

# CRS Report for Congress

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## Insurance Provisions of Financial Services Modernization Bills in the 106<sup>th</sup> Congress: Antecedent Supreme Court Decisions

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### Summary

Part of the background against which financial services modernization legislation is proceeding involves the way the courts have treated insurance powers of national banks. Recent Supreme Court decisions have upheld regulatory interpretations establishing the ability of national banks to conduct various kinds of insurance activities. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.* opened the way for national banks to sell insurance nationwide from towns of under 5,000, under the authority of section 92 of the National Bank Act. *Barnett Bank of Marion County, N.A. v. Nelson* held that section 92 preempts state laws to the extent that they “prevent or significantly interfere with the national bank’s exercise of its powers.” This report will not be updated.

Financial services modernization legislation<sup>1</sup> is proceeding against a background of regulatory rulings and court decisions regarding insurance activities of national banks. Generally, banks by virtue of their charters and their enabling statutes, which may be state or federal, have limited powers that are generally confined to the business of banking. In some instances, they are specifically excluded from insurance activity. Over the course of the years, however, various legal authorities have permitted certain insurance sales activities. Three recent Supreme Court decisions have upheld regulatory interpretations establishing the ability of national banks to sell insurance from offices in towns of less than 5,000, to sell annuities, and to preempt state law forbidding bank sale of insurance. The Supreme Court decisions invalidating state prohibitions on national bank insurance sales leave open the possibility of some form of state regulation provided it does not

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<sup>1</sup> See CRS Report RS20098, ‘Insurance Provisions of Financial Services Modernization Bills in the 106<sup>th</sup> Congress; CRS Report RS20027, “Financial Reform Legislation in the 106<sup>th</sup> Congress: Early Activity;” CRS Issue Brief IB10035, “Financial Services Modernization Legislation in the 106<sup>th</sup> Congress.”

significantly interfere with powers given to national banks by federal law. Some states have subsequently adopted laws that are designed to provide some form of regulation of bank insurance sales. The federal regulator of national banks, the Office of the Comptroller of the Currency (OCC), on the other hand, has taken the lead in setting standards for national bank insurance sales by issuing various guidelines on national bank insurance sales. The Supreme Court has recently upheld OCC interpretations of two statutes relative to their conferring limited insurance powers: (1) 12 U.S.C. § 24 Seventh,<sup>2</sup> which grants incidental powers, was held to permit annuity sales by any national bank; and (2) 12 U.S.C. § 92, which authorizes insurance sales in towns of 5,000, as permitting nationwide sales from offices or branches in such towns.<sup>3</sup>

In *United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439 (1993), the Court upheld OCC regulations authorizing national banks to conduct general insurance agency businesses from their offices in towns of under 5,000 on the basis of a statutory provision, 12 U.S.C. § 92. OCC concluded that the primary purpose of the statute was to provide additional sources of revenue for national banks located in towns so small that a reasonable profit margin was problematic. The bank was, thus, authorized to sell insurance to existing and potential customers anywhere provided the insurance company was licensed to do business in their state. The Supreme Court decision went to whether or not 12 U.S.C. § 92 remained in force. Once the Court concluded that it did exist, the case was remanded to the appellate court where the OCC interpretation of the regulation was upheld as reasonable. *Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F. 2d 958 (D.C. Cir. 1993). The case drew its authority from a Supreme Court decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that holds that courts are to defer to an agency interpretation of a statute if the agency's interpretation is reasonable, provided they first find that the statute is ambiguous.

In *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 252 (1995) (VALIC), the Supreme Court upheld OCC's authorization of national bank sale of annuities as a reasonable interpretation of 12 U.S.C. § 24 Seventh, which authorizes national banks "to exercise...all such incidental powers as shall be necessary to carry on the business of banking."

In, 517 U.S. 25 1103 (1996), the Supreme Court held that 12 U.S.C. § 92, permitting national banks to sell insurance in towns of 5,000, preempts state law forbidding them to

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<sup>2</sup> 12 U.S.C. § 24 authorizes national banks to "exercise...all such incidental powers as shall be necessary to carry on the business of banking...." This raises the question of the extent to which insurance powers have been conferred.

<sup>3</sup> 12 U.S.C. § 92 provides that national banks "located in 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 such State, by soliciting and selling insurance and collecting premiums on policies issued by such company and may receive for services so rendered such fees, between said...[bank] and the insurance company for which it may act as agent...." This raises two issues: (1) to what extent national banks may sell insurance nationwide from offices in towns of 5,000 and (2) the extent to which national bank sale of insurance must conform to state law.

do so, despite the existence of the McCarran-Ferguson Act provision, 15 U.S.C. § 101(b), which relegates the regulation of insurance to states unless a federal law that “specifically relates to the business of insurance” specifies otherwise. The Court, thus, held that section 92, “specifically relates to insurance,” and that a statute can relate to both banking and insurance. The Court noted that by holding that national banks may continue to sell insurance from towns of 5,000 or less despite state laws that prohibit bank sales of insurance, it was not invalidating other forms of state regulation of national banks so long as they did not “prevent or significantly interfere with the national bank’s exercise of its powers.” The distinction the Court made between impermissible state outlawing of national bank sale of insurance in the face of a federal statutory authorization and permissible state regulation has prompted speculation as to the type of state regulation that will be permissible. Among the consequent developments are OCC issuance of various guidelines<sup>4</sup> and state enactment of laws attempting to regulate bank sale of insurance within their states.<sup>5</sup>

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<sup>4</sup> OCC Interpretive Letter No. 753 (Nov. 4, 1996), reprinted in [1996-1997 Transfer Binder] *Fed. Banking L. Rep.* (CCH) Para. 81-107, authorizing First Union National Bank to conduct insurance sales, provides an extensive legal interpretation by OCC of national bank insurance sales powers.

<sup>5</sup> According to testimony presented to the House Committee on Banking and Financial Services on February 10, 1999, by William B. Greenwood, President of the Independent Insurance Agents of America, there has been considerable state activity to regulate bank sales of insurance in the wake of *Barnett*. Seventeen states have enacted laws regarding bank insurance activities: Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Mexico, New York, Pennsylvania, Rhode Island, Texas, and West Virginia. Six others are considering such legislation: Florida, Georgia, Maryland, Mississippi, Ohio, Vermont, and Wyoming.