



Office of the Comptroller of the Currency

Interpretive Letter #753

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12 U.S.C. 24(7); 12 U.S.C. 92

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Return to: [Contents of Interpretive Letter #753](#)

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Re: First Union National Banks, Establishment of Operating Subsidiaries to Engage in Insurance Agency Activities, Control Nos. 96-ML-08-009 through -015 Dear Mr. Andersen:

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. (**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.

Go to: [More of Interpretive Letter #753](#)