
Jonathan B. Cleveland

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Comment


Jonathan B. Cleveland

Commercial banks stand to earn billions of dollars in annual fee income\(^1\) from selling annuity contracts.\(^2\) Although historically the sale of annuities has been the almost exclusive domain of insurance companies, the Office of Comptroller of the Currency (OCC)\(^3\) recently opined that national banks may sell fixed and variable annuity contracts in their branches through a brokerage subsidiary.\(^4\) Not surprisingly, the insurance industry opposes commercial banks entering their once-protected market. An insurance company challenged the OCC opinion, claiming


\(^{2}\) An annuity contract creates an obligation to periodically pay a stated sum to a stated recipient for either a pre-determined fixed term, or for the life of the annuitant. See 1 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 81 (1988).


that annuities are insurance, and that 12 U.S.C. § 925 prohibits national banks from selling insurance in cities with more than 5000 persons.

A district court upheld the OCC opinion, but the Fifth Circuit overruled the OCC in Variable Annuity Life Insurance Company v. Clarke (VALIC). VALIC not only eliminates a potential billion-dollar source of fee income for national banks from the sale of annuities, but also sharply restricts national bank insurance powers. The Fifth Circuit interpreted § 92 broadly to prohibit national banks from brokering virtually any insurance company product or engaging in any insurance related activity.

5. Section 92 provides that "any such [national bank] 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... by soliciting and selling insurance and collecting premiums on policies issued by such company." 12 U.S.C. § 92 (1988) (omitted since 1952). The United States Code has omitted § 92 since 1952 with a note indicating that Congress repealed it by the Act of April 5, 1918. See United States Nat'l Bank v. Independent Ins. Agents of Am., 113 S. Ct. 2173, 2176 (1993). The Supreme Court held that Congress did not repeal § 92. Id. at 2176-77.

The circuits disagree over the substantive meaning of 12 U.S.C. § 92. The Second and Fifth Circuits contend that § 92 creates a prohibition on national bank insurance activities in cities with more than 5000 persons. See American Land Title Ass'n v. Clarke, 968 F.2d 150, 156 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993); Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc. 399 F.2d 1010, 1013 (5th Cir. 1968). The Eighth and D.C. Circuits contend that § 92 imposes no limitation on national bank insurance activities. See Independent Ins. Agents of Am., Inc. v. Board of Governors of the Fed. Reserve Sys., 736 F.2d 468, 476-77 (8th Cir. 1984); Independent Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164, 1170 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980); infra note 147.


8. 998 F.2d at 1296. The Fifth Circuit recently denied a petition by the OCC for review of the ruling en banc. Valic Rehearing Rejected in 5th Circuit, Banking Arr'y, Jan. 24, 1994, at 3. Although the OCC was undoubtedly disappointed by the ruling, the decision seems to provide an "engraved invitation to the Comptroller and the banking industry to ask the Supreme Court to review VALIC." Id. The Fifth Circuit rejected the OCC's petition for review because only four of the seven judges necessary voted in favor of rehearing the case. Id. Notably, six judges recused, leaving more judges in favor of rehearing than against. Id. Furthermore, the four judges favoring a rehearing issued a stinging statement objecting to the VALIC decision. See Postal, supra note 1, at 1. Judge Jerry E. Smith, voting in favor of a rehearing, stated that VALIC represents of view of § 92 that is "contrary to the well settled interpretation that has prevailed." Id. (quoting Judge Smith, dissenting from the Fifth Circuit's decision not to rehear VALIC).

9. See infra notes 96-99 and accompanying text.
Furthermore, VALIC retreats from a policy of bank deregulation that greatly expanded the financial products and services that commercial banks now market.\textsuperscript{10}

This Comment argues that the Fifth Circuit erred in VALIC. Part I of the Comment provides a brief overview of the United States commercial banking industry with particular emphasis on the successful efforts of bank agencies to increase securities powers, and the less fruitful attempts to expand insurance powers. Part II discusses VALIC and the Fifth Circuit’s rationale for prohibiting the sale of annuities in cities with more than 5000 persons. Part III critiques the court’s reasoning and concludes that the Fifth Circuit should have deferred to the OCC interpretation that annuities are not insurance under § 92. Notwithstanding the classification of annuities, § 92 imposes no limit on national bank insurance powers. Thus, this Comment proposes that pursuant to OCC approval, national banks may market annuities and other insurance products without limitation.

I. OVERVIEW OF COMMERCIAL BANKING: SECURITIES AND INSURANCE POWERS

A. DUAL CHARTERING

The National Bank Act of 1864 (NBA)\textsuperscript{11} created the Office of the Comptroller of the Currency\textsuperscript{12} and empowered the OCC to grant federal bank charters.\textsuperscript{13} Congress enacted the NBA to

\begin{itemize}
  \item[10.] See infra notes 46-48 and accompanying text (discussing the dismantling of Glass-Steagall securities restrictions by bank agency interpretations).
  \item[13.] Congress modeled the National Bank Act on various state bank chartering laws, particularly the New York Free Banking Act of 1838. See Edward L. Symons, The "Business of Banking" in Historical Perspective, 51 Geo. Wash. L. Rev. 676, 689-90 (1983). In general, the state chartering laws provided that parties with a prescribed amount of capital could engage in banking activities without limitation. See id. at 689; Kerry Cooper & Donald R. Fraser, Banking Deregulation and The New Competition in Financial Services 46 (1984). The lack of stringent legal barriers to bank entry during this period
help the federal government finance the Civil War\textsuperscript{14} and to establish an exclusively federal banking system.\textsuperscript{15} Despite the NBA, state-chartered banks flourished due to considerably fewer restrictions than their federally-chartered counterparts.\textsuperscript{16}

The dual chartering system\textsuperscript{17} led federal regulators to increase national bank powers to match those held by state banks.\textsuperscript{18} Following the turn of the century, federal legislation enabled national banks to operate branch banks,\textsuperscript{19} to loan on real estate,\textsuperscript{20} and to sell insurance.\textsuperscript{21} Shortly after World War I,
Congress permitted national banks to underwrite corporate securities.\textsuperscript{22} As a result of these expansive powers, both state and federal commercial banks proliferated.\textsuperscript{23}

**B. The Banking Crisis of the 1930s and Remedial Legislation**

Between 1930 and 1933 approximately one-third of the nation's commercial banks failed.\textsuperscript{24} In response to the bank failures, Depression-era legislation created a comprehensive regulatory framework to ensure the solvency and stability of commercial banks and to protect depositors' funds.\textsuperscript{25} The Depression-era legislation attempted to prevent future commercial bank failures by creating a comprehensive regulatory framework to ensure the solvency and stability of commercial banks and to protect depositors' funds.

22. After the Civil War, state-chartered banks were major participants in the lucrative securities underwriting market that financed the railroad expansion to the West. See \textit{Litan, supra} note 14, at 22. National banks, however, could not underwrite corporate securities. \textit{Id.} Underwriting activity intensified after World War I, and Congress attempted to lessen the restraints on national banks by permitting underwriting of those securities approved by the OCC. \textit{Id.} at 23; see Act of February 25, 1927, ch. 191, § 2, 44 Stat. 1226 (1927) (codified as amended at 12 U.S.C. § 24(7) (1988)). At first, the Comptroller only approved bank underwriting of corporate bonds. \textit{Litan, supra} note 14, at 22. Later, in response to the proliferation of state-chartered banks, the OCC permitted underwriting of corporate equity. \textit{Id.}

23. In the early 1920s, more than 30,000 commercial banks operated in the United States. \textit{Cooper \\& Fraser, supra} note 13, at 50. Technological advances in transportation and communications made geographic expansion feasible for commercial banks. \textit{Litan, supra} note 14, at 24-25. The McFadden Act provided national banks with the legal authority to open branch locations according to the laws of their domiciliary state. \textit{Id.} at 24. By 1929, multi-office banks held more than half of all assets in the American banking system. \textit{Id.}

24. \textit{Litan, supra} note 14, at 25; see also \textit{Cooper \\& Fraser, supra} note 13, at 50 (describing impact of the Great Depression on the banking industry).


Depression-era legislation attempted to prevent future commercial bank
pression-era legislation brought the "free banking era" to an abrupt end, establishing stringent regulatory oversight designed to ensure a sound and stable banking system.

In particular, Congress believed that commercial banks buying, selling, and underwriting securities precipitated bank failures. As a result, Congress enacted the Glass-Steagall provisions of the Banking Act of 1933 to end commercial bank underwriting and to severely limit other securities activities.

The Depression-era legislation also sought to diffuse economic power. See Fischer, supra, at 739. Toward this end, legislation restricted geographic expansion and bank affiliations with other industries. Id. at 737. The Glass-Steagall provisions of the 1933 Act separated commercial and investment banking. See infra notes 29-31 and accompanying text.

26. Depression-era legislation limited bank entry. See Rose, supra note 12, at 86; see also Cooper & Fraser, supra note 13, at 52 (discussing end of "free banking era"); Fischer, supra note 25, at 741-43 (discussing entry restrictions imposed by Depression-era legislation). The chartering laws required that, to win approval, a federal bank charter applicant had to substantively prove that a significant public need existed, and that the new bank would be successful without injuring operating banks. See Cooper & Fraser, supra note 13, at 52. The FDIC can indirectly limit the entry of state banks by denying deposit insurance to a state bank applicant. Id. Because deposit insurance is generally necessary to operate a bank, the FDIC exercises de facto veto power over state bank entry. Id.

27. The 1933 Act increased the regulatory oversight role of the Federal Reserve System, prohibited the payment of interest on demand deposits, and raised the minimum capital requirements of national banks. See Banking Act of 1933, ch. 89, §§ 16, 20-22, 48 Stat. 162, 184-189 (1933). The Depression-era legislation preferred regulation to competition to restore stability in the banking system. See Rose, supra note 12, at 353. Considering the economic circumstances of the 1930s in hindsight, regulators may have been justified in promulgating over-reaching regulation. See id. The present costs of over-regulation, however, may exceed the benefits derived from safety and soundness in the banking system. Id. at 86. In addition, reformers may have overstated the costs attributed to the free banking era. Id.

28. See Norton, supra note 25, at 329. Congress believed that excessive use of bank credit to speculate in the stock market precipitated the 1929 stock market crash and subsequent bank failures. Id.; see Matarese, supra note 17, at 221 (citing S. Rep. No. 77, 73d Cong., 1st Sess. 3-9 (statement of Sen. Glass)). In addition, Congress thought that using customer deposits for investment into corporate securities created unacceptable risks for commercial banks. Norton, supra note 25, at 329. Furthermore, Congress believed that commercial banks engaged in investment banking did not allocate credit or provide investment advice impartially. Id. at 334.


30. The Banking Act of 1933 is sometimes referred to as the Glass-Steagall Act. Norton, supra note 25, at 327 n.2. The term "Glass-Steagall" applies accu-
Glass-Steagall advanced the Depression-era policy of limiting competition among, and restricting permissible activities of, financial institutions.  

C. JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCIES

Following the Depression era, federal bank agencies expanded national bank powers by liberally interpreting Glass-Steagall and other banking laws. Courts generally noted that bank agency regulations, opinions, and statutory interpretations warranted judicial deference. Courts did not, however, apply a consistent standard to review bank agency decisions.

In 1984 the Supreme Court defined the relationship between courts and administrative agencies in *Chevron U.S.A.*, rately to only four key provisions of the 1933 Act, §§ 16, 20, 21 and 22. *Id.* Together, these four provisions separated commercial from investment banking. *See id.* at 330-34. Commercial banks could not engage in underwriting or dealing in securities, and investment banks could not accept deposits. *Id.*

31. *See Kaufmann & Kornendi, supra* note 12, at 29; *Rose, supra* note 12, at 352-54.


33. The Supreme Court articulated a presumption of judicial deference to bank agency interpretations of banking laws in *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27 (1971). *Matarese, supra* note 17, at 230. The Court then, however, overturned an OCC regulation that authorized national banks to operate open-end mutual funds because the OCC stated no reasons for its decision. *Camp*, 401 U.S. at 627. Thus, *Camp* illustrates that an unsubstantiated bank agency decision does not warrant judicial deference because a court cannot ascertain whether the decision-maker properly considered the impact of the statute. *See id.* at 628.


34. *See* Matarese, *supra* note 17, at 204-09.
**Inc. v. Natural Resources Defense Council, Inc.** The Court instructs courts that administrative agencies perform day-to-day law making. Because administrative agencies are politically accountable branches, judicial deference to administrative decisions effectuates the policy objectives of the electorate.

*Chevron* established a two-step test for review of an agency's interpretation of a statute. If Congress clearly and unambiguously stated its intent, both the agency and the court must effectuate that intent. If, however, Congress did not directly address the question, or addressed the question ambiguously, then the court must determine whether the agency interpretation is a "permissible construction" of the statute. The agency need not adopt the only permissible construction, nor the reading that the court would have reached on its own. The agency's construction controls unless it is "arbitrary, capricious, or manifestly contrary to the statute."

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36. See Mikva, supra note 35, at 3. In *Chevron* the Court stated that "if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation . . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." 467 U.S. at 843-44 (footnote omitted).

37. The Court reasoned that "[j]udges . . . are not part of either political branch of the Government. . . . [I]t is entirely appropriate for [administrative agencies] to make such policy choices - resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency . . . ." Id. at 865-66. Furthermore, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." Id. at 866; see Mikva, supra note 35, at 3.

A court cannot circumvent *Chevron* and supersede an agency interpretation with its own policy preference. See *Chevron*, 467 U.S. at 866 (arguing that "the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ."). Independent decision making by inexpert judges precludes utilizing agency expertise to make technical policy choices. See Mikva, supra note 35, at 3. Some regulatory areas require heavy technical expertise and frequent oversight is efficiently accomplished only by utilizing administrative agencies. Id.


39. Id.

40. Id. at 843.

41. Id. at 843, n.11.

42. Id. at 844.
D. Dismantling Glass-Steagall with the Help of Chevron

Chevron enabled bank regulators to "dismantle" Glass-Steagall.43 Beginning in the 1970s, economic factors and rapid technological advances dramatically changed the landscape of the financial services industry.44 Depression-era legislation restricted commercial banks from effectively competing with other financial institutions.45 Bank agencies responded during the 1980s by deregulating commercial banks, particularly the restrictions imposed by Glass-Steagall.46 Bank agency interpreta-

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43. See, e.g., Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 403-04 (1987) (upholding an OCC opinion under Chevron allowing national banks to market securities through retail discount brokerage subsidiaries located in their branches). Clarke v. Securities Indus. Ass'n illustrates the great extent to which courts must defer to interpretations by the OCC. Id. at 403-04.

44. Interest rate ceilings imposed on banks proved untenable during the double-digit inflation periods of the 1970s. Litran, supra note 14, at 33. In addition, rapid technological advances and "one-sided" regulation enabled other institutions, such as nonbanks, to effectively exploit market opportunities and to replace commercial banks in many areas. Id. at 33-34; see Fischer, supra note 25, at 771-75 (discussing competition between nonbanks and commercial banks).

A nonbank is an entity that provides either credit or depository functions, but not both. See Cooper & Fraser, supra note 13, at 198-203. The size and scope of nonbanking firms poses a significant threat to the market share of commercial banks. See Litran, supra note 14, at 44. Diversified nonbank financial institutions offer a wide range of depository, lending, and investment services that commercial banks historically provided. Id. In addition, non-financial industrial companies have become leading providers of financial services. Id.

45. Nonbanks can compete in commercial bank markets, but commercial banks cannot enter many nonbank markets. Litran, supra note 14, at 41. Increasingly, commercial banks did not meet the credit needs of borrowers due to the "one-sided" regulatory constraints. Id. Commercial enterprises obtained short and intermediate term financing from the commercial paper markets. Id. The booming securities market during the 1980s encouraged raising funds from the capital markets rather than borrowing from banks. Id. at 42. Consequently, commercial banks lost market share as providers of credit. See id. at 45 (Figure 2-7).

As a result of increased competition in the credit markets, commercial banks assumed riskier loans to boost profitability. Id. at 49. Commercial banks lent to higher-risk borrowers because low-risk borrowers utilized alternative sources. Id. Thus, one-sided regulation jeopardized the structural soundness of commercial banks. Id.

tions, generously upheld under *Chevron*, substantially displaced prohibitions on dealing and underwriting securities.47 By 1990, bank holding companies and national banks could operate discount and full service brokerages, as well as engage in limited underwriting and dealing in commercial paper, corporate debt and equity, municipal revenue bonds, and mortgage-backed securities.48

E. NATIONAL BANK INSURANCE POWERS

Increasingly, commercial banks have sought authority to market insurance and other non-traditional financial products.49 Bank regulators, however, have resisted expanding bank insurance powers due partly to the historical perception that banking and insurance are distinct industries.50 Congress has

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47. In 1987 the Board of Governors of the Federal Reserve System (Board) approved the application of several bank holding companies seeking to engage in underwriting of and dealing in certain “ineligible securities,” activities expressly prohibited under § 20 of Glass-Steagall. *Citicorp*, 73 Fed. Reserve Bull. 473 (1987). The Board determined that a member bank may underwrite ineligible securities through a subsidiary so long as the subsidiary is not “engaged principally” in underwriting ineligible securities. *Id.* at 475-77. A subsidiary is “engaged principally” in an activity if it derives five percent or more of its average gross revenues over a two-year period from that activity. *Id.* at 483. The Second Circuit upheld the Board’s interpretation based on *Chevron*. *See Securities Indus. Ass’n v. Board of Governors of Fed. Reserve Sys.*, 839 F.2d 47, 69 (2d Cir. 1988). *Securities Indus. Ass’n v. Board of Governors* precipitated the “dismantling of Glass-Steagall.” *See Fischer, supra* note 25, at 782. In 1989, the Board expanded the class of securities that banks can underwrite to include all types of corporate debt and equity. *J.P. Morgan & Co., Inc.*, 75 Fed. Reserve Bull. 192, 193 (1989). Later that year, the Board determined that a BHC could earn up to 10% of its gross revenues from underwriting without being “engaged principally” in that activity. *See 75 Fed. Reserve Bull.* 751 (1989).


49. *See id.* Commercial banks did not initially engage in broad insurance activities because of the relatively lower returns available when compared to investment banking. *Litman, supra* note 14, at 72. Larger banks, however, seemingly could benefit by selling insurance because they could market insurance more aggressively than existing insurance company agents. *Id.* at 72-73 n.27 (citing *Consumer Federation of America, The Potential Costs and Benefits of Allowing Banks to Sell Insurance* (1987)). American consumers would benefit most, saving five to seven billion dollars per year as a result of the increased competition. *Id.*

generally acquiesced to insurance industry lobbying efforts and refused to expand national bank insurance powers.\textsuperscript{51} Furthermore, the pre-	extit{Chevron} practice of judicial deference to bank agencies generally did not extend to national bank insurance powers.\textsuperscript{52} Even after 	extit{Chevron}, some courts narrowly interpreted national bank insurance powers relying on those pre-	extit{Chevron} decisions.\textsuperscript{53}

National banks may engage in insurance activities pursuant to 12 U.S.C. § 24(7)\textsuperscript{54} and 12 U.S.C. § 92.\textsuperscript{55} Neither § 24(7) nor § 92 expressly limits national bank insurance activities.


\textsuperscript{52} See Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1013-17 (5th Cir. 1968); \textit{infra} notes 59-61 and accompanying text (discussing Saxon).

\textsuperscript{53} See American Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992), \textit{cert. denied}, 113 S. Ct. 2959 (1993); \textit{infra} notes 71-74 and accompanying text (discussing \textit{American Land Title Ass'n v. Clarke}).

\textsuperscript{54} Section 24(7) states "[a national bank shall have power to] exercise . . . all such \textit{incidental powers} as shall be necessary to carry on the \textit{business of banking}.” 12 U.S.C. § 24(7) (1988) (emphasis added). Thereafter, § 24(7) enumerates specific activities in which national banks can engage. Section 24(7) is commonly referred to as the “powers clause.” See Symons, supra note 13, at 698.

Section 24(7) does not expressly grant insurance powers to national banks. Insurance powers derive from the "business of banking" clause and the "incidental powers" clause. \textit{Id.} at 683. Although the OCC has relied on the "incidental powers" clause to approve insurance activities, some commentators contend that the "business of banking" clause grants the authority to engage in many financial activities, including insurance. \textit{Id.} at 680. \textit{See generally} American Ins. Ass'n v. Clarke, 865 F.2d 278 (D.C. Cir. 1988) (stating that the "business of banking" includes activities beyond those enumerated in § 24(7)); Independent Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979) (upholding national bank authority to broker credit life insurance under § 24(7)), \textit{cert. denied}, 449 U.S. 823 (1980).

\textsuperscript{55} Section 92 states that "any such [national bank] 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 . . . by soliciting and selling insurance and collecting premiums on policies issued by such company." 12 U.S.C. § 92 (1988) (omitted since 1952); see supra note 5 and accompanying text.
Bank agencies and courts, therefore, have determined permissible commercial bank insurance activities. To date, the Supreme Court has remained silent on the substantive scope of national bank insurance powers under § 92.\textsuperscript{56}

In 1963 Comptroller James Saxon, a strong proponent of expanding commercial bank powers,\textsuperscript{57} promulgated an OCC ruling that permitted national banks to sell insurance incidental to banking transactions.\textsuperscript{58} The Fifth Circuit, however, overturned the OCC ruling in \textit{Saxon v. Georgia Ass'n of Independent Insurance Agents},\textsuperscript{59} holding that § 92 prohibits national banks from operating insurance agencies in cities where the population exceeds 5000 persons.\textsuperscript{60} The court concluded that the express grant of insurance powers in § 92 defines the full extent of national bank insurance powers.\textsuperscript{61}

\textit{Saxon} jeopardized all insurance-related activities at most national bank locations, including a long standing practice of

\textsuperscript{56} But see United States Nat'l Bank v. Independent Ins. Agents of Am., 113 S. Ct. 2173, 2176-77 (1993) (holding that Congress did not repeal 12 U.S.C. § 92, but failing to address the substantive meaning of § 92). For a discussion of the Court's decision that 12 U.S.C. § 92 was not repealed, see \textit{supra} note 5 and accompanying text.

\textsuperscript{57} See \textit{LITAN}, \textit{supra} note 14, at 31.

\textsuperscript{58} OCC Ruling No. 7110 (1963). The OCC ruling stated that "[i]ncidental to the powers vested in [national banks] under 12 U.S.C. sections 24, 84, and 371, National Banks have the authority to act as agent in the issuance of insurance which is incident to banking transactions." \textit{Saxon v. Georgia Ass'n of Indep. Ins. Agents}, 399 F.2d 1010, 1012 (1968) (quoting OCC Ruling No. 7110 (1963)). The OCC did not limit its ruling to cities of 5000 persons or fewer. \textit{Id.} Subsequently, the OCC approved the application of Citizens and Southern National Bank to sell broad forms of automobile, home, casualty, and liability insurance in branches located in cities with more than 5000 persons. \textit{Id.}

\textsuperscript{59} 399 F.2d 1010 (5th Cir. 1968).

\textsuperscript{60} \textit{Id.} at 1012.

\textsuperscript{61} \textit{Id.} The Fifth Circuit rejected the claim that insurance powers exist outside of § 92 based on the \textit{expressio unius est exclusio alterius} rule of statutory construction. \textit{Id.} at 1013-14. The \textit{expressio unius} rule of statutory construction means that the mention of one thing in the statute implies the exclusion of another. \textit{Id.} at 1014. Accordingly, the express power to operate insurance agencies in cities with fewer than 5000 persons implies that national banks lack the power to do the same in cities with more than 5000 persons. \textit{Id.} at 1013. The Fifth Circuit supported its construction with the legislative history of § 92. \textit{Id.} The court noted that Congress enacted 12 U.S.C. § 92 in response to a letter by Comptroller John Skelton Williams in 1916. \textit{Id.} (citing 53 Cong. Rec. 11,001 (1916)). The Comptroller's letter stated that national banks neither have the express nor the implied authority to act as insurance agents. \textit{Id.} The Comptroller, therefore, recommended that Congress grant insurance powers to national banks located in small towns. \textit{Id.}
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selling credit life insurance. Subsequently, in Independent Bankers Ass'n of America v. Heimann, the D.C. Circuit held that the sale of credit life insurance did not violate § 92. In Heimann, the court determined that national banks have certain insurance powers under § 24(7) not subject to § 92. According to the D.C. Circuit, the Saxon construction of § 92 applied only to national banks operating general insurance agencies. The court concluded that selling credit life insurance is incidental to lending, an activity expressly authorized in § 24(7).

The Eighth Circuit also disagrees with the Saxon construction of § 92. In Independent Insurance Agents of America, Inc. v. Board of Governors of the Federal Reserve System, the Eighth Circuit ignored Saxon and held that § 92 does not apply to a number of insurance activities.

63. 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980).
64. Id. at 1170. Credit life insurance is a form of security on consumer loans. Id. at 1168. A borrower purchases credit life insurance to satisfy the loan in the event of a casualty. Id. at 1168 n.9.
65. Id. at 1170. The court disagreed with the Saxon interpretation that § 92 limits national bank insurance activities. Id. According to the court, § 92 creates no limit on national bank insurance activities in cities with more than 5000 persons. Id. at 1170 n.18.
66. Id. at 1170.
67. Id. According to the D.C. Circuit, national banks have incidental powers to pursue all activities related to the "business of banking" activities enumerated in 12 U.S.C. § 24(7). Id. Credit life insurance is a commonplace product when ordinary loans on security are involved. Id. Thus, a bank has the incidental power to sell credit life insurance under § 24(7) notwithstanding § 92. Id.

The D.C. Circuit avoided applying § 92 to a national bank insurance activity in American Ins. Ass'n v. Clarke, 865 F.2d 278 (D.C. Cir. 1988). The court upheld an OCC decision allowing a national bank to sell municipal bond insurance. Id. at 281-82. To reach its decision, the court deferred to the OCC's interpretation that municipal bond insurance was the functional equivalent of issuing a standby letter of credit, a service traditionally provided by national banks under 12 U.S.C. § 24(7). Id. at 281-82. The court expressed that the term "business of banking" in § 24(7) includes activities beyond those specifically enumerated. Id. at 281. Confining bank activities to those specifically enumerated in 12 U.S.C. § 24(7), or those merely incident thereto, reflects "a narrow and artificially rigid view of both the business of banking and the [National Bank Act]." Id. (quoting the district court decision in American Ins. Ass'n v. Clarke, 656 F.Supp 404, 408 (D.D.C. 1987), aff'd 865 F.2d 278 (D.C. Cir. 1988)). Under Chevron, "the Comptroller's expert judgment in this regard should not be overturned." Id. at 283 (quoting district court decision in American Ins. Ass'n v. Clarke, 656 F.Supp at 409-10). Thus, the Saxon construction of § 92 does not apply to insurance activities within the broad parameters of the "business of banking" powers of § 24(7).
68. 736 F.2d 468 (8th Cir. 1984).
bank holding company's (BHC) national banks when the BHC's insurance agencies are separate subsidiaries.69

Responding to the favorable shift toward commercial bank insurance powers, the OCC extended national bank insurance powers into areas less related to traditional bank activities.70

The Second Circuit, however, recently took a narrow view of national bank insurance powers in American Land Title Ass'n v.

69. Id. at 470. The Board permitted two BHCs, Commerce Bancshares, Inc. (Commerce) and Mercantile Bancorporation, Inc. (Mercantile), to sell certain kinds of insurance through a separate subsidiary to customers of its operating banks. Id. For example, the subsidiary may sell car insurance, collision, and liability, to a customer of the bank who borrowed money to buy the car. Id. at 471. Mercantile and Commerce operated several national banks in cities with more than 5000 persons. Id. at 476. The insurance association plaintiff argued that the sale of insurance violated 12 U.S.C. § 92. Id. The court noted that Saxon was difficult to distinguish from this situation, yet openly criticized and questioned the validity of the Saxon construction of § 92:

There is a strong argument that Saxon was wrongly decided. The legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance. Despite our doubts about Saxon's validity, we prefer not to disagree openly with a sister circuit, and find it unnecessary to do so.

Clarke,\textsuperscript{71} holding that § 92 prohibits national banks from selling title insurance in cities with more than 5000 persons.\textsuperscript{72} The court based its decision on the Saxon construction of § 92.\textsuperscript{73} Furthermore, the Second Circuit rejected the D.C. Circuit’s holding in Heimann that § 24(7) provides insurance powers not subject to limitation by § 92.\textsuperscript{74}

Notwithstanding the adverse impact of American Land Title Ass’n v. Clarke, national banks discovered a loophole to avoid the Saxon limitation on national bank insurance powers. In Independent Insurance Agents of America, Inc. v. Ludwig,\textsuperscript{75} the D.C. Circuit upheld an OCC opinion and concluded that § 92 imposes no geographical limitation on a national bank insurance agency located in a town of fewer than 5000 persons.\textsuperscript{76} Ludwig provided a significant victory for national banks because such banks can simply locate branches in towns of fewer than 5000 persons and market insurance products into cities with more than 5000 persons.\textsuperscript{77} Unfortunately, commercial banks proba-

\textsuperscript{71} 968 F.2d 150 (2d Cir. 1992), cert. denied, 113 S. Ct. 2959 (1993).
\textsuperscript{72} Id. at 157.
\textsuperscript{73} Id. at 156. The court first recognized that the Chevron standard of review was applicable. Id. at 154-55. Next, the court followed the Saxon expressio unius est exclusio alterius construction of § 92 and concluded that Congress intended to prohibit any general insurance agency activity of a national bank in towns with more than 5000 persons. Id. at 155. To support its construction, the court referenced the 1916 letter to Congress by Comptroller John Skelton Williams that proposed giving banks the power to operate insurance agencies in small towns. Id. at 155-56 (citing 53 CONG. REC. 11,001 (1916)).
\textsuperscript{74} The court criticized the Heimann position that § 92 imposes no limitation on national bank insurance activities. Id. at 156-57. According to the Second Circuit, if Congress wanted all banks to possess insurance powers regardless of location, then the population provision would be superfluous. Id. at 155. Notwithstanding § 92, the court distinguished Heimann based on the unique nature of credit life insurance. Id. at 156. Title insurance differs from credit life insurance because title insurance protects both the borrower’s and the lender’s interest, whereas credit life insurance only protects the lender’s interest. Id. at 157. Thus, credit life insurance constitutes a banking activity and title insurance an insurance activity. Id.
\textsuperscript{75} 997 F.2d. 958 (D.C. Cir. 1993).
\textsuperscript{76} Id. at 958. The OCC interpretive letter stated that “a national bank or its branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers located anywhere.” Id. at 959 (quoting Letter from Judith A. Walter, Senior Deputy Comptroller for National Operations, to U.S. National Bank of Oregon).
\textsuperscript{77} Chase Manhattan and other national banks may circumvent the American Land Title Ass’n decision and sell title insurance nationwide through a small town branch. See Arthur D. Postal, OCC Chase Stratagem Exploits Insurance Rule, FDIC WATCH, Oct. 11, 1993, at 1. The Ludwig decision prompted intense lobbying efforts by the insurance industry to close the “small-town loop-
bly cannot effectively sell annuities from distant branches. Thus, while liberalizing bank insurance powers dramatically, *Ludwig* does not resolve the dilemma national banks face in marketing annuities.

II. **VALIC: NATIONAL BANK ANNUITY SALES LIMITED** BY 12 U.S.C. § 92

The OCC opined that national banks may market fixed and variable annuities in their branches pursuant to 12 U.S.C. § 24(7) and that 12 U.S.C. § 92 does not apply to the sale of annuity contracts by national banks. Subsequently, the OCC ap-

78. *See* David W. Roderer, *VIEWPOINT: Congress Should Defer Action on Bank Annuity Sales*, *Am. Banker*, Nov. 3, 1993, at 12. See Postal, *supra* note 77, at 1. Selling annuities by mail and via telemarketing is not feasible. *Id.* Banks will probably exploit *Ludwig* with other forms of insurance more easily sold by mail and telephone solicitations. *Id.*

79. In 1985, the OCC permitted national banks to broker variable annuities through discount brokerage subsidiaries. *OCC Interpretive Letter No. 331, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,773 (Apr. 4, 1985).* Variable annuity contracts provide an accumulation unit in a separate investment portfolio in exchange for a lump sum or periodic payment. *Id.* At maturity, the annuitant receives a pro rata share of the portfolio for either a fixed term or life. *Id.* The OCC acknowledged that variable annuities expose issuers to the risk that the annuitant will outlive the expected mortality date. *Id.* at 77,774. In that regard, issuers may structure the payments according to detailed mortality tables. *Id.* A variable annuity, however, does not guarantee any payment at maturity and therefore, the investment risk falls entirely on the annuitant. *Id.* Thus, despite the feature of mortality risk, a variable annuity more closely resembles shares in a mutual fund. *Id.* The OCC cited cases supporting its reasoning. *Id.* (citing SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1966); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971)). As such, variable annuities are securities that a national bank can buy and sell without recourse under 12 U.S.C. § 24(7). *Id.*

In 1990, the OCC approved the sale of fixed annuity contracts by national banks. *OCC Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090, at 71,210 (Feb. 12, 1990).* A fixed annuity provides a guaranteed payment for a fixed term, or life, in exchange for the premium, or premiums, paid by the annuitant. *Id.* at 71,212. National banks may sell fixed annuities pursuant to their general power to broker financial instruments. *Id.* at 71,213. Although historically a product of insurance companies, the OCC determined that annuities are financial investment products, not insurance. *Id.* The OCC noted that investors purchase annuities to provide tax-sheltered saving for retirement, not to shift financial risk of catastrophic events as in the case of insurance. *Id.* at 71,212; *see also* In re Howerton, 21 B.R. 621, 623 (1982) (opining that "life insurance is a promise to pay a certain sum on the death of an insured and an annuity is essentially a form of investment"); *APPLEMAN, supra* note 2, at 295 (arguing that "annuity contracts must . . . be recognized as investments rather than insurance"). Thus, the "risk is essentially an investment risk, not an insurance risk." *OCC Interpretive Letter*
proved the application of NCNB National Bank of North Carolina to sell fixed and variable annuity contracts through its subsidiary NCNB Securities. On April 16, 1991, the Variable Annuity Life Insurance Company (the Company) filed suit seeking declaratory and injunctive relief against the OCC. The Company claimed that the sale of annuities by national banks violated 12 U.S.C. § 92. On cross motions for summary judgment, the district court granted the OCC's motion and denied the Company's. The district court found that Congress never specifically addressed whether national banks can sell annuity contracts. The court then upheld the OCC opinion because the

No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090, at 71,212 (Feb. 12, 1990); see also Helvering v. LeGierse, 312 U.S. 531, 542 (1941) (reasoning that "any risk that the [premium] would earn less than the amount paid to respondent as an annuity was an investment risk . . . not an insurance risk"). In addition, annuity contracts resemble debt instruments because an issuer's obligation to make periodic payments resembles that of a debtor. OCC Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090, at 71,212-13 (Feb. 12, 1990). Furthermore, the OCC reasoned that a fixed annuity functionally resembles a certificate of deposit (CD). Id. at 71,213. A fixed annuity for a fixed term resembles a CD that withdraws a portion of principal to reduce the balance to zero at the end of the term. Id. An annuity with a life term operates like a CD with a life interest in the income. Id. The OCC concluded that banks sell other financial instruments that entail the two principal features of a fixed annuity, life term and fixed return. Id.

The OCC also disagreed with the Saxon interpretation of § 92. Id. Congress did not define "insurance" in § 92. Id. at 71,214. The OCC cited various dictionary definitions and cases to support its decision that annuities are not "insurance" within the meaning of § 92. Id. The OCC determined, however, that even under Saxon, § 92 does not prohibit the sale of annuities. Id. at 71,215. According to the OCC, the Saxon limitation applies, if at all, only to broad forms of insurance, such as fire or life insurance, and does not affect specialized products such as annuities. Id.


82. Id. The Company sells annuities in all fifty states and directly competed with NCNB in the business of selling annuity contracts. VALIC, 998 F.2d at 1297.


84. Id. at 641. According to the district court, Congress did not address whether banks may sell insurance in cities with more than 5000 persons or the meaning of insurance under § 92. Id. The court noted that the plain language of § 92 expressly grants national banks the authority to operate insurance agencies in cities with fewer than 5000 persons. Id. The language does not expressly prohibit national bank insurance activities and "it is neither arbitrary nor capricious to view 12 U.S.C. § 92 as a supplemental powers provision and not a limitation on national banks['] incidental powers under § 24(7)." Id. at
OCC’s interpretation was a “permissible construction” under Chevron. On appeal, the Fifth Circuit reversed the district court and concluded that the sale of annuities by national banks violated 12 U.S.C. § 92.

According to the Fifth Circuit, the Saxon interpretation of § 92 exhibits Congress’s clear intent to limit national bank insurance activities to cities with fewer than 5000 persons; therefore, the district court never should have reached the second step of Chevron. The court relied on the expressio unius est exclusio alterius construction of § 92 set forth in Saxon to reach this conclusion. The court supported its construction by noting that the legislative record of § 92 indicates that national banks should operate insurance agencies only in small communities. Furthermore, the court contended that the OCC cannot invoke Chevron to overrule the judicial precedent established by Saxon.

The court also noted that the legislative record indicates that Congress enacted § 92 to provide an additional source of income for national banks located in small towns, not to protect insurance companies from competition. The court observed that § 92 does not define “insurance.” Congressional silence, combined with express rulemaking authority delegated to the OCC, “left a gap for the [Comptroller] to fill.” (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). The OCC determined that annuities were financial investment instruments, not insurance products, because they do not indemnify against risk of loss.


In addition, the Second Circuit recently followed Saxon in reversing an OCC directive permitting national banks to sell title insurance. Id.; see American Land Title Ass’n v. Clarke, 968 F.2d 150 (2d Cir. 1992); supra notes 71-74 and accompanying text (discussing American Land Title Ass’n v. Clarke).

The only source of legislative history concerning § 92 is a 1916 letter from Comptroller John Skelton Williams to Congress proposing that national banks should have the authority to act as insurance agents. To support its construction of § 92, the Fifth Circuit cited a portion of that letter that states “from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities.” Id. at 1299 (citing 53 Cong. Rec. 11,001 (1916)).

The OCC questioned the precedential weight of Saxon because the case was decided sixteen years before Chevron. Id.
The Fifth Circuit then held that annuities are insurance products, both historically and functionally. All fifty states regulate annuities under their insurance laws. Annuities are insurance products because "functionally they are the mirror image of life insurance." In addition, life insurance and annuities both rely in part on actuarial calculations of mortality risk. The Fifth Circuit concluded that annuities are insurance and therefore, § 92 prohibits the sale of annuities in cities with more than 5000 persons.

The Fifth Circuit rejected the OCC's argument that, under Heimann, § 92 only applies to broad insurance activities by stating that this distinction would require courts to create an arbitrary distinction between general and specialized insurance products. According to the Fifth Circuit, giving banks the power to sell insurance under § 24(7) would render § 92 superfluous. Moreover, the court reasoned that Heimann did not

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91. Id. at 1300-01
92. Id. at 1306.
93. Id. at 1301. The court reasoned that "[a]n annuity contract is the exact inverse of a life insurance contract." Id. (emphasis added). By "exact inverse," the court refers to the typical payment structure of annuities and life insurance policies. See id. In exchange for periodic payments, a life insurance contract provides a lump sum upon the death of the insured. Id. An annuity provides an annuitant periodic payments in exchange for a lump sum. Id. Although accurate, life insurance and annuity contracts offer other payment structures as well. See OCC Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 (Feb. 12, 1990).
94. VALIC, 998 F.2d at 1301. Both life insurance and annuities transfer the economic risk of death from the policyholder or annuitant to the insurance company. Id. Life insurance protects the insured from premature death, and an annuity protects the annuitant from outliving forecasted mortality. Id.
95. Id.
96. Id. The OCC argued that even if annuities are insurance products, the Saxon construction of § 92 only applies to "general" types of insurance. Id. Saxon reversed an OCC ruling which allowed a national bank to sell "broad forms of automobile, home, casualty and liability insurance." See Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1012 (5th Cir. 1968); supra notes 58-61 and accompanying text (discussing Saxon). According to the OCC, annuities are a specialized insurance product to which Saxon does not apply. VALIC, 998 F.2d at 1301-02. Furthermore, the OCC contended that annuities are analogous to credit life insurance which Heimann held national banks were permitted to sell. Id. at 1302.
97. VALIC, 998 F.2d at 1302. The court also noted that the Second Circuit dismissed the same argument in American Land Title Ass'n v. Clarke, 968 F.2d 150, 156-57 (2d Cir. 1992). VALIC, 998 F.2d at 1302; see supra notes 71-74 and accompanying text (discussing American Land Title Ass'n v. Clarke). The court noted that annuities are no less a "general" type of insurance than land title insurance. VALIC, 998 F.2d at 1302.
98. VALIC, 998 F.2d at 1303. As such, § 92 reflects Congress's understanding that national banks did not have incidental powers to sell insurance under
apply because, unlike credit life insurance, selling annuities is not closely related to the business of banking.\textsuperscript{99}

The Fifth Circuit concluded that \textit{Saxon} compelled its decision in \textit{VALIC}.\textsuperscript{100} Since 1968 Congress has not modified the \textit{Saxon} construction of § 92.\textsuperscript{101} The court admonished national banks for seeking more power than that granted by statute and recommended that banks "look to Congress, not the Comptroller . . . or the courts" to expand insurance powers.\textsuperscript{102} Thus, the Fifth Circuit reversed the district court and held that the OCC decision allowing NCNB to sell annuities in towns with more than 5000 persons violated 12 U.S.C. § 92.\textsuperscript{103}

\section*{III. A NEW VIEW ON ANNUITIES AND NATIONAL BANK INSURANCE POWERS}

\textit{VALIC} represents a major set-back for the banking industry's push into insurance markets. \textit{VALIC} not only restricts certain national banks from participating in the billion dollar annuity market,\textsuperscript{104} but also reflects an unduly narrow interpretation of national bank insurance powers.\textsuperscript{105} In addition, \textit{VALIC} jeopardizes the relationship established by \textit{Chevron} between federal courts and administrative agencies.\textsuperscript{106} Bank agency de-

\footnotesize{\textsuperscript{99} VALIC, 998 F.2d at 1302. Both the Fifth and Second Circuits view national banks selling credit life insurance as simply charging a higher price for the loan. \textit{Id.} In addition, the Fifth Circuit noted that notwithstanding the general grant of power in § 24(7), the § 92 limitation controls. \textit{Id.}}

\footnotesize{\textsuperscript{100} \textit{Id.}}

\footnotesize{\textsuperscript{101} \textit{Id.} at 1303.}

\footnotesize{\textsuperscript{102} \textit{Id.} (quoting \textit{Saxon}, 399 F.2d at 1021 (Thornberry, J., concurring)).}

\footnotesize{\textsuperscript{103} \textit{Id.}}

\footnotesize{\textsuperscript{104} See supra note 1 (noting magnitude of the income generated by national banks from sale of annuities). The decision does not presently affect national bank annuity sales outside the Fifth Circuit. Robert M. Garsson, \textit{Courts Slam Lid on Annuity Sales in Texas, Louisiana, Mississippi}, \textit{Am. Banker}, Aug. 31, 1993, at 2 (quoting Ronald Glancz).}

\footnotesize{\textsuperscript{105} One commentator notes, "[t]he way the decision is written, it seems to me that taking the case to the Supreme Court will be a win or lose all decision." \textit{IBAA Breaks Ranks on Insurance}, \textit{Am. Banker} Sept. 6, 1993, at 8 (quoting an unidentified banking industry lawyer). \textit{But see supra note 8 (discussing likelihood that OCC will seek review by Supreme Court based on manner its petition for rehearing \textit{en banc} was rejected).} Michael F. Crotty of the American Bankers Association noted that the court took a "parsimonious view of incidental powers." See Garsson, supra note 104, at 2.}

\footnotesize{\textsuperscript{106} See supra notes 35-42 and accompanying text (discussing judicial defer-}
cisions now lack finality, and reliance on regulatory approval by banks may be costly.\textsuperscript{107}


The Fifth Circuit stated that it "must determine the applicability [or inapplicability] of § 92 to the sale of annuities."\textsuperscript{108} Section 92 only applies if annuities are insurance. The Fifth Circuit, therefore, should have begun its analysis by asking whether annuities are insurance. Instead, the Fifth Circuit first upheld the \textit{Saxon} construction of § 92 and then addressed whether annuities are insurance.\textsuperscript{109} The court's approach requires a finding that annuities are insurance: otherwise the initial analysis of § 92 becomes irrelevant dictum.

Noting the ambiguity in § 92, the district court correctly observed that "[b]ecause § 92 is silent with respect to defining the term 'insurance,' the court must defer to any reasonable interpretation by the Comptroller on that issue."\textsuperscript{110} Congress did not define "insurance" in § 92.\textsuperscript{111} In addition, the legislative record does not indicate the products or activities to be included by the term "insurance."\textsuperscript{112} The OCC determined that annuities are


\textsuperscript{108.} \textit{VALIC}, 998 F.2d at 1298.

\textsuperscript{109.} \textit{See id. at 1298-1300.}


\textsuperscript{112.} \textit{See} 53 CONG. REC. 11,001 (1916) (Letter of Comptroller Williams proposing legislation). Comptroller Williams stated that Congress should permit national banks "to act as agents for insurance companies in the placing of polices of insurance - fire, life, etc. . ." in towns with fewer than 3000 persons. \textit{Id.} The letter did not mention the sale of annuities. \textit{See id.}
not "insurance" under § 92.113 Thus, the Fifth Circuit should have reviewed the OCC interpretation under the second step of *Chevron* to determine whether this is a "permissible construction."114

Courts and commentators widely recognize annuities as an investment vehicle clearly different from insurance.115 Insurance involves a different form of risk than annuities.116 The issuer of an insurance contract bears an immediate risk of indemnifying a loss.117 Annuity contracts, however, create no immediate risk for the issuer.118 Instead, the investor bears the risk of not realizing future income.119 The Fifth Circuit concluded that annuities are insurance because of this "mirror image" inverse relationship.120 The court's counter-intuitive conclusion contradicts general authority.121

In addition, annuities and life insurance serve different pur-

113. See supra note 79 and accompanying text.
115. "Ordinarily, it is recognized, even by laymen, that contracts of life insurance and of annuity are distinctly different." *Appleman*, supra note 2, at 295 (emphasis added). Apparently, this distinction escaped the Fifth Circuit. See *Chatham County Hosp. Auth. v. John Hancock Mut. Life Ins. Co.*, 325 F. Supp. 614, 617 (D. Ga. 1971) (finding that "annuities are 'essentially a form of investment' and that the contingency of continuance of life does 'not bring it within the classification of insurance'") (quoting Wolfe v. Breman, 26 S.E.2d 633, 637 (Ga. 1943)); 3A C.J.S. *Annuities* § 3 (1973) (noting that "an annuity contract differs from an insurance contract, and it comprehends few of the elements of an insurance contract").
117. See *Appleman*, supra note 2, at 295 (noting "there is an immediate hazard of loss thrown upon the issuer . . ."); 3A C.J.S. *Annuities* § 3 (1973) (stating that "insurance, as generally understood, is an agreement to indemnify against loss . . .").
118. See *Appleman*, supra note 2, at 295 (noting that "the hazard of loss is no longer upon the company but upon the recipient . . .").
119. Id. In the case of variable annuities, future income is contingent on the investment performance of the underlying portfolio. See supra note 79 and accompanying text; see also *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. at 71-72 (referring to variable annuities, the Court stated that "they guarantee nothing to the annuitant except an interest in a portfolio of common stocks or other equities"). Fixed annuities expose investors to the risk of future payments made in depreciated dollars. See *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. at 70; *Appleman*, supra note 2, at 285. Thus, annuities produce an investment risk, not an insurance risk. See supra note 79 and accompanying text.
120. *VALIC*, 998 F.2d at 1301.
121. See supra notes 79, 115-119 and accompanying text (discussing general authority that annuities are not insurance).
poses.\textsuperscript{122} Life insurance distributes proceeds to a designated beneficiary upon the death of the insured.\textsuperscript{123} Conversely, an annuity benefits the purchaser by providing contingent future income.\textsuperscript{124} As such, annuities are generally regarded as investments rather than insurance.\textsuperscript{125}

Furthermore, the annuity contracts that the OCC approved closely resemble other financial investment products that are not considered insurance.\textsuperscript{126} Variable annuity contracts are functionally equivalent to shares in a mutual fund because payments to an annuitant depend entirely on the performance of the investment portfolio.\textsuperscript{127} Fixed annuity contracts typically offer a guaranteed return, similar to a certificate of deposit (CD), and payments for a life term.\textsuperscript{128} Other non-insurance instruments offer life interests in the income of an asset.\textsuperscript{129} For example, banks can sell a CD with a life interest in the income,\textsuperscript{130} or corporate bonds with annuity features, without violating § 92.\textsuperscript{131}

\begin{footnotes}
122. See Chatham County Hosp. Auth., 325 F. Supp. at 617 (concluding that "generally speaking, life insurance is a provision for death, while an annuity is a provision for life") (quoting Wolfe v. Breman, 26 S.E.2d 633, 638 (Ga. 1943)); Appleman, \textit{supra} note 2, at 295.
123. See Chatham County Hosp. Auth., 325 F. Supp. at 617.
125. \textit{SEC v. Variable Annuity Life Ins. Co.}, 359 U.S. at 709; see \textit{Appleman}, \textit{supra} note 2, at 285-299. Insurance contemplates payment as a result of loss, such as loss of life, property, or health. In re New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dept., 598 N.Y.S.2d 824, 828 (N.Y. App.Div. 1993) [hereinafter NY Annuity Case]. Annuities contemplate a long-term income stream based on an initial payment. \textit{Id.} The OCC analogized annuities to several common financial investments in its opinion. See \textit{supra} note 79 and accompanying text.
126. See \textit{supra} note 79 and accompanying text.
128. See \textit{supra} note 79 and accompanying text.
129. See \textit{supra} note 79 and accompanying text.
130. See \textit{supra} note 79 and accompanying text.
\end{footnotes}
The Fifth Circuit noted that, historically, annuities have been considered insurance products.\textsuperscript{132} This historical perception of annuities results because insurance companies typically issue annuities and all fifty states regulate annuities under their insurance laws.\textsuperscript{133} The court, however, ignored that several of these states allow their state-chartered banks to sell annuities.\textsuperscript{134} Furthermore, federal law distinguishes annuities from insurance.\textsuperscript{135}

Contrary to the Fifth Circuit's conclusion, insurance company products are not necessarily "insurance." Such a conclusion leads to an inappropriately intransient classification of financial products considering today's dynamically changing financial markets.\textsuperscript{136} Moreover, assuming that § 92 limits national bank insurance activities, the plain language applies only to "soliciting and selling insurance and collecting premiums on

\textsuperscript{132} VALIC, 998 F.2d at 1300 (quoting the 1990 OCC opinion approving the sale of fixed annuities by national banks).

\textsuperscript{133} Id.

\textsuperscript{134} See, e.g., \textit{NY Annuity Case}, supra note 125, at 826 (holding that New York state-chartered banks may sell annuities as a permissible incident to the business of banking). The New York court concluded that, although the state's Insurance Law defines "annuity," and the Department of Insurance regulates annuity sales, an annuity is not insurance. \textit{Id.} at 828; see also \textit{CONN. GEN. STAT. ANN.} § 36-142 (West 1987 & Supp. 1993) (permitting state-chartered savings banks to establish insurance departments); \textit{IND. CODE ANN.} § 28-1-11-2 (Burns 1993) (permitting state banks to solicit and write insurance as brokers for insurance companies); \textit{MASS. GEN. LAWS ANN.} ch. 178, §§ 1-6 (Law. Co-op. 1987 & Supp. 1993) (permitting state-chartered banks to establish an insurance department and grant and sell annuities); \textit{Banks and Banking—Activities of State Chartered Banks}, 43 Op. Atty Gen. Mont. 293-95 (1990) (Montana Attorney General opines that state law permits state-chartered banks to directly market fixed annuities); \textit{Retirement Annuities}, 1985 Op. Atty Gen. S.D. 16 (1985) (South Dakota Attorney General opines that state law permits state-chartered banks to sell retirement annuities); \textit{CAPATIDES}, supra note 50, at 249 (citing FDIC survey indicating that twenty-four states permit state-chartered banks or their subsidiaries to engage in general insurance agency and brokerage activities).

\textsuperscript{135} See \textit{SEC v. Variable Annuity Life Ins. Co.}, 395 U.S. at 69-73. The Supreme Court held that, under federal law, variable annuities are not insurance. \textit{Id.} at 68-73.

\textsuperscript{136} The Fifth Circuit failed to recognize the blurring of lines between different segments of the financial services industry. See \textit{NY Annuity Case}, supra note 125; supra notes 44-45 and accompanying text (discussing changes in the commercial banking industry). In the \textit{NY Annuity Case}, the court correctly observed that "we should not close our minds to the well-known fact that the banking business in this country has developed rapidly during the last few years to meet the ever-growing demands of business. Banks \textit{ex necessitate} have been required to extend their functions and perform services formerly foreign to the banking business." \textit{NY Annuity Case}, supra note 125, at 827 (quoting \textit{Dyer v. Broadway Cent. Bank}, 169 N.E. 635, 636 (N.Y. 1930)).
Thus, for § 92 to apply, the court must make a functional finding that annuities are "insurance," not simply insurance company products.

The Fifth Circuit reasoned that annuities are functionally equivalent to life insurance policies because both use actuarial calculations to price mortality risk. Actuarial calculations of mortality risk are a common characteristic of annuities and life insurance, but not the touchstone of what constitutes insurance. Automobile and property insurance policies set premiums without reference to mortality tables, yet these products are still considered insurance. Actuarial calculations of mortality risk are a matter of form, not substance. An annuity lacks the key substantive element of insurance: indemnification for catastrophic loss.

A court must defer to a regulatory interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." The OCC determined that annuities are not "insurance" under § 92 because annuities lack the key element of insurance: indemnification for catastrophic loss. The OCC substantiated its decision by further noting that annuities and life insurance involve different forms of risk.

Other financial investments reflect assumptions of mortality risk, even if not actuarially calculated. Investors indirectly account for the risk of an officer's death (or departure) if the success of the company largely depends on that officer's management. In this situation, as with annuities, mortality risk constitutes a component of the investment price. The investment, however, does not become life insurance simply because mortality risk influenced the price.

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138. VALIC, 998 F.2d at 1301.
139. See SEC v. Variable Annuity Life Ins. Co., 359 U.S. at 70-73. The Court noted that issuers of annuities assume mortality risk based on an "actuarial prognostication" of life expectancy. Id. at 70. Although mortality risk is an aspect of insurance, the Court noted that the insurance aspect of annuities created by mortality risk is "apparent, not real; superficial, not substantial." Id. at 70-71. The Court's reasoning applies equally to fixed annuities.

Other financial investments reflect assumptions of mortality risk, even if not actuarially calculated. Investors indirectly account for the risk of an officer's death (or departure) if the success of the company largely depends on that officer's management. In this situation, as with annuities, mortality risk constitutes a component of the investment price. The investment, however, does not become life insurance simply because mortality risk influenced the price.

140. See supra notes 79, 116-117, 122-123 and accompanying text (authority distinguishing annuities from insurance). According to the Supreme Court in SEC v. Variable Annuity Life Ins. Co., insurance involves a "conventional concept of risk-bearing" that requires an issuer to assume an immediate risk of loss. 359 U.S. at 70-71. Neither fixed nor variable annuities create this risk for the issuer.


142. See supra note 79 and accompanying text (discussing characteristics of annuities).

143. See id.
insurance law commentators support the OCC construction.144 As the district court correctly held, *Chevron* requires deference to the OCC.145 Oblivious to *Chevron*, the Fifth Circuit bluntly responded to the OCC's interpretation: "We disagree."146 The Fifth Circuit erred by ignoring the *Chevron* standard of review and independently defining annuities.


Notwithstanding the classification of annuities, § 92 imposes no limit on national bank insurance powers. 147 Although the Fifth Circuit's analysis of § 92 claims to follow *Chevron*, the court treated *Chevron* disingenuously. The Fifth Circuit implied Congress's "clear intent" under the *expressio unius* rule of statutory interpretation148 and construed Congress's silence in § 92 as a *prohibition* on national bank insurance powers in cities with more than 5000 persons.149 Congress, however, can only express its clear and unambiguous intent when it has "directly spoken to the precise question at issue."150 Thus, courts should not rely on the *expressio unius* rule of statutory construction to

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144. *See supra* notes 115-125 and accompanying text (citing cases and secondary sources distinguishing annuities from insurance).
146. *VALIC*, 998 F.2d at 1300.
147. Three positions have evolved concerning national bank insurance powers under § 92. First, § 92 is the full extent of national bank insurance powers. *See* American Land Title Ass'n v. Clarke, 968 F. 2d 150, 155 (2d Cir. 1992) (holding that the *expressio unius* rule leads to the conclusion that Congress intended to *prohibit* national banks located and doing business in towns with over 5000 persons from engaging in the insurance agency business); Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010, 1014 (5th Cir. 1968) (reasoning that "since Congress dealt specifically with the insurance agency power in Section 92, the *expressio unius* [est exclusio alterius] rule negates the existence of any other power to act as an insurance agent under the general provisions of Section 24(7)"). Second, § 92 only restricts national banks from operating general insurance agencies in cities with more than 5000 persons; § 24(7) authorizes insurance activities incidental to commercial bank activities. *See* Independent Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164, 1169-70 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *supra* notes 63-67 and accompanying text (discussing Heimann). Third, § 92 creates no limit on national bank insurance powers. *See* OCC Interpretive Letter No. 499, [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090 (Feb. 12, 1990); Independent Ins. Agents of Am. v. Board of Governors of Fed. Reserve Sys., 735 F.2d 468, 477 n.6 (8th Cir. 1984); *Variable Annuity Life Ins. Co. v. Clarke*, 786 F.Supp. 639, 642 (S.D. Tex. 1991).
148. *See* VALIC, 998 F.2d at 1298.
149. *See* id. at 1300.
150. *Chevron*, 467 U.S. at 842 (emphasis added).
determine Congress's intent under the first step of *Chevron*.151

The Fifth Circuit asserted that the legislative record supports the *Saxon* § 92 construction.152 The legislative record, however, consists only of Comptroller Williams' 1916 letter to Congress.153 The letter cannot evidence Congress's intent because the Comptroller, not Congress, is speaking. Comptroller Williams' statement that insurance powers "should be limited to banks in small communities"154 does not control when the statute is silent on this point. Had Congress agreed with the Comptroller, the statute itself would expressly limit national bank insurance powers to cities with less than 5000 persons. Furthermore, the Comptroller's letter indicates that the primary purpose of § 92 was to increase the revenue of small town banks which had difficulty meeting the minimum capital requirements under federal chartering laws.155 Ironically, giving the Comptroller's statements controlling weight over the language Congress used in the statute accomplishes what the Fifth Circuit seeks to prevent: it allows the Comptroller to contravene Congress.156

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151. Applying the *expressio unius* rule, a court reaches a conclusion by negative implication based on the language of the statute. See *supra* note 61 and accompanying text (discussing Fifth Circuit application of *expressio unius* rule). *Chevron*, however, holds that those things not "directly spoken to" by Congress create a delegation of legislative authority to the administrative agency. *Chevron*, 467 U.S. at 843-44; see *supra* notes 35-42 and accompanying text (discussing *Chevron*). When a court invokes the *expressio unius* rule, Congress necessarily has not "directly spoken." Thus, the *expressio unius* rule directly conflicts with the first step of *Chevron*.

152. See VALIC, 998 F.2d at 1298-99.

153. See 53 Cong. Rec. 11,001 (1916); see *supra* note 89 and accompanying text (discussing the Fifth Circuit's use of Comptroller Williams' letter).

154. 53 Cong. Rec. 11,001 (1916).

155. See id.; Independent Ins. Agents of Am. v. Board of Governors of Fed. Reserve Sys., 736 F.2d 468, 477 n.6 (8th Cir. 1984) (opining that "the legislative history [of § 92] indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance"); Variable Annuity Life Ins. Co. v. Clarke, 786 F.Supp. 639, 641 (S.D. Tex. 1991) (opining that "the legislative history of § 92 indicates that it was proposed to provide an additional source of revenue for national banks located in small towns and not to protect the markets from competing insurance agents"); cf. American Land Title Ass'n v. Clarke, 968 F.2d 150, 156 (2d Cir. 1992) (quoting parts of the Comptroller's letter indicating that national banks did not have insurance powers before Congress enacted 12 U.S.C. § 92); *Saxon* v. Georgia Ass'n of Indep. Ins. Agents, Inc., 399 F.2d 1010, 1015 (6th Cir. 1968) (interpreting the Comptroller's letter to mean that national bank insurance powers are limited to cities with less than 5000 persons).

156. See *supra* text accompanying note 102 (noting the Fifth Circuit's assertion that national banks should look to Congress, not the OCC, or the courts, for expanded insurance powers).
The Fifth Circuit further contended that *Chevron* does not entitle the OCC to overrule the judicial precedent established by *Saxon*.157 In *Lechmere, Inc. v. NLRB*,158 the Supreme Court noted that *stare decisis* prevents an agency's interpretation from overriding the Court's construction of a statute.159 The Fifth Circuit misplaces its reliance on *Lechmere* because the Supreme Court has not interpreted the substantive meaning of § 92.160 Furthermore, *Saxon* is not entitled to precedential weight under the doctrine of *stare decisis*.161 The Fifth Circuit decided *Saxon* prior to *Chevron*,162 and subsequently, the Eighth163 and D.C. Circuits164 have disagreed with the *Saxon* construction of § 92.

Section 92, by its plain language, creates no limitation on national bank insurance powers.165 An interpretation consistent with the plain language of the statute is not "arbitrary, capricious, or manifestly contrary to the statute" under the second step of *Chevron*.166 The OCC construction that § 92 imposes no

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157. VALIC, 998 F.2d at 1300 (citing *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847-48 (1992); *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519, 523 (8th Cir. 1991)).


159. *Id.* at 847-48 (citing *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990)).


161. The Fifth Circuit decided *Saxon* assuming that a court's interpretation of a statute may supersede an administrative agency's interpretation. See 399 F.2d. at 1015. In *Saxon*, the court independently interpreted § 92 without regard to the OCC's construction. *Id.* Under *Chevron*, a court cannot reach an interpretation on its own, or even a better interpretation of the statute. See *Chevron*, 467 U.S. at 843-44; supra notes 35-42 and accompanying text (discussing *Chevron*). Thus, *Saxon* does not provide a valid construction of § 92 because the court did not conform to the standard of judicial review *Chevron* established.

162. The Fifth Circuit also relied on *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991), to support its argument that *Chevron* does not entitle an administrative agency to overrule judicial precedent. VALIC, 998 F.2d at 1300. In *BPS Guard Services*, however, the agency's original interpretation was reviewed under *Chevron*. See 942 F.2d at 523-24. Conversely, in *Saxon*, the OCC construction of § 92 was not reviewed under *Chevron*. Thus, *Saxon* should not govern the Fifth Circuit's decision or the OCC interpretation.


165. See supra notes 5, 55 and accompanying text (quoting language of § 92).

166. See *Chevron*, 467 U.S. at 844; see also supra note 38 and accompanying text (describing *Chevron*'s two-step analysis).
limit on national bank insurance powers is a permissible construction and warrants deference under *Chevron*.

C. THE VALIC CONSTRUCTION OF 12 U.S.C. § 92 IS INCONSISTENT WITH EXISTING NATIONAL BANK INSURANCE POWERS

The Fifth Circuit erred by relying on *Saxon* because the *Saxon* construction of § 92 conflicts with more recent decisions concerning national bank insurance powers. *Heimann* holds that § 92 does not limit national bank insurance activities incidental to the business of banking.\(^{167}\) The Fifth Circuit attempted to reconcile *Heimann* with the *Saxon* construction of § 92 by implying that credit life insurance may not be "insurance" under § 92 because it amounts to simply charging a higher price on the underlying loan.\(^{168}\) Credit life insurance, however, does not differ in form, or substance, from traditional life insurance policies.\(^{169}\) Credit life insurance provides health, accident, or life insurance coverage to protect a borrower’s debt obligation in the event of a casualty.\(^{170}\) Credit life insurance indemnifies an insured’s loss, a principal characteristic of insurance,\(^{171}\) and entails pricing mortality risk, the court’s primary reason for holding that annuities are insurance.\(^{172}\) Furthermore, the

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\(^{167}\) *See supra* notes 63-67 and accompanying text (discussing *Heimann*). In addition, the Eighth Circuit avoided the *Saxon* construction of § 92. *See supra* note 69 and accompanying text. Furthermore, after *Independent Ins. Agents of Am., Inc. v. Ludwig*, § 92 no longer places any practical limitation on national bank insurance powers. *See supra* notes 76-77 and accompanying text (discussing *Ludwig*). Although *Ludwig* provides national banks with the legal authority to market insurance products into larger cities from a small town branch, in practice, this is inconvenient and inefficient. *See supra* notes 75-79 and accompanying text (discussing *Ludwig*).\(^{168}\) *VALIC*, 998 F.2d at 1302. The Fifth Circuit also relied on the Second Circuit’s distinction that credit life insurance only protects the lender’s interest. *Id.* (citing *American Land Title Ass’n v. Clarke*, 968 F.2d 150, 157 (2d Cir. 1992)). The Second Circuit concluded that title insurance protects the lender’s and the borrower’s interest. *American Land Title Ass’n v. Clarke*, 968 F.2d at 157.\(^{169}\) The Second Circuit is incorrect. Credit life insurance protects the borrower’s interest. If the borrower dies, or the prescribed event occurs for which the insurance applies, credit life insurance protects the borrower from a claim for repayment of the debt. *See Heimann*, 613 F.2d at 1168. The Second Circuit’s reasoning, with which the Fifth Circuit agreed in *VALIC*, unreasonably contends that borrowers will pay for something that provides no benefit.\(^{170}\) *See Heimann*, 613 F.2d at 1168 n.9. \(^{171}\) *See id.*\(^{172}\) *See supra* notes 116-117 and accompanying text (discussing characteristics of insurance).
court's rationale that credit life insurance is simply a bank's method of charging a higher price for the loan fails to recognize that federal statutory law prohibits "tying arrangements."\textsuperscript{173}

Credit life insurance is "insurance" under § 92. The Fifth Circuit's construction of § 92 therefore directly conflicts with Heimann. The court attempted to distinguish Heimann on the basis that credit life insurance is "intimately related to the bank's primary business of lending."\textsuperscript{174} Similarly, selling annuities is "intimately related" to the bank's primary business of offering financial products to customers. The Fifth Circuit, however, disagreed and stated that "annuities have nothing to do with the primary business of banking."\textsuperscript{175} This statement ignores the expansion of commercial bank activities, i.e., the "business of banking," that has transpired over the past twenty years.\textsuperscript{176}

Notwithstanding the Fifth Circuit's narrow interpretation of the "business of banking," the court seemingly created an exception to the Saxon construction of § 92 by stating that banks may sell insurance products "intimately related to the business of banking" without violating § 92.\textsuperscript{177} Earlier in its opinion, however, the court rejected the OCC's argument that Heimann limits Saxon to only "broad forms" of insurance.\textsuperscript{178} Thus, VALIC confuses, rather than clarifies, the meaning of § 92.

\begin{footnotes}
\textsuperscript{173} See 12 U.S.C. § 1972 (1988). A tying occurs when the bank directly or indirectly forces borrowers to purchase other bank products as a condition for receiving credit. See Litran, supra note 14, at 131. If a national bank required a borrower to purchase credit life insurance as a condition for receiving a loan, then the court's argument would have merit. The court ignores, however, that under federal law, selling the insurance policy must be a distinct transaction from tendering the loan. See 12 U.S.C. § 1972 (1988). Thus, credit life insurance does not constitute charging a higher price on the underlying loan.
\textsuperscript{174} See VALIC, 998 F.2d at 1302.
\textsuperscript{175} Id.
\textsuperscript{176} See NY Annuity Case, supra note 125, at 828.

Quite plainly, in order to properly interpret the very amorphous phrase "incidental powers" necessary to carry on the "business of banking," special expertise is required encompassing a comprehensive understanding of the evolution of banking, the nature and extent of present practices, and the need for and legitimacy of added banking services in light of present day business technology and customer needs.
\textsuperscript{177} VALIC, 998 F.2d at 1302.
\textsuperscript{178} Id. at 1301-02.
\end{footnotes}
D. Consequences of the OCC Construction of 12 U.S.C. § 92

The OCC construction of § 92 imposes no limitation on national bank insurance activities.\textsuperscript{179} The structural soundness of the overall U.S. banking system should benefit from allowing banks to sell insurance.\textsuperscript{180} Commercial banks can reduce systemic risk through product line diversification.\textsuperscript{181} Diversification allows an institution to smooth earnings fluctuations from deposit taking and lending\textsuperscript{182} and derive cost savings through economies of scope.\textsuperscript{183}

Assuming OCC approval, American consumers could substantially benefit if commercial banks sold various forms of insurance. Commercial banks could become "financial supermarkets" offering "one-stop" shopping for depository, consumer and commercial credit, capital market, and insurance products and services.\textsuperscript{184} In addition to convenience, increased competition in the sale of insurance would result in estimated cost savings to American consumers of five to seven billion dollars.\textsuperscript{185}

Permitting national banks to sell insurance does not infringe upon the overriding banking policy objective of maintaining the "safety and soundness" of the banking system.\textsuperscript{186} Congress believed that commercial bank securities activities principally caused the banking crisis of the 1930s, and legislation targeted securities as the primary area of product line regulation.\textsuperscript{187} By 1990, however, bank agencies, along with judicial acquiescence, eliminated many of the Glass-Steagall investment banking restrictions imposed on commercial banks.\textsuperscript{188} Thus, maintaining the separation between insurance and banking is

\textsuperscript{179} See supra note 79 and accompanying text (discussing OCC interpretation of § 92).

\textsuperscript{180} See Litman, supra note 14, at 60-118. This assumes that the OCC approves a national bank's application to sell insurance under 12 U.S.C. § 24(7).

\textsuperscript{181} Id.

\textsuperscript{182} Id. at 104-05.

\textsuperscript{183} Id. at 74-81.

\textsuperscript{184} See Capatides, supra note 50, at 244.

\textsuperscript{185} See supra note 49 and accompanying text (noting benefits associated with banks' expansion into non-traditional financial products).

\textsuperscript{186} See supra notes 25-27 and accompanying text (discussing safety and soundness rationale for regulating the banking industry).

\textsuperscript{187} See supra notes 28-31 and accompanying text (discussing Depression-era legislation).

\textsuperscript{188} See supra notes 46-48 and accompanying text (discussing deregulation of commercial banks).
inconsistent with, and inappropriate in light of, the expanded securities powers of commercial banks.

CONCLUSION

The Fifth Circuit's decision in VALIC defied the framework for judicial review established in Chevron. The OCC determined that 12 U.S.C. § 92 does not apply to the sale of annuities because annuities are not insurance, and even if they are, § 92 does not impose a limit on national bank insurance activities. Because Congress did not directly express an intent to limit national bank insurance activities in § 92, the Fifth Circuit should have reviewed the OCC opinion under the second step of Chevron. The OCC interpretation that § 92 does not limit national bank insurance activities accords with the plain language of the statute and is therefore a permissible construction under Chevron.

The Fifth Circuit did not need to address the substantive scope of § 92 in VALIC because annuities are not insurance. Section 92 does not define insurance which, according to Chevron, creates a delegation of legislative authority to the OCC to determine which products constitute insurance. Under Chevron, the court should have deferred to the OCC interpretation that annuities are not insurance. The Fifth Circuit, however, erroneously ignored Chevron and simply asserted its own opinion that annuities are insurance and within § 92.

The Fifth Circuit's narrow view of permissible bank activities is particularly inappropriate in light of today's complex financial markets. Empirically, commercial banks have suffered from rigid product line restrictions. As a result, bank regulators virtually eliminated the Glass-Steagall separation of investment banking and commercial banking during the 1980s. The Fifth Circuit's bright line dividing commercial banks and insurance, without statutory support, is not only ill-advised, but inconsistent with the policy of creating a level playing field for commercial banks.