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Bank Regulatory Law

Scope of Insurance Sale Activities by National Banks

"Place Of 5,000"

Below is a summary of the First Union Letter issued by Comptroller of the Currency on November 4, 1996. The First Union Letter delineates, in detail, the scope of insurance sale activities that may be engaged in by national banks and presents the legal basis for this analysis.

Scope of Insurance Activities - "place of 5,000"

Proposal

Establish operating subsidiaries in 10 states, including Florida, to engage in selling insurance

Each subsidiary will be located in a place of less than 5,000 where the parent bank has a branch

Letter outlined activities proposed to be conducted in the "place of 5,000" and activities that would be conducted outside the "place of 5,000"

OCC provided lengthy analysis of 12 U.S.C. § 92

Statute provides: "... 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 ..."

Legislative history of 12 U.S.C. section 92 - enacted in 1916

Reviewed events surrounding enactment of law

Banking in 1916

"Country Banks"

Service to Customers

Bank advertising

Insurance sales in 1916

Organizational Structure - General Agency System

Methods of Selling Insurance

Conclusion of analysis: So long as the branch or bank is located in the "place of 5,000", insurance customers of the bank may be outside the "place" and, similarly, insurance related activities with potential or existing customers may occur outside the "place".

Place where bank is "located and doing business" - footnote 147

12 U.S.C. § 81 - requires national bank to transact its general business in its main office or legally established branch.

For purposes of 12 U.S.C. § 81, branch is defined as place at which "deposits are received, or checks paid, or money lent" 12 U.S.C. § 36(j).

In considering 12 U.S.C. § 81, the Supreme Court has held that term "the general business of each national banking association" does not necessarily encompass all business in which a 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. *Clark v. Securities Industry Ass'n*, 479 U.S. 388, 404 (1987)

In *Clark*, the question was whether the OCC approval of two banks offering discount brokerage services to the public at locations other than a branch violated the National Bank Act's branching provisions.

OCC concluded that the offices offering brokerage services would not constitute branches because none of the statutory branching functions would occur in those offices. The Supreme Court agreed and held that the operation of a brokerage service was not a core banking function.

The Supreme Court held that the locational restrictions 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.

In footnote 147, the OCC states: "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".

By virtue of footnote 147, the OCC appears to be inviting national banks to establish insurance sales offices in "places of 5,000" *even if the bank does not have a branch in the "place of 5,000"*... However, any national bank considering such a move must be cautioned that it may be paving new roads - subject to challenge. The more conservative approach would be to only establish an insurance office in a "place of 5,000" in which the bank has its main office or a branch office.

General principles established in the First Union Letter:

The agency located in the "place of 5,000" must, of course, be *bona fide*. In other words, it must be a real, operating office.

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". This will generally permit:

Meetings with customers and solicitations and sales of insurance by agents of the bank agency at locations inside and outside the "place of 5,000".

Mailings to advertise and sell insurance may originate from inside and outside the "place of 5,000" and brochures and other direct mail advertising may be distributed from locations both inside and outside the "place of 5,000", including other branches of the same bank. Personnel of bank branches outside the "place of 5,000" may make referrals to the bank's insurance agency. Telephone and cybermarketing may be used and calls and messages need not originate with the "place of 5,000".

The bank may contract with third parties to assist the agency's sales activities, for example advertising support, direct mail marketing services, telemarketing, payments processing or other types of "back office" support.

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