RESCINDED

Office of the Comptroller of the Currency

AL 1996-8 is replaced by the Comptroller's Handbook Insurance Activities booklet.

Advisory Letter 96-8 - Guidance to national banks on insurance and annuity sales activities

October 8, 1996

TO: Chief Executive Officers of all National Banks, Department and Division Heads, and all Examining Personnel

PURPOSE

This advisory provides guidance to national banks on various issues raised by insurance and annuities sales. Each bank's management should address these issues in a manner appropriate to the nature and extent of insurance and annuity sales activities conducted by its organization.

DISCUSSION

A. *Introduction*

The ability of national banks to sell diverse and complementary financial products and services, including insurance products and annuities, helps bank customers to meet specific financial objectives, benefits consumers by promoting competition, and can make insurance products and annuities available to customers that are underserved or unserved by other distribution systems. The Supreme Court's March 1996 decision in *Barnett Bank of Marion County N.A.* v. *Nelson, Florida Insurance Commissioner* ("*Barnett*") provided important clarification of the authority of national banks to sell insurance. The Court's 1995 decision in *NationsBank* v. *Variable Annuity Life Insurance Co*. also upheld the broad authority of national banks to engage in the "business of banking" and sustained the OCC's determination that the power to sell annuities is part of that authority. Thus, insurance and annuity sales have been, and promise to continue to be, an important line of business for national banks.

Adequate consumer protections, qualified employees, and appropriate sales practices are key to responsible insurance and annuity sales activities -- by any type of seller. The OCC is committed to ensuring that national banks' insurance and annuity sales activities meet high standards.

The following sections of this advisory (1) review the federal statutory anti-tying rules applicable to banks; (2) discuss how state laws apply to national banks; (3) highlight issues raised by insurance and annuities sales that national banks should evaluate and address when they structure their sales programs and oversee their sales activities; and (4) summarize the OCC's basic approach to oversight of national banks' sales of insurance and annuities.<1>

B. ***Federal Prohibitions on Tying***

Tying the availability of credit from the bank to the purchase of insurance or annuities offered by the bank or a bank affiliate is illegal. Under 12 U.S.C. 1972, a bank is prohibited (subject to certain exceptions) <2> from requiring a customer to obtain credit, property, or services as a prerequisite to obtaining other credit, property, or services. This standard applies whether the customer is retail or institutional, or the transaction is on bank premises or off. The OCC has extended these protections to cover national bank operating subsidiaries.

The OCC remains committed to enforcing 12 U.S.C. 1972 and expects national banks to have adequate policies and procedures in place to prevent violations. OCC Bulletin 95-20 describes measures that help to ensure compliance with the tying prohibitions. The measures include:

- Monitoring to eliminate impermissible coercion when offering customers multiple products or services.
- Training bank employees about the tying prohibitions, including providing examples of prohibited practices and sensitizing employees to the concerns raised by tying.
- Involving management in reviewing training, audit, and compliance programs, and updatingany policies and procedures to reflect changes in products, services, or applicable law.
- Reviewing customer files to determine whether any extension of credit is conditioned impermissibly on obtaining an insurance product or annuity from the bank or its affiliates.
- Monitoring incentives, such as commissions and fee splitting arrangements, that may encourage tying.
- Responding to any customer allegations of prohibited tying arrangements.

The tying prohibitions do not prevent bank sales personnel from *informing* a customer that insurance is required in order to obtain a loan or that loan approval is contingent on the customer obtaining acceptable insurance. In such circumstances, sales personnel may indicate that insurance is available from the bank and may provide instructions on how the customer can obtain additional information.

However, the bank should take steps necessary to make clear to the customer that the bank's decisions with respect to a loan application are independent of the customer's decision where to obtain insurance. For example, in the situation described above, when a customer is first informed that insurance is available from the bank, the customer also should be clearly and unambiguously informed that he or she need not purchase insurance from the bank, its subsidiary, an affiliate, or any particular unaffiliated third party, that insurance is available through brokers or agents other than the bank, and that the customer's choice of insurance provider will not affect the bank's credit decision or credit terms in any way. These disclosures are particularly important in situations where it is not feasible to have different bank employees involved in the loan and the insurance transactions. *See also* "Sales of Insurance in Connection with Extending a Loan."

The same concerns are equally pertinent and potentially more acute, if a type of insurance that is *unrelated to* or *not required* in connection with a pending loan application is offered to a loan applicant as part of the loan application process. In that situation, banks should use heightened care to dispel any impression that the unrelated products are being mentioned because of a potential connection to the bank's credit decision, and should ensure that, if such offers are permitted, they are adequately monitored by the bank's compliance systems.

C. *Applicability of State Laws*

The application of state laws to national banks' insurance and annuity sales can present complex issues. <3> In general, however, the OCC anticipates that a state law that applies generally to regulate insurance agents and agencies will apply to national banks provided the law does not effectively prevent national banks from conducting activities authorized under federal law, and provided that, if the law interferes with those authorized activities, the interference is insignificant. When state laws result in special burdens on the ability of national banks to exercise the powers granted to them under federal law, however, the possibility of federal preemption of state law arises.

For example, the Supreme Court's decision in *Barnett* clarified that traditional judicial standards of federal preemption should govern whether 12 U.S.C. 92, which authorizes national banks to sell insurance in an agency capacity, preempts state laws (or rules) that interfere with a bank's exercise of that authority.<4> In *Barnett*, the Supreme Court first noted that courts have historically interpreted "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." <5> But, the Court then noted, this does not "deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers."<6> Thus, if a state law only interferes with a national bank's exercise of its powers in an insignificant way, the state law would *not* be preempted and would be applicable. <7>

In practice, these principles should mean that most state laws that apply generally to regulate insurance agents and agencies and that do not discriminate against or have a disparate impact on banks would *not* be preempted because, ordinarily, they would not prevent national banks from exercising their federally authorized powers and the extent to which they might actually interfere with or impair the ability of a national bank to exercise those powers would be insignificant. If a state law prevented or impaired significantly the ability of national banks to exercise their powers, however, that state law would not be applicable because it would be preempted under the standards set by the Supreme Court.<8>

Thus, for example, and provided a particular law is not preempted, the types of state laws applicable to national banks would include non-discriminatory requirements such as:

- Licensing requirements establishing character, experience, and educational qualifications for individuals selling insurance as agent;
- Testing and continuing education requirements, and requirements for license renewals, for individuals selling insurance as agent;
- Licensing requirements pertaining to different types of insurance that apply to individuals selling particular types of insurance in an agency capacity; and
- Market conduct and unfair trade practices standards prohibiting insurance agents from making unfair and deceptive statements; falsifying financial statements; engaging in defamation, boycott, coercion and intimidation; unfairly discriminating; improperly rebating; coercing customers; improperly disclosing confidential information; <9> and engaging in unfair claims settlement practices.

When state laws are not preempted, the OCC recognizes the role and ability of state insurance regulators to administer and oversee compliance with those laws.

D. ***Management Oversight***

Bank management is responsible for ensuring that a bank's insurance and annuity sales are conducted in a safe and sound manner and in accordance with applicable law. Sound management practices include active oversight by senior management, competent personnel, and internal controls that effectively identify, monitor, and control significant aspects of the seller's insurance and annuity sales operations. These principles apply not just to banks, but to all sellers of insurance and annuities.

The practices and policies each bank applies will depend on the activities it undertakes and the manner in which it offers products. For example, although certain issues arise in all circumstances, the complexity of the products offered and the volume of insurance and annuities sales may require some banks to establish more elaborate internal controls or management processes than banks with relatively simple insurance and annuities sales activities. A bank's approach should be tailored to its goals and resources and should be well understood by bank personnel engaged in insurance and annuity sales. Banks also are encouraged to seek advice from professionals with expertise in the insurance and annuities field who can provide guidance with respect to legal, regulatory, and business considerations presented by the bank's insurance and annuities sales activities.

The following sections describe issues that may arise when sales and recommendations for insurance products and annuities are made by a national bank and its employees, as well as by employees of any third party (a national bank subsidiary or affiliate, or an unrelated third party), when the third party sells from bank premises. If these issues arise from a national bank's insurance and annuities sales program, bank management should address them in a manner appropriate and effective for the particular bank. Considerations that apply to both insurance and annuity sales are set forth first, then issues distinct to sales of insurance and annuities, respectively.

General Considerations

1. Evaluation and Selection of Products

The success of a sales program and the satisfaction of the bank's customers are directly related to the quality and nature of the insurance products and annuities sold by the bank. Bank customers benefit from bank sales of insurance and annuities when the bank offers products responsive

to the diverse needs of its customers and those products perform as customers expect. The safety, soundness, and claims paying ability of the companies that originate the insurance and annuity products sold by a bank are considerations for bank customers and may also present risks for the reputation of the bank's other products and services, as well as the potential for future claims against the bank. The company originating the products sold by the bank should be in good standing and maintain the necessary licenses required to operate its insurance business. A bank's selection of the products it offers should be founded on the quality and customer benefits of the products available from those companies, not on a company's commission structure. In addition, a bank should help to ensure the quality of the insurance products and annuities that it sells, and protect itself from future complaints, by evaluating at the outset and periodically thereafter:

- The company's rating by a nationally recognized rating service and other readily available information on the historical performance of the company (or companies), as well as its current financial and managerial strength.
- When available, the number and substance of material complaints filed against the company, and the existence of any criminal judgments against the company or its senior management.
- The extent to which particular products are available from various companies.
- The pricing of the insurance products or annuities, including the premium rates, compared with that of similar products offering the same benefits or coverage (if such similar products are available).
- The sales support provided by the company, including the marketing and sales strategy for the products it provides.
- Readily available information concerning the first hand experience of other financial institutions with products of the company.

2. Qualifications and Training

Knowledgeable, experienced, and qualified personnel help to ensure that the bank's sales program is carried out in a manner that provides customers with competitive products, sound advice, and accurate information. Familiarity with the bank's policies and procedures also ensures better compliance with the bank's internal guidelines and facilitates management oversight. Timely and regularly scheduled training can keep personnel aware of the latest innovations in financial products, changes in bank policies, and developments in applicable laws or regulations. Measures the bank should use to achieve these goals include:

- Clearly defining the responsibilities of personnel authorized to sell insurance products or annuities and the scope of the activities of any third party involved in the sales program.
- Verifying that sales personnel are licensed and in good standing under applicable state and, if appropriate, federal law, and, where feasible, ascertaining whether individuals have been the subject of disciplinary action.
- Limiting the involvement of tellers and individuals not qualified to sell insurance or annuities to directing customers to qualified personnel who can provide authoritative information.

3. Inappropriate Recommendations or Sales

Customers interested in purchasing insurance products or annuities may have particular needs based on their financial status, current insurance coverage, or other circumstances. Customers inexperienced in dealing with financial products, particularly those involving an investment risk component, may also require more detailed information about the products offered. Bank management should evaluate, for the types of insurance and annuity products it offers, the extent to which it is necessary to inquire into the appropriateness of the product for a particular customer in order to assist the customer in making informed product selections, and the nature of the inquiry that is desirable (or that may be required by other regulatory requirements). In addition, regardless of the product involved, management should clearly communicate to its sales personnel that it is unacceptable to recommend and sell new or replacement insurance or annuity policies to customers on the basis of commissions to the seller rather than the benefits of the policy.<10> Such "churning" may also violate applicable state laws.

4. Employee Compensation

Commission-based compensation is a common method of selling insurance and annuities and may help to increase customer awareness of the availability of the insurance products and annuities offered by a bank. However, whenever an employee is compensated for a sale or referral, management needs to be sensitive to the concern that the employee might be motivated by the prospect of financial reward for the sale or referral rather than the best interests of the customer. As noted above, sales should not be driven by commissions and management should clearly communicate to its sales personnel that it is unacceptable to engage in high pressure sales tactics, sell duplicative or unnecessary insurance, or recommend and sell new or replacement insurance policies to customers on the basis of commissions to the seller rather than the benefits of the policy.

5. Complaints and Compliance

Even the most well-managed insurance and annuity sales program can be subject to some customer complaints. Both customers and the bank will benefit if the bank has an orderly process for assessing and addressing customer complaints and resolving compliance issues. A process that keeps track of customer complaints also helps the bank to identify and monitor any systemic problems in its sales program that could harm its franchise. This process might include maintaining records concerning the number, nature, and disposition of customer complaints received by a bank, subsidiary, or affiliated or unaffiliated third party. For non-complex banks, the process could take the form of a complete and orderly "complaint" file. Management should also ensure that there is an effective process through which management receives information about complaints or other concerns in connection with a bank's insurance and annuity sales so that management may implement corrective measures. The bank's systems must be sufficient to monitor compliance with the bank's own policies, applicable federal and state laws, and OCC guidance.

National banks also should comply with state laws that require copies of any customer complaints to be forwarded to the appropriate state insurance regulatory authority, or that require that when an insurance sale is consummated, the customer be advised that he or she may forward any complaints to that state insurance authority.

6. Advertising

Advertising is a fundamental marketing tool, and banks often disseminate information, written or otherwise, including by telephone or other electronic means, to bank customers and the general public describing insurance products or annuities that are available from the bank, its subsidiaries or affiliates, or unaffiliated third parties. Banks also communicate with their customers on how to obtain more information about insurance products or annuities. These communications must not suggest or convey any inaccurate information, and should be designed with care to avoid misunderstanding, confusion, or misrepresentation to the bank's customers. Accordingly, bank management should ensure that:

- To the extent disclosed, the nature, terms, or conditions of any insurance product or annuity, and the financial condition of any person, entity, or legal reserve system in any way related to an insurance product or annuity, are not misrepresented.
- Disclosures regarding particular products identify clearly the company that is underwriting the insurance or annuity product and that the company is not the bank.
- Steps are taken through other disclosures, including prominent and distinct signage, separate business cards, and distinctive promotional material, to minimize customer confusion about the nature of the product and to clarify that the product is not guaranteed by the bank and is not insured by the FDIC.
- Terminology customarily associated with insured bank products that obscures the nature of a payment or policy is avoided, *e.g.*, use of the word "deposit" to

describe a premium payment, or referring to an insurance policy or annuity as an "account."

7. Customer Privacy

In the course of providing banking and other services, banks will acquire various types of financial and personal information about their customers. Bank management should be sensitive to privacy expectations of the bank's customers regarding this information. Management should take appropriate internal measures to safeguard the security of customer information as well as developing internal policies on the use of customer information. These considerations apply generally to all aspects of a bank's operations. Insurance and annuity sales activities are but one context in which questions regarding the use and sharing of customer information arise. Nor are banks unique in facing issues relating to customer privacy.

Banks' policies on use of customer information should also recognize that different types of information can present different degrees of sensitivity from a customer perspective. Information of an especially personal nature, such as information regarding the health or physical well-being of a customer, may be viewed as particularly sensitive and thus warrant safeguards or restrictions under the bank's policies.

Use of certain customer information in connection with the sale of insurance products, such as that bearing on a customer's credit standing, as well as disclosure of this information to third parties, including bank affiliates, can present various legal issues and may be restricted by law. Banks should consider especially whether any provisions of the Fair Credit Reporting Act are applicable before using or disclosing customer information.<11> That Act allows banks to share with third parties information about their transactions with a customer. Recent amendments to that Act also allow parties related by common ownership or affiliated by corporate control to share other information that is not a consumer report provided the customer in question is given an opportunity to object.<12> In addition, among other things, the Act permits banks and affiliates to obtain limited information from a consumer report for use in connection with firm offers to provide consumer related insurance products to potential customers.

8. Third-Party Arrangements

If a national bank, directly or indirectly, including through a subsidiary, sells insurance products or annuities through a third party, the performance and reputation of the third party reflect on the bank and might even give rise to liabilities that the bank must bear. Developing knowledge and understanding about the third party's qualifications and operations can assist the bank in avoiding problems and uncertainties. Particularly when a bank is using an unrelated third party to sell insurance and annuities on bank premises, it is important for the agreement with the third party to:

- Describe the duties and responsibilities of each party, including the permissible activities by the third party on the national bank's premises; the terms governing the use of the national bank's space, personnel, and equipment; and the compensation arrangements for personnel of the national bank and the third party. Where a bank and a third-party subsidiary, affiliate, or unrelated entity utilize joint employees, the duties, responsibilities, and job responsibilities should be clearly articulated in the agreement with the third party, as well as communicated to these employees.

- Authorize the national bank to monitor the third party as appropriate to the volume and complexity of the products offered, in order to effectively review and verify that the third party and its sales representatives are complying with the agreement.
- Require the third party to indemnify the national bank for potential liability resulting from actions of the third party with respect to the insurance product or annuity sales program.
- Require the third party to forward any customer complaints to appropriate state insurance authorities and to the bank.

Insurance Sales

The following issues are applicable to situations in which the Interagency Statement on Retail Sales of Nondeposit Investment Products does *not* apply. (*See* "Annuities and Investment Product Sales," below, for a summary of the Interagency Statement.)

1. Sales of Insurance in Connection with Extending a Loan

When a bank requires a customer to obtain insurance in connection with a loan and the insurance is available through the bank, under some circumstances, a customer may believe either that the insurance must be purchased from the bank or that a purchase from the bank will improve the

customer's chances of a favorable credit decision.<13> As discussed in section B., above, sales personnel may inform customers that insurance is required in order to obtain a loan or that loan approval is contingent on the customer obtaining acceptable insurance. Sales personnel may inform customers that insurance is available from the bank, its subsidiary, an affiliate, or particular unaffiliated third parties, and indicate how to obtain additional information.

However, the bank should take steps necessary to make clear to its customer that the bank's decisions with respect to the loan application are independent of the customer's decision of where to obtain insurance. For example, to avoid the impression that a linkage exists between the bank's credit decision and the customer's choice of insurance seller, the customer should also be clearly and unambiguously informed that he or she need not purchase insurance from the bank, its subsidiary, an affiliate, or any particular unaffiliated third party, that the insurance is available through brokers or agents other than the bank, and that the customer's choice of insurance provider will not affect the bank's credit decision or credit terms in any way. These disclosures should be provided when the bank first informs a customer that insurance required in connection with a loan is available from the bank, a subsidiary, affiliate, or unaffiliated third party selling insurance on bank premises. Banks should also consider:

- Providing the disclosures described above in writing, and obtaining a signed statement from the customer, at or prior to closing the insurance sale, acknowledging that the customer has received, has read, and understands the disclosures.
- Whether any customer confusion arises because the bank uses combined documentation forrelated credit and insurance transactions and whether separate and independent documents would effectively reduce this confusion.

As also discussed in section B., if a type of insurance that is unrelated to, or not required in connection with, a loan is offered to a loan applicant as part of the loan application process, banks should use heightened care to dispel any impression that the unrelated product is being mentioned because of a potential connection to the bank's credit decision, and to monitor this aspect of its insurance and annuity sales activities.

2. Setting and Circumstances of Insurance Sales Activities and Specific Disclosures

The way in which insurance products are sold within a bank can help customers distinguish between deposits that are insured or are obligations of the bank and uninsured products offered by the bank or another entity. A bank's objective should be to avoid misunderstanding, confusion or misrepresentation to its customers. Although the particular measures that are most effective to accomplish this may vary on a case-by-case basis, several steps are most important.

Banks should define clearly and limit the roles of bank employees when they operate in a traditional physical setting, generally a "teller window," that is closely associated with and predominantly services insured deposit account transactions. To the extent practicable, a bank's sales of insurance should take place in a location that is distinct from such a traditional teller window setting. The involvement of tellers and individuals not qualified to sell insurance products also should be limited to directing customers to qualified personnel who can provide information. When physical considerations, such as the size or design of a particular bank facility, prevent sales from being conducted in a location distinct from the common teller area, the bank should make every effort to minimize customer confusion.

In addition, during any customer contact, including communication by telephone or other electronic means, banks should disclose to customers that an insurance product is not FDIC insured, is not a deposit or obligation of the bank, is not guaranteed by the bank, and (if applicable) is subject to investment risk, including possible loss of principal, unless the bank affirmatively determines, for specific products, that customers would not reasonably benefit from, or might in fact be confused by, these disclosures. Management should address the manner in which the disclosures are provided to a proposed insured, and the point or points during the solicitation or sales transaction at which written or oral disclosures should be furnished to customers. Other aids to customers distinguishing between products include:

- Specifying how individuals selling or recommending insurance products identify themselves and their sales role.
- Conspicuous signage in the areas where insurance is sold that clarifies that the insurance sold by or through the bank is not a deposit or obligation of the bank, is not guaranteed by the bank, and is not insured by the FDIC.

Annuities and Investment Product Sales

The Interagency Statement on Retail Sales of Nondeposit Investment Products contains standards for sales and recommendations of nondeposit "investment products," which include fixed and variable annuities. Under the Interagency Statement, when a bank recommends or sells to retail customers nondeposit "investment products," the bank should, among other things and at a minimum, inform the customer that the nondeposit investment products are (a) not insured by the FDIC; (b) not a deposit or other obligation of, or guaranteed by, the depository institution; and (c) subject to investment risks, including possible loss of the principal amount invested. The Interagency Statement calls for these disclosures to be provided (a) orally during any sales presentation; (b) orally when investment advice concerning the nondeposit investment products is provided; (c) orally and in writing prior to or at the time an investment account is opened to purchase these products; and (d) in advertisement and other promotional materials, as specified in the Interagency Statement. In addition, a bank should obtain a signed statement from the customer at the time an account is opened, acknowledging that the customer has received and understands these disclosures. Any written disclosures should be conspicuous and presented in a clear and concise manner.

The Interagency Statement provides that confirmations and account statements for nondeposit investment products should contain the minimum disclosures if they contain the name or logo of the bank or an affiliate, in addition to any other required disclosures. If a customer's periodic deposit account statement includes account information concerning the customer's nondeposit investment products, the information concerning these products should be clearly separate from the information concerning the deposit account and should be introduced with the minimum disclosures and the identity of the entity conducting the nondeposit transaction. In addition, where applicable, the bank should disclose the existence of any advisory or material relationship between the bank or an affiliate of the bank and an investment company whose shares are sold by the bank and any material relationship between the bank and an affiliate involved in providing nondeposit investment products.

The foregoing is only a summary of provisions of the Interagency Statement. Bank management should be familiar with the standards contained in the Statement if the bank sells annuities or other investment products covered by the Statement and managers should address those standards in the bank's sales practices.

E. ***OCC Supervision***

The OCC's evaluation of a bank's insurance and annuity sales activities will be guided by the OCC's supervision-by-risk approach, which focuses on identifying problems, or potential problems, in individual banks or the banking system, and ensuring that problems are appropriately corrected. The OCC applies this philosophy in all supervisory activities it conducts, including safety and soundness, compliance, and fiduciary.

The types of risk most likely to arise in connection with insurance and annuity sales include reputation risk, compliance risk, transaction risk, and strategic risk. In general, experience has demonstrated that national banks conduct their insurance and annuity sales activities in a safe and sound manner and that their activities have been responsive to the interests of their customers. Thus, insurance and annuity sales should be a relatively low risk activity.

The OCC believes that it can identify and focus on key indicators of potential problems with a bank's sales of insurance and annuities as part of the examination process, and will be developing additional instructions to guide its examiners in this area. (The considerations specified in this advisory, therefore, are not intended for use as an examination checklist by OCC examiners, but are designed to help national banks identify and manage relevant risk areas for each institution.) For example, customer complaints can be valuable signals of problems in each of the risk areas mentioned above. Thus, the OCC anticipates that as part of national banks' regularly scheduled examinations for compliance with applicable federal requirements, including compliance with anti-tying standards, OCC examiners will review the level and nature of customer complaints concerning the bank's insurance and annuity sales activities.

The OCC also expects to work cooperatively with state insurance regulators and recognizes their role and their ability to administer and oversee compliance with the types of state laws, discussed in section B., that are applicable to national banks.

FURTHER INFORMATION

For further information or questions relating to this advisory, please contact the Legislative and Regulatory Activities Division, (202) 874-5090.
/s/
Julie L. Williams
Chief Counsel

Endnotes:

1. National banks also are reminded that the Interagency Statement on Retail Sales of Nondeposit Investment Products (February 15, 1994) contains guidelines for the sale of nondeposit investment products, which include annuities. The provisions of 12 C.F.R. Part 2 also apply to sales of credit life insurance, which is

defined as "credit life, health, and accident insurance, sometimes referred to as credit life and disability insurance, and mortgage life and disability insurance." In addition, 12 C.F.R. 7.3001 applies when banks share space and employees with other businesses. Products that are securities under the federal securities laws also are subject to additional requirements and standards under rules of the Securities and Exchange Commission and the National Association of Securities Dealers.

2. In addition to statutorily enumerated exceptions, the statute authorizes the Federal Reserve Board to permit, by order or regulation, additional exceptions to the tying prohibitions. National banks can avail themselves of the Federal Reserve Board's exceptions to the extent they are applicable. Banks should also note that the Federal Reserve Board has recently proposed changes to its tying regulations. *See* 61 Fed. Reg. 47242 (Sept. 6, 1996).
3. This advisory is designed to complement, not to displace, state laws that may apply to national banks' sales of insurance and annuity products. It is intended to highlight for national banks particular issues and aspects of insurance and annuity sales activities that the OCC believes should be areas of attention for bank management. In addition, the advisory addresses certain issues not covered by some state laws, such as particular disclosure requirements that are intended to differentiate insurance products or annuities from insured deposits. Banks should also note that, for purposes of state law, many states regulate annuities as insurance products.
4. Section 92 provides that national banks "located and doing business in any place the population of which does not exceed 5,000 inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the [OCC], 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...."
5. *Barnett Bank of Marion County, N.A.* v. *Nelson, Florida Insurance Commissioner*, 116 S. Ct. 1103, 1108 (1996).
6. *Id.*, at 1109.
7. This threshold reflects the *Barnett* decision's discussion of federal preemption and the cases cited by the Supreme Court in its description of the federal preemption test. These cases use terms such as "interfere with, or impair" (*First National Bank* v. *Commonwealth of Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1870)); "incapacitates" (*Id*.); "hinders" (*Id*., at 363); "infringe" *(Anderson National Bank* v. *Luckett*, 321 U.S. 233, 248 (1944)); "infringe or interfere" (*Id*., at 249); "encroachment" (*Id*., at 249); "frustrate the purpose" (*McClellan* v. *Chipman*, 164 U.S. 347, 357 (1896)); "hampered" (*Id*., at 358); and "impairs the efficiency" (*Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1895)) to reflect that a relatively small level of impact on the authority of national banks is sufficient to result in federal preemption of the state law at issue.
8. Because of the variety of state laws that could raise this concern, the OCC would need to do a factual analysis of the impact of each particular law on the operations of national banks, as well as a complete legal analysis, both of which are beyond the scope of this advisory, in order to reach conclusions about preemption. If asked by national banks or state insurance regulatory authorities, the OCC expects

that it would opine on state law preemption questions on a case by case basis. Various preemption issues also may be subject to a public notice and comment process pursuant to section 114 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 , Pub. L. 103-328 (12 U.S.C. 43). In any case, the OCC will apprise the relevant state insurance regulator and will consult with that regulator, when such a question is posed.

9. Recent amendments to the Fair Credit Reporting Act may expressly preempt state laws, however, in connection with certain disclosures of customer information. *See* Section 624(b) of the Fair Credit Reporting Act (15 U.S.C. 1681t(b)), as amended by section 2419(2) of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Pub. Law 104-208, 110 Stat. 3009).
10. The OCC has recently revised Part 2 of its regulations, which governs aspects of national bank sales of credit life, health and accident insurance, to state specifically that recommendations to customers to buy insurance should be based on the benefits of the policy, not the commissions received from the sale. *See* 12 C.F.R. 2.3(b); 61 Fed. Reg. 51777 (October 4, 1996).
11. Additional requirements and standards may also impact the extent to which the bank can share information with third parties. For example, if the third party is a securities broker-dealer, special rules may apply to it, as well. *See, e.g.*, National Association of Securities Dealers, Inc. Conduct Rules, National Association of Securities Dealers, Inc. Manuel (CCH), page 4101 *et. seq.*; *see also* Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Regulating the Conduct of Broker/Dealers Operating on the Premises of a Financial Institution, 61 Fed. Reg. 11913 (Mar. 22, 1996).
12. *See* Section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)(2)(A)(iii)), as amended by section 2402(e) of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (Pub. Law 104-208, 110 Stat. 3009).
13. This situation does not include when the bank places insurance on real or personal property because a customer has failed to provide reasonable evidence of required insurance in accordance with the terms of a loan or extension of credit.