “banks in New York join with banks in Texas to make syndicated loans secured by real estate in Alaska; banks in Illinois issue letters of credit to Portuguese corporations in order to facilitate shipments between Brazil and Japan; banks in Arizona issue credit cards to residents of Maine; the citizens of North Dakota can put their assets in trusts managed by banks in Florida and write checks on banks in Hawaii” *Id.* In determining where a bank is “located,” the court reviewed the language of 12 U.S.C. § 85 permitting a national bank to charge any rate of interest that is proper under state law where the bank is located. For purposes of section 85, the Supreme Court has held that a bank is “located” where its physical facilities are found.

See *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). Thus, explained the *Bennett* court, under *Marquette*, a Nebraska bank charging 18% interest made its loans “in” Nebraska to residents of Minnesota, which capped interest rates at 12%, even though neither the borrower nor the merchant ever visited Nebraska. See *Bennett*, 67 F.3d at 632.) On this basis, the court concluded “[i]f national banks have been able to engage in interstate transactions ever since 1864, when they were created, then transactions with customers living outside the bank’s home town are the background against which we must understand § 92.” **NOTE:** See *id.* at 632. Further, the court recognized section 92’s delegation of regulatory power to the Comptroller which entitles the Comptroller to fill gaps and resolve ambiguities concerning the meaning of the statute. See *id.* Moreover, the court recognized that Congress in 1916 may not have anticipated all the questions that might come up concerning the statute. For this reason, “Congress frequently delegates power, as it did in § 92.” *Id.* The court did not reach the question of precisely “where” the “place of 5,000” bank’s or branch’s insurance agent activities must occur.)

Similarly, the court in *USNB Oregon* upheld the Comptroller’s view that “section 92 imposes no geographic limit on the insurance market so that, as long as [the bank or branch] is located in a small town, a bank is free to solicit and serve insurance customers everywhere.” **NOTE:** *USNB Oregon*, 997 F.2d at 958. The court did not address how the bank or branch should solicit and serve insurance customers and thereby did not address whether the bank or branch must conduct certain insurance agent activities in the “place of 5,000.”) The United States National Bank of Oregon (“USNB Oregon”), a subsidiary of the multi-million dollar holding company U.S. Bancorp, proposed to sell insurance under the authority of section 92 from its branch in Banks, Oregon, population 489. The Comptroller approved USNB Oregon’s plan and provided that the small town branch could sell insurance to existing and potential customers located anywhere. Trade associations filed suit arguing that the Comptroller had exceeded his statutory authority.

The D.C. Circuit in *USNB Oregon* looked at the congressional intent behind section 92 by examining the language of the statute and the legislative history, and found “no specific congressional intent to restrict the geographic reach of the insurance sales authorized by section 92.” **NOTE:** *Id.* at 961. The court reviewed the Comptroller’s interpretation under the principles of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), looking at the issue of unambiguous congressional intent and reasonable agency interpretation.) While the court recognized that the changed business environment in the modern world has led to events probably unforeseen by the 1916 drafters, the court stated “it is not our job to divine how legislators would have responded to hypotheticals.” **NOTE:** *USNB Oregon*, 997 F.2d at 961. The court continued “particularly where the question is as unknowable as the reaction of 1916 legislators to a world of microchips, communication satellites, fax machines, direct mail and telephone solicitation, and all the other technologies and techniques that now enable a nationwide business to be conducted from any hamlet.” *Id.*) The court also found no basis for overturning

the Comptroller's permissible construction of the statute. Accordingly, the court concluded that Congress expressly permitted banks in a "place of 5,000" to sell insurance and the Comptroller has found that Congress did not impose a geographic limit on the insurance business they are allowed to conduct. **NOTE:** See *id.*

As stated in *Bennett*, the background against which we must understand section 92 is banks engaging in transactions with customers living outside of the bank's home town. **NOTE:** See *Bennett*, 67 F.3d at 632.) So long as the bank or branch is located in the "place of 5,000," insurance customers may be outside of the "place" and, similarly, insurance-related activities with potential or existing customers may occur outside of the "place." Under the same analysis as in *Bennett*, in order for banks to make loans or encourage deposits from customers in faraway locations, bank representatives may need to travel to or conduct activities from those locations. **NOTE:** 753-4n2) Likewise, to solicit and serve insurance customers everywhere, as acknowledged in *USNB Oregon*, **NOTE:** *USNB Oregon*, 997 F.2d at 958.) a bank agency in the "place of 5,000" may need to engage in insurance activities occurring away from the "place." **NOTE:** 753-4n1)

Bennett and *USNB Oregon* support the proposition that in a modern world of fax machines, third-party marketing strategists, and advanced telecommunications, all activities related to insurance sales do not have to be conducted from one location, or for that matter, conducted from a location physically close in proximity to the home base of the operations. **NOTE:** See *Bennett*, 67 F.3d at 633 ("[u]nanticipated developments frustrate many a drafter"); *USNB Oregon*, 997 F.2d at 961 ("technological innovations undreamed of in the early years of this century").) The *USNB Oregon* decision indirectly sanctioned geographically dispersed insurance activities by upholding the Comptroller's conclusion that section 92 "did not impose a geographic limit on the insurance business [small town banks] are allowed to conduct." **NOTE:** See *Barnett*, 134 L. Ed. 2d at 244.) Section 92's broad permissive language on banks' insurance agent activities, as cited in *Barnett*, also supports a flexible reading of where insurance sales activities may occur so long as the location of the bank or branch is in the "place of 5,000." **NOTE:** See *Barnett*, 134 L. Ed. 2d at 244.)

In sum, the literal language of the statute, its apparent purpose, and all the highest level decided cases support the same proposition: Section 92 authorizes national bank insurance agencies located in a "place of 5,000" to solicit and sell insurance however any other insurance agent (that is not a bank or affiliated with a bank) can solicit and sell insurance. It also does not address (or restrict) supporting activities that do not constitute elements of the solicitation and sale process.

V. Application of Section 92 in the Modern Context

This brings us to the application of section 92 today. Two critical elements emerge from the preceding discussion. First, section 92 by its literal terms, consistent with Congressional intent and as construed by relevant case law, does not subject national banks soliciting and selling insurance under that section to unique restrictions or disabilities relative to insurance agents generally in a particular state. Second, given the flexibility with which banks and insurance agents operated in 1916, it is entirely consistent with the section's authority and purpose to allow national bank insurance agencies to employ the same variety of marketing resources and tools as are used today by other insurance agencies.

Accordingly, the first question we ask is a relatively simple one: Could a non-bank, non-bank-affiliated insurance agency based in a particular "place of 5,000" use the methods, tools and facilities the bank proposes to use to solicit and sell insurance? If state law would not so limit the marketing range, methods and facilities available for non-bank, non-bank-affiliated agencies, then that scope and those methods and facilities also should be permissible for a bank or bank-affiliated agency.

The second question draws on the history of section 92: Are the bank agency's operations inconsistent with the type of activities Congress accepted and authorized? On this issue, a brief recap of the historical perspective when Congress authorized national banks to act as insurance agents in 1916, discussed in detail in section III, *supra*, is helpful. At that time, nonbank insurance agents were soliciting and servicing insurance customers in territories that could encompass large geographic areas, such as whole states or several states. The insurance salesmen's general pattern was to personally solicit customers in any way possible, such as seeking out prospective customers at home, at the office, at the club, or elsewhere. The efficient and prosperous salesmen used any means available to seek out prospects. Similarly, the general business of banking was not limited to the confines of the bank's physical location. Bankers also engaged in personal solicitation of prospective customers.

In conducting their business, insurance salesmen and bankers alike used the latest devices and technology to sell their products, such as the mails, the telegraph, and the telephone. These activities extended beyond city and town boundaries. The clear emphasis for banks was to adopt progressive methods and strategies to sell the bank's services, similar to methods and strategies used in the commercial and industrial business spheres.

In particular, both the insurance and banking industry in 1916 used advertising to solicit business. **NOTE:** By 1916 bankers had gone from mere announcement advertising to full-scale advertising campaigns. See notes 56-74 *supra* and accompanying text. Banks engaged in extensive advertising in a variety of forms, including local mediums such as newspapers, window displays, and streetcars, as well as nationally circulating trade journals and magazines. **NOTE:** Banks were encouraged to be creative, individual, and

develop a personality through advertising. See Earl Fischer, *The Keyword in Bank Advertising*, 2 *Successful Banking* 27 (May 1917).

The organizational structure of the “general insurance agency” usually resulted in agents being managed from a local agency, although agents were not necessarily based or present in the local office on a day-to-day basis. By 1916, the general agent acted as the local sales manager and was in charge of the activities of his agents. Salesmen typically were paid by the general agent from the local agency location. Similarly, bank employees typically were managed from the local bank location. **NOTE:** See Howard M. Jefferson, *Improvements of Bank Methods*, 97 *Bankers Mag.* 261 (Sept. 1918) (banks used the functional type of organization to some extent and managers were placed in charge of new divisions as they were created).

The local agency was the insurance salesmen’s place of business for licensing purposes. Insurance agents and managers sent correspondence and applications from the local agency office to the home office while the home office sent the policies for delivery to the local agency offices. **NOTE:** See The Prudential Life Ins. Co. of America, *Manual of Instructions to Superintendents and Ass’t. Supt. and Instructions to Agents*, *supra* at 14-15, 20-21; The Prudential Life Ins. Co. of America, *Instructions Regarding the Care of Ordinary Policies, Premiums, and Office Details*, *supra* at 17.) Soliciting agents were required to be licensed by the state for registration, tax, or regulatory purposes. **NOTE:** Stalson, *supra* at 626 (Massachusetts in 1911 intended to license all full-time agents; New York considered requiring examinations of applicants for soliciting licenses as early as 1911.) Insurance companies also were subject to state licensing requirements. **NOTE:** See *id.* at 436. In addition, state laws required that an out-of-state insurance company must grant state-wide power of attorney for acceptance of legal service of summons and complaint to someone residing in the state. These requirements led insurance companies to give broad general powers to their principal selling representative, i.e. the “general” agent, and thus state lines tended to become the boundaries of the agent’s power of attorney as well as his selling activities. Today insurance companies have made the superintendent of insurance (insurance commissioner) the agent for service of process. See *id.* at 379-80.)

Section 92 as enacted in 1916 generally described the ways national bank insurance agencies operated: by soliciting and selling, by collecting premiums, and by receiving commissions and fees for these services from the insurance company. Congress knew how to, but conspicuously did not delineate or curtail how these activities were to be conducted by bank insurance agencies. Thus, Congress permitted national banks to operate effectively in the insurance business that existed in 1916, and also did not restrain banks’ ability to modernize their solicitation and sales methods as needed to remain competitive as the insurance business evolved.

Thus, today, insurance agents enjoy expanded geographic flexibility, and employ technological innovations and contemporary marketing methods and facilities. The language of section 92, its legislative history, the practices of banks and insurance agents in 1916, the OCC's longstanding interpretive ruling, and recent cases, all support the conclusion that a national bank insurance agency 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.

Accordingly, the following general principles can be distilled from the foregoing analysis to define the scope of solicitation and sales activities permissible for national banks under section 92:
(NOTE: This description is not intended to be exhaustive and we recognize that solicitation and sales techniques can vary with the different marketing strategies employed by different banks and yet still be consistent with the general principles set forth herein.)

- *The agency located in the "place of 5,000" must, of course, be bona fide.* In the present situation that will clearly be the case. Agents will be managed through the agency and the "place of 5,000" will be the agency's business location for licensing purposes. Each agency will be responsible for collecting commissions from insurance carriers and paying commissions to its licensed sales staff. The agency also generally will be responsible for processing insurance applications, delivery of insurance policies, and collection of premiums, where consistent with procedures of the relevant insurance carriers. In addition, business records of the agency, including copies of customer application and policy information, and licensing, customer complaint, and other compliance records, will be available at the "place of 5,000."
(NOTE: As previously noted, business records may be maintained and available at the agency in electronic form, with the original hardcopy kept in off-site storage.)

- The bank agency and its agents may seek the same market range and use the same marketing tools and facilities as generally available for a licensed insurance agency, not affiliated with a bank, that is based in the "place of 5,000."
(NOTE: As previously noted, this letter does not address and is not intended to express any opinion on any state law preemption issues. See note 5 *supra* and accompanying text.) This will generally allow the following:
 - .. Meetings with customers and solicitations and sales of insurance by agents of the bank agency may take place at locations inside the "place of 5,000" as well as at locations outside that "place," provided the agents are managed and paid through the bank agency located in the "place of

5,000" and use that location as their place of business for licensing purposes. If an insurance company has adopted other procedures for its nonbank agents, however, the bank agency may follow the same procedures as other insurance agents selling the company's policies.

- .. Mailings to advertise and sell insurance may originate from inside or outside of the "place of 5,000," and brochures, leaflets, and other literature alerting potential customers to the bank's insurance activities may be distributed from locations both inside and outside of the "place of 5,000," including other branches of the same bank. Personnel of bank branches outside of the "place of 5,000" also may make referrals to the bank's insurance agency. Likewise, telephone and cybermarketing may be used and the calls and messages need not originate within the "place of 5,000."
- .. The bank may contract with third parties to assist the agency's sales activities. For example, third parties might provide advertising support, direct mail marketing services, telemarketing services, payments processing, or other types of "back office" support.

Based on the foregoing analysis and conclusions, and the representations made by the Banks that the Subsidiaries would operate in a manner that is consistent with the analysis described above, the OCC concludes that the Subsidiaries' proposed insurance agency activities are permissible under section 92 and that the Subsidiaries' proposed activities as agent for the sale of fixed and variable annuities are permissible under 12 U.S.C. § 24(Seventh).

Accordingly, the OCC approves the Banks' operating subsidiary notification. If you have any questions, please do not hesitate to contact me (202/874-5200) or Suzette H. Greco, Senior Attorney (202/874-5210).

Sincerely,

/s/

Julie L. Williams
Chief Counsel