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The Retirement CD and Recent OCC Action Regarding Banks-in-Insurance

John Jaye

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I. INTRODUCTION

The landscape of financial services is changing. The constraints once imposed by regulators to protect consumers are now being criticized as measures that hamper consumer choice and hurt U.S. banks in the global marketplace.[1] Within the struggle for reform, several layers of conflict exist. For example, the banking industry is lobbying for an expanded role in insurance brokering and underwriting. On the other hand, the insurance industry is seeking to protect its own economic interests by opposing a broad interpretation of "the business of banking." In fact some in the insurance industry are considering leveling the playing field by gaining ground in banking. In addition to industry interests, Congress, the Office of the Comptroller of the Currency (OCC), and the Federal Reserve Board (the Fed) are struggling to advance the reform process. This Comment considers examples of recent legal and administrative action in order to define and explore the issues involved in financial services reform. This Comment specifically examines the legal battle over the Retirement Certificate of Deposit (Retirement CD), a recent OCC Interpretive Letter, and new OCC regulations. The purpose of this examination is to provide tools for understanding the broader context within which the reform of financial services will take place.

The Retirement CD is a new investment vehicle developed by banks that combines many of the traditional features of a certificate of deposit and an annuity.[2] The controversy surrounding the Retire-

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1. The constraints under attack are specifically those in the Glass-Steagall Act. Proposed legislation is aimed at financial modernization, seeking to allow banks to affiliate with securities firms and insurance companies under a holding company structure. This same legislation would allow national banks to form operating subsidiaries to engage in various brokering and underwriting activities. This financial modernization legislation failed, but Congressional leaders vowed to renew their efforts in the 1997 term. *See* Joanne Morrison, *Leach Says OCC May Bog Down Financial Services Reform*, BOND BUYER, Dec. 5, 1996, at 2-4, *available in* 1996 WL 5644990 [hereinafter Morrison, *Bog Down*]; Joanne Morrison, *House Banking Chairman Is Readying A New Financial Modernization Bill; Leach Will Try to Repeal Glass-Steagall, Again*, BOND BUYER, Dec. 30, 1996, at 4, *available in* 1996 WL 14935431 [hereinafter Morrison, *House Banking Chairman*].

2. *See* American Deposit Corp. v. Schacht, 887 F. Supp. 1066, 1068-71 (N.D. Ill.

ment CD is generated by the fact that it is a hybrid derived from products traditionally sold and distributed by different entities. Certificates of deposit are investments that fall within the bailiwick of banks, and annuities are offered and underwritten primarily by insurance companies. A change in the status quo would likely have a large effect on the allocation of consumer investments in the industries.

The Retirement CD has been under fire since its development, and in less than two years, the federal courts, the IRS, and Congress have taken action against it.[3] To understand the attention it has garnered, one must place the Retirement CD in its proper context in the ongoing battle between the banking industry and the insurance industry. The two powerhouses squared off in a territorial dispute, and after significant judicial inroads and some legislative progress, the banking industry found itself losing the Retirement CD battle.[4] The primary reason for the attack on the Retirement CD was the contention that its creation was an effort by national banks to conquer new ground in an area that was traditionally reserved to the insurance industry—the selling and underwriting of annuities. As such, the Retirement CD became an instrument for compromise between the two industries.[5] At the same time, the introduction of the Retirement CD spawned litigation at the state level.[6]

The courts have been involved in establishing and interpreting some of the boundaries of the banking and insurance industries. In fact, a review of the *NationsBank of N.C. v. Variable Annuity Life*

1995) (explaining terms and conditions of the Retirement CD); American Deposit Corp. v. Schacht, 84 F.3d 834, 836 (7th Cir. 1996). For further discussion, see *infra* notes 25-39 and accompanying text.

3. For an example of the judicial action, see *infra* notes 83-160 and accompanying text.

4. The judicial victories have come recently in two decisions. *See NationsBank of N.C. v. Variable Annuity Life Ins.*, 513 U.S. 251 (1995) (affirming the determination of the Comptroller of the Currency that national banks may sell annuities), *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103 (1996) (holding that a federal statute granting national banks the power to sell insurance in towns with fewer than 5,000 people preempts a state statute forbidding them to do so). The legislative progress came with a price. Congress passed a major omnibus appropriations bill before adjourning at the end of September 1996. Not included in the bill was language that would have required banks that sell insurance to obtain licensure from state insurance regulators. However, the insurance industry won a provision stripping the Retirement CD of its FDIC insurance. *See GOP Leaders Agree on 99 Percent of SAIF, Reg.-Relief Package, Leach Says*, 67 Banking Rep. (BNA) No. 12, at 477 (Sept. 30, 1996). For a discussion of other legislative efforts, see *supra* note 1, discussing other legislative efforts.

5. *See supra* note 4 for a discussion of the compromise struck in Congress' recent omnibus appropriations bill.

6. For a discussion of some of the litigation, see *infra* notes 83-160 and accompanying text.

Ins.[7] and *Barnett Bank of Marion County, N.A. v. Nelson*[8] opinions suggests that banks forged a strong foothold into traditional insurance territory by expanding the national commercial banks' ability to sell annuities as agents. However, the Seventh Circuit refused to further broaden the power of banks in *American Deposit Corporation v. Schacht (ADC)*,[9] and in fact, it may have effectively narrowed the powers of banks domiciled in the Seventh Circuit.[10]

The Retirement CD is an innovative investment vehicle whose hybrid nature makes it an ideal tool for testing the legal definitions of "deposit" and "insurance" as well as the statutory framework within which the banking and insurance industries function.[11] In *ADC*, for instance, the parties recognized the importance of legal definitions and "toss[ed] about various names to denote their understanding of the Retirement CD: deposit, investment, annuity, insurance. In so doing, each side [attempted] to bring the Retirement CD within its auspices."[12] The introduction of the Retirement CD by banks served as a barometer for determining how far their recent legal momentum could take them as they pushed into what was traditionally considered the insurance business.[13] The opposition generated by the Retirement CD served as a clear message to the banking industry that the time for rapid judicial advancement had come to an end.

The battle between the banking and insurance industries shifted to Congress, where efforts to pass a comprehensive financial modernization bill were thwarted by lack of consensus between the two industries.[14] With the failure of legislative efforts, the OCC stepped in and announced new regulations which could expand the powers of

7. 513 U.S. 251 (1995).

8. 116 S. Ct. 1103 (1996).

9. 84 F.3d 834 (7th Cir. 1996).

10. *See infra* notes 83-160 and accompanying text for a discussion of *ADC*. The following states comprise the Seventh Circuit: Illinois, Indiana, and Wisconsin.

11. The clash in *ADC* involved interpretations and constructions of the National Banking Act, *see* 12 U.S.C. § 24 (1994), the McCarran-Ferguson Act, *see* 15 U.S.C. § 1012(b) (1994), and the Illinois Insurance Code, *see* 215 ILL. COMP. STAT. 5/1 (West 1993).

12. American Deposit Corp. v. Schacht, 887 F. Supp. 1066, 1074 (N.D. Ill. 1995).

13. Although the plaintiffs in *ADC*, American Deposit Corporation and Blackfeet National Bank, structured their arguments around a variety of case law, the banking industry has, as a whole, gained most of its recent momentum from two Supreme Court cases. *See NationsBank of N.C. v. Variable Annuity Life Ins.*, 513 U.S. 251 (1995); *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S. Ct. 1103 (1996).

14. *See Rep. Leach: Treasury Misguided In Bank Regulation Approach*, CAPITAL MARKETS REPORT, Dec. 3, 1996.

the national banks through the use of operating subsidiaries.[15] These administrative efforts have also prompted a similar proposal from the Federal Reserve Board for its state chartered banks, in effect circumventing Congressional efforts at comprehensive reform.[16]

This Comment will first compare the Retirement CD with other popular retirement savings options.[17] Then it will examine the case law surrounding the Retirement CD by focusing on *American Deposit Corp. v. Schacht*[18] and related cases.[19] Next, this Comment will explore the roles of the Office of the Comptroller of the Currency and the Congress.[20] Finally, it will examine the present status of the Retirement CD and the future of similar products, with a particular emphasis on the policy and practical implications that the new administrative action will have on the battle for consumer territory between banks and insurance companies.[21]

II. COMPARISON OF RETIREMENT INVESTMENTS

Nomenclature is a recurring issue in the Retirement CD debate. Insurance companies and banks have clashed over classifying products under state and federal law in an effort to retain control over their sale and distribution.[22] Insurance industry opposition to the Retirement CD is based on the fact that it strongly resembles an annuity, an investment vehicle which insurance companies have historically sold and underwritten. Banks have recently made inroads into the insurance industry by expanding their ability to sell annuities as agents. The Retirement CD represents an effort by banks to move into underwriting annuities and annuity-like products—a function that commercial banks historically have not been allowed to undertake under state insurance law.[23]

15. *See* John R. Wilke & Stephen E. Frank, *Comptroller Lets Banks Into New Areas But Restricts the Amount of Investment*, WALL ST. J., Nov. 21, 1996, at A2. For a discussion of recent OCC actions, see *infra* notes 161-214 and accompanying text.

16. *See Fed Proposal Cutting Restrictions on State Banks*, CFO ALERT, Dec. 16, 1996.

17. *See infra* notes 22-82 and accompanying text.

18. 84 F.3d 834 (7th Cir. 1996).

19. *See infra* notes 83-160 and accompanying text.

20. *See infra* notes 161-214 and accompanying text.

21. *See infra* notes 215-23 and accompanying text.

22. *See American Deposit Corp. v. Schacht*, 887 F. Supp. at 1074 (N.D. Ill. 1995) (discussing nomenclature and control).

23. The underwriting issue is the same one considered in *American Deposit Corp. v. Schacht*, 84 F.3d 834 (7th Cir. 1996).

Any investment can be a retirement investment.[24] One could have a Retirement Van Gogh or a Retirement Studabaker as well as a Retirement Mutual Fund. However, the retirement savings goal of these investments does not necessarily make them effective retirement investments. For the purposes of this analysis, "retirement vehicles" include investments with tax-advantaged status and specific rules and terms regarding investor actions such as early withdrawal. Included in this category are 401(k) plans, Individual Retirement Accounts (IRA), annuities, and Retirement CDs. Although this is not an exhaustive list of retirement investments, it covers the more popular retirement plans and offers a useful comparison of restrictions, tax consequences, and payout options.

A. *Retirement CD*

Ignoring for the moment the battle between insurance companies and banks for territorial control, the Retirement CD was essentially designed to be a tax-deferred retirement investment. For instance, consider the typical Retirement CD marketed by banks like Blackfeet National Bank (Blackfeet).[25] The CD required the customer to make a minimum investment of $5000.[26] The customer selected a maturity date, which usually corresponded with his expected retirement.[27] Interest accrued from the date of deposit and was calculated under a formula tied to the five-year U.S. Treasury Note.[28] The initial rate was in effect for one year and was adjusted every five years thereafter.[29] Under IRS regulations in effect at the time of its development and initial offering, the interest accrued by the Retirement CD was to receive tax deferred status.[30] Early with-

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24. *See generally* JANE BRYANT QUINN, MAKING THE MOST OF YOUR MONEY (1991) (discussing retirement planning and the various investments and plans available to employees and other investors).

25. For a complete discussion of the Retirement CD and the recent Seventh Circuit ruling, see *ADC*, 84 F.3d 834 (1996); *see infra* notes 83-160 and accompanying text.

26. *See ADC*, 887 F. Supp. at 1071 (N.D. Ill. 1995).

27. *See ADC*, 84 F.3d at 836 (7th Cir. 1996).

28. *See id.*; *see also ADC*, 887 F. Supp. at 1071 (N.D. Ill. 1995).

29. *See ADC*, 887 F. Supp. at 1071 (N.D. Ill. 1995).

30. *See id.*; *ADC*, 84 F.3d 834, 836 (7th Cir. 1996). The IRS has since proposed that the Retirement CD be stripped of its tax deferred status. *See* 60 Fed. Reg. 17,731. Although the proposed changes to section 1.1275-1(d) of title 26 of the Code of Federal Regulations were included in the IRS' 1996 Business Plan, the proposed rule has yet to be finalized. The proposed changes were challenged by Blackfeet in a separate case. *See Blackfeet National Bank v. Rubin*, 890 F. Supp. 48 (D.D.C. 1995). The District Court held that the bank was not denied administrative due process, and that "any issues raised by proposed regulations were not ripe for judicial review inasmuch as there had been no

drawal was subject to penalties and IRS treatment as taxable income.[31] At maturity, the customer was to be entitled to withdraw up to two-thirds of the account balance, including interest accrued.[32] The remainder of the balance was to be disbursed to the customer in the form of lifetime Scheduled Monthly Withdrawal Payments; in effect, these payments were to establish a lifetime annuity with the monthly payment amount determined by using the account balance, the current monthly interest rate, the customer's age at maturity, and the appropriate Society of Actuaries annuity table.[33] The monthly payments were to be fixed and guaranteed for the remainder of the customer's life.[34] The customer was to be assured of receiving at least the entire account balance regardless of lifespan.[35] If the customer died prior to receiving the full account balance, the remainder of the account was to be paid to his estate or a designated beneficiary.[36] For tax purposes, the monthly payments were to be characterized as apportioned from principal and interest.[37]

When the Retirement CD was first offered, the Federal Deposit Insurance Corporation (FDIC) insured an amount equal to the customer's deposits plus interest, but not the entire lifetime monthly payment stream.[38] However, the present status of the Retirement CD has changed significantly. Congressional action has stripped the Retirement CD of FDIC insurance, and proposed IRS regulations would eliminate the CD's tax-deferred status.[39] Consequently, the recent legal battles over nomenclature and control may have a less significant impact on the Retirement CD than originally thought. The true death knell for the Retirement CD would be a loss of tax-deferred status, since that is an underlying goal of all retirement investment vehicles.

B. 401(k) Retirement Plans

The 401(k) retirement plan is a salary-deferral plan sponsored by most large employers and many small ones. With a 401(k) plan, the

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final agency action." *Id.* The decision was affirmed *per curiam*. *See* Blackfeet National Bank v. Rubin, 67 F.3d 972 (D.C. Cir. 1995).

31. *See ADC*, 887 F. Supp. at 1071 (N.D. Ill. 1995).
32. *See id.*; *see also ADC*, 84 F.3d at 836 (7th Cir. 1996).
33. *See ADC*, 84 F.3d at 836.
34. *See id.*
35. *See id.*
36. *See id.*
37. *See* ADC, 887 F. Supp. 1066, 1071 (N.D. Ill. 1995).
38. *See id.*
39. For further discussion, see *supra* note 30.

employee agrees to set aside a portion of his salary for retirement; that amount is exempt from current income taxes, and the earnings (interest, dividends, and capital gains) are allowed to accumulate tax-deferred.[40] Taxation generally occurs upon withdrawal.[41] Some plans may also allow for after-tax contributions, which will also enjoy tax-deferred accumulation.[42] The employees' maximum tax-deductible contribution is set by the company and is subject to a legal ceiling which is adjusted yearly for inflation.[43] Under most 401(k) plans in large companies, employers contribute to the employee's accounts by matching a percentage of the employee's contribution up to a percentage of the employee's salary.[44]

In order to provide flexibility to investors, 401(k) plans typically allow a wide array of investment choices and periodic opportunities to switch from one investment vehicle to another.[45] Upon leaving a company, 401(k) funds contributed by the employee can generally be invested in that employee's next 401(k) plan or rolled-over into an IRA.[46] Notably, in these cases, employers' contributions are subject to various restrictions which may prohibit full transfer of funds.[47] In addition, withdrawal of 401(k) funds prior to the age of fifty-nine and one-half years old is only allowed when facing a financial "hardship,"[48] and the withdrawals are subject to a ten percent penalty plus the payment of income tax on the withdrawn funds.[49] The pen-

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40. *See* QUINN, *supra* note 24, at 743.

41. *See id.* For further discussion, see *infra* note 49 and accompanying text.

42. *See id.*

43. The ceiling in 1996 was approximately $9,500. It is important to note that contributions are also limited by complex regulations that prohibit higher paid employees from taking advantage of 401(k)'s if lower paid employees do not. In theory, this keeps the plans open to all employees instead of having retirement plans serving simply as perquisites for elite employees. In practice, it may simply reduce the ceiling on a highly paid employee's contributions. *See id.* at 744; *see also* THE WALL STREET JOURNAL, LIFETIME GUIDE TO MONEY 193 (C. Frederic Wiegold ed., Dow Jones & Company, Inc. 1997) [hereinafter WALL STREET JOURNAL GUIDE].

44. *See* WALL STREET JOURNAL GUIDE, *supra* note 43, at 193.

45. *See id.*

46. For a discussion of IRA's, see *infra* notes 55-64 and accompanying text.

47. Some employers allow all of their contributions to be taken with a departing employee. Others vest their contributions based on length of time in the plan. Full vesting usually occurs after seven years. *See* QUINN, *supra* note 24, at 745.

48. *See id.* (listing several examples of hardships including: large medical expenses, buying a principal residence, an impending college tuition bill, or a threat of eviction).

49. Although the payment of income tax is expected upon withdrawal, it can be a "penalty" if taken early, depending on your tax bracket. The attractiveness of deferring income tax until retirement is usually based on two factors: (1) the money you would have paid in taxes remains invested and compounds into even greater returns, and (2) upon retirement, the loss of a regular salary places many investors in a lower tax bracket

alty can only be waived under certain circumstances and meeting the conditions for a waiver does not negate the requirement of first showing "hardship."[50]

The differences between the Retirement CD and the 401(k) plan are significant. The key differences are as follows: (1) the Retirement CD contributions/deposits are not made from pre-tax dollars;[51] (2) the Retirement CD does not receive the benefit of employer contributions;[52] (3) the Retirement CD does not offer the investment options that 401(k) plans enjoy;[53] and (4) the Retirement CD has no deposit/contribution ceiling like the 401(k) plans.[54]

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than they were in when they were working. This often results in a lower income tax bill. Note that income tax is paid only on before-tax contributions.

50. Penalty loopholes include: total disability, death, early retirement at 55 or older, divorce decree, medical expenses that exceed 7.5% of your adjusted gross income, or a lifetime periodic withdrawal plan. The last loophole requires that the investor stick to the plan for at least five years *and* until age 59.5. The investor can then change the payment size or discontinue payments altogether. Although this flexibility sounds good, the reality is that the investor is still tapping retirement savings for present financial needs and is forced to drain the fund for at least five years. Unless middle-aged and desperate, even loophole six falls into the undesirable category. Early retirement is the sole bright loophole. *See* QUINN, *supra* note 24, at 759-60.

51. From a tax policy viewpoint, this simply creates a larger incentive to contribute to 401(k) employer plans than an independent vehicle such as the Retirement CD. A pretax contribution reduces your tax bill by up to 35% of your contribution (depending on your tax bracket). This savings is often used for analysis purposes as offsetting and reducing your contribution. For example, for an investor in the 35% tax bracket, it would cost $650 to make a $1000 contribution ($1000 contribution multiplied by 35% equals $350 savings; $1000 subtracted by $350 equals $650 net cost). Keep in mind that the savings (or increased investing power) is further maximized by an employer contributions. *See supra* note 44 and accompanying text.

52. The addition of employer contributions are practically similar to tax deductibility in that the additional contribution increases the investing power of your own contribution. Typical formulas include employer matching of 50% for a contribution of up to 6% of your salary. *See* WALL STREET JOURNAL GUIDE, *supra* note 43, at 193.

53. The Retirement CD does offer a guaranteed return tied to the five-year U.S. Treasury Note. This reduces diversification in exchange for guaranteed return. Needless to say, this kind of trade-off is one that must be made by each individual investor. However, the same fixed-income guarantee can be obtained in a 401(k) by choosing the Treasury Note itself as part of a broader investment portfolio.

54. This is the Retirement CD's primary advantage over the 401(k) as the Retirement CD was originally offered. For high income investors or those needing to invest large amounts to make up for lost time, passing up the benefits of employer contributions and tax deductibility can be favorably offset by no limit on investment. In effect, though, the lack of tax deductibility and employer contributions combined with limited diversification makes the Retirement CD a valuable retirement tool for some high income or conservative investors, but certainly not a candidate for an investor's primary retirement vehicle.

C. Individual Retirement Accounts

Although Individual Retirement Accounts are no longer universal tax shelters, they remain a valuable tax deduction and powerful retirement vehicle for many investors. Currently, the IRA contribution is limited to $2000 per year for individuals and is tax deductible only under certain conditions.[55] Investors may take full advantage of the tax deduction if they are not eligible to participate in a company pension plan or if they do participate in a company plan but have an adjusted gross income lower than $25,000 if single or $40,000 if married.[56] For participants with higher incomes, the tax deductibility is reduced and completely phased out at $35,000 for single investors and $50,000 for married investors.[57]

IRAs also have the advantage of being extremely flexible. They can be established with a variety of institutions depending upon the investment goals of the consumer.[58] A "self-directed" IRA established with a brokerage house offers the broadest number of investment choices; frequent investment switching is limited only by the cost of commissions on purchases and sales.[59] This flexibility can be important to some investors. For instance, an employee with a strong 401(k) program may be unable to invest in a particular vehicle if it is not available in his company's offerings; a separate brokerage house IRA would allow that employee to have the desired "extra"

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55. The ceiling for contributions is $2,000 for each individual. A couple with only one income can put away an additional $250 per year. In 1997, married couples are allowed to contribute $4,000 per year even if one spouse is not employed. *See* QUINN, *supra* note 24, at 753; *see also* WALL STREET JOURNAL GUIDE, *supra* note 43, at 8.

56. *See* QUINN, *supra* note 24, at 753.

57. *See id.* Investors may also make non-deductible contributions to an IRA. The primary downside to non-deductible IRA contributions is tax filing complexities. These headaches come in the form of an extra filing at year-end (Form 8606) and potentially complicated withdrawal calculations. To avoid double taxation on after-tax IRA contributions, these contributions are non-taxable upon withdrawal. However, if an investor has made both deductible and non-deductible contributions, the calculations can be complicated. Any withdrawal requires a prorating of the portion which is non-taxable using a ratio that divides total non-deductible contributions by the total balance in the account. *See* QUINN, *supra* note 24, at 753-54; *see also* WALL STREET JOURNAL GUIDE, *supra* note 43, at 579-80. Investors who are not eligible for the tax deduction must weigh the additional filing requirements with the benefits of tax deferral to decide if an IRA is still a worthwhile endeavor. Since taxes are already a headache for most investors, the ability to essentially reinvest earnings which would have been gobbled up by the IRS (tax deferral) is a potentially powerful tool, especially as your income and tax bracket rises. The extra headache is usually worth the gain.

58. Ordinary CD IRA's are offered by banks, savings associations, and credit unions. Insurance companies offer annuity IRA's. Brokerage houses offer "self-directed" IRA's which can invest in virtually anything. *See* QUINN, *supra* note 24, at 755.

59. *See id.*

retirement investment.[60]

Early withdrawals from an IRA are subject to tax penalties similar to those incurred by the holder of a 401(k). Generally, income taxes are due upon withdrawal of IRA funds and a ten percent penalty is levied on investors who withdraw funds before they reach fifty-nine and one-half years of age.[61] Avoidance of early withdrawal penalties is more difficult than for a 401(k). For an IRA, only total disability, death, exorbitant medical expenses (more than seven and one-half percent of adjusted gross income), or a lifetime payment schedule will help you escape the penalty.[62] The early retirement and divorce options present under a 401(k) plan are not available in an IRA. As with any early withdrawal of tax-advantaged retirement funds, only careful thought and planning will minimize the cost to the investor.

One of the advantages that the 401(k) enjoys over the Retirement CD is not present in the IRA: employer contributions.[63] IRAs also have a lower investment ceiling than the 401(k) and produce tax deductibility for a much smaller number of investors.[64] As a result, the primary advantage that an IRA has over the Retirement CD is breadth of investment options. However, given the limited investment amount allowed for IRAs, the Retirement CD could still serve an important role for high income investors with a penchant for heavy retirement savings or tax-deferred investment.

D. *Tax-Deferred Annuities*

Annuities come in many forms. For purposes of this discussion, analysis will focus on tax-deferred,[65] fixed,[66] single-premium[67] annui-

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60. *See* WALL STREET JOURNAL GUIDE, *supra* note 43, at 87. IRA's will usually serve as an additional retirement investment rather than as an investor's primary retirement vehicle. The 401(k) plans carry a higher maximum investment, guaranteed tax deductibility, and the potential for employer matching. These features make 401(k)'s the better choice for savings up to the 401(k) limit. Additional funds could then be invested in an IRA.

61. *See* QUINN, *supra* note 24, at 756.

62. *See id.* For further discussion, see *supra* note 50 and accompanying text.

63. For a comparison of the Retirement CD and the 401(k), *see supra* notes 51-54 and accompanying text.

64. Investors who benefit from tax deductible IRA contributions are primarily ones who are not eligible for company plans or those who are in lower income brackets.

65. Tax-deductible annuities are available to some religious, charitable, or educational organizations enrolled in 403(b) plans. *See* QUINN, *supra* note 24, at 752.

66. Fixed annuities pay a "fixed" rate of interest that is set by the company and can be changed by the company. Variable annuities allow the investors to put their money into stocks, bonds, or mutual funds and to receive the interest from those vehicles. *See*

ties, since these annuities have terms very similar to those of the Retirement CD as it was originally offered.[68] Contributions to annuities are not subject to any limits, although annuities generally have minimum required investments. Contributions to annuities are made from after-tax dollars. The tax advantage is in tax-deferred accumulation, which also comes with the concomitant IRS penalties for early withdrawal.[69] The standard ten percent penalty on earnings withdrawn before age fifty-nine and one-half applies to annuities, and avoidance of the withdrawal penalty can only be accomplished through death, disability, or a lifetime payment schedule.[70] Regular, periodic withdrawals, such as quarterly payments over the investor's lifetime, are treated partly as taxable income and partly as return of capital.[71] If an investor makes irregular, unscheduled withdrawals, then the entire amount is treated as taxable income until the total amount of earnings have been withdrawn.[72] The remainder is treated as return of the investor's original investment.[73] In addition to IRS penalties, the company issuing the annuity also levies penalties for early withdrawal. Penalties vary, but a typical system will feature a sliding scale of interest penalties which decrease over time.[74]

Withdrawal options for tax-deferred annuities vary considerably and some are taxed more aggressively than others.[75] One option is the straight-life annuity. This plan pays the investor a fixed amount monthly, quarterly, or annually for as long as the annuitant lives. This is the format that is available under the Retirement CD for the amount not taken as a lump sum upon maturity.[76] The risk for the investor is that he will not live to full life expectancy, resulting in the underwriting company retaining any balance upon his "premature"

QUINN, *supra* note 24, at 764.

67. Single-premium annuities are purchased with a lump sum payment whereas flexible-premium annuities allow periodic and irregular contributions. *See id.*

68. *See supra* notes 25-39 and accompanying text for the terms and conditions of the Retirement CD.

69. Within tax-deferred accumulation is the inherent potential advantage of withdrawing money and paying income taxes after retirement, when employment related income has fallen dramatically. These retirees sometimes enjoy a lower tax bracket upon retirement.

70. *See* QUINN, *supra* note 24, at 765.

71. *See id.*

72. *See id.*

73. *See id.*

74. For example, there might be a 7% penalty during the first year, 6% the second year, etc. until the penalty phases out after the seventh year.

75. *See* QUINN, *supra* note 24 at 800.

76. *See supra* note 33-36 and accompanying text.

death. For the company, the risk is that payments must continue until death. If the investor outlives his actuarial life expectancy, the company could suffer a loss.[77] It is this risk which the *ADC* court chose to characterize as mortality risk for the purpose of characterizing annuities as insurance.[78] Annuity funds can also be withdrawn as annuities "for life or a period certain,"[79] installment payments,[80] aperiodic payments,[81] or lump sum withdrawals.[82]

Annuities strongly resemble the Retirement CD. Potential differences include the initial fees charged by many annuities and the early insurance company withdrawal penalties. The two share many of the same advantages—no ceiling on investment—and disadvantages—IRS early withdrawal penalties and no tax-deductibility of initial contributions. A dramatic disadvantage of the Retirement CD, in comparison to annuities, is the proposed loss of IRS tax-deferred status. The loss of tax-deferred status essentially eliminates the effectiveness and marketability of the Retirement CD as a retirement investment.

III. RETIREMENT CD LITIGATION: *AMERICAN DEPOSIT CORP. V. SCHACHT*

American Deposit Corp. v. Schacht[83] involved Illinois' ban on the sale of the Retirement CD. The case dealt specifically with whether the Retirement CD, considered an annuity by the court, was properly classified as insurance, and therefore subject to state regulation under the McCarran-Ferguson Act. The court's analysis in *ADC* reflects the kind of debate which is taking place on a broader level in the financial reform process. As traditional investment classifications are re-examined, policy-makers must decide what consumer and business

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77. *See* QUINN, *supra* note 24, at 800.

78. *See supra* notes 83-160 and accompanying text for a discussion of *ADC*.

79. This option guarantees the annuitant a periodic income for life or a fixed number of years, whichever is longer. For example, "for life or ten years certain" pays the investor a periodic income. If he dies before the ten years passes, a designated beneficiary receives the payments for the remainder of the ten years certain. A variant on this option is what the Retirement CD offered—a cash refund annuity. There, the designated beneficiary gets the balance of the annuity in a lump sum cash payment upon the death of the investor. *See* QUINN, *supra* note 24, at 800.

80. Installment payments pay the investor a fixed number of payments over a fixed period of time. Any balance left at death goes to a designated beneficiary. *See id.* at 801.

81. Aperiodic payments allow the investor to withdraw money whenever they want. The remainder at death goes to a designated beneficiary. *See id.*

82. "Take the money and run." *Id.*

83. 84 F.3d 834 (7th Cir. 1996).

interests need to be protected, and how the allocation of control over different investment vehicles impacts those interests.

American Deposit Corporation (ADC), of Pine, Colorado, developed the Retirement CD and licensed the product to Blackfeet National Bank, a small, national bank located on the Blackfeet Indian Reservation in Browning, Montana.[84] At the time of its initial offering, the Retirement CD was to receive not only tax-deferred status from the IRS, but also FDIC insurance protection from the federal government.[85] Blackfeet began marketing the Retirement CD in Illinois in 1994.[86] In a cease and desist order of December 9, 1994, the Acting Director of Insurance for the State of Illinois stated that by selling and underwriting the Retirement CD, Blackfeet and ADC were engaged in the business of insurance and subject to state regulation.[87] The basis for this order was a provision of the Illinois Insurance Code,[88] which provided that "no company shall transact any business of insurance until it has received a certificate of authority" from the Director of Insurance.[89] Under the Illinois Insurance Code, a national bank like Blackfeet could not qualify for a certificate of authority and, therefore, could not sell or underwrite annuities.[90] ADC and Blackfeet responded by filing a complaint against the Acting Director of Insurance for the State of Illinois on January 11, 1995, seeking injunctive and declaratory relief.[91]

The district court held that "the Retirement CD is an appropriate subject for regulation under the Illinois Insurance Code and that the National Bank Act does not direct otherwise."[92] The U.S. Magistrate defined the issue as "whether the Retirement CD is an insurance-type instrument subject to state regulation or a certificate of deposit which, under the Bank Act, would be outside state regulation."[93] The district court emphasized that labeling the Retirement CD a deposit, investment, annuity, or insurance was not dispositive.[94] Instead, the court looked to the "nature of the product to determine

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84. *See* American Deposit Corp. v. Schacht, 887 F. Supp. 1066, 1068 (N.D. Ill. 1995); American Deposit Corp. v. Schacht, 84 F.3d 834, 836 (7th Cir. 1996).

85. *See ADC*, 887 F. Supp. at 1068; *ADC*, 84 F.3d at 836.

86. *See ADC*, 887 F. Supp. at 1068.

87. *See ADC*, 84 F.3d at 836 (7th Cir. 1996).

88. *See* 215 ILL. COMP. STAT. 5/24 (West 1993).

89. *Id.*

90. *See ADC*, 84 F.3d at 836-37.

91. *See ADC*, 887 F. Supp. at 1068.

92. *Id.* at 1082.

93. *Id.* at 1068.

94. *See id.* at 1074.

whether or not that nature makes it an appropriate subject for regulation under the Insurance Code [of Illinois]."[95] The magistrate concluded that "an annuity can be called an insurance product when it involves not only a mortality risk to annuitant and issuer, but [also] includes a guaranteed fixed return."[96] The magistrate further held that the National Bank Act[97] did not preempt the state Insurance Code and that, even if it did, the McCarran-Ferguson Act[98] "immunized" the Code from preemption.[99]

The Court of Appeals for the Seventh Circuit affirmed the lower court in a split decision.[100] The Seventh Circuit appropriately characterized the case as one arising out of tension "between activities arguably authorized by the Bank Act and activities that individual states have a legitimate interest in regulating."[101] This "tension" was the friction which had developed between the banks and insurance companies as they fought over consumer territory in the rapidly changing financial services landscape.[102] The court assumed, arguendo, that the National Bank Act authorizes the sale of annuities and recognized that federal law preempts a conflicting state law under the Supremacy Clause of Article VI of the Constitution.[103] However, the court noted that an exception to the ordinary rule of federal preemption exists under the McCarran-Ferguson Act.[104] Under that Act, the "business of insurance" is to be regulated by the several States and "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically related to the business of insurance."[105] The court sought to resolve three is-

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95. *Id.* at 1075.

96. *Id.* at 1078 (citing SEC v. Variable Ann. Ins., 359 U.S. 65, 71-73 (1959); Otto v. Variable Ann. Life Ins., 814 F.2d 1127, 1131 (7th Cir. 1986)).

97. 12 U.S.C. § 24(7) (1994).

98. 15 U.S.C. § 1012 (1994).

99. American Deposit Corp. v. Schacht, 887 F. Supp. 1066, 1079-82 (N.D. Ill. 1995).

100. *See* American Deposit Corp. v. Schacht, 84 F.3d 834 (7th Cir. 1996).

101. *Id.* at 837.

102. As financial modernization reform continues to be hammered out, the same tension exists between Congress and administrative regulatory agencies like the OCC and the Federal Reserve Board. *See infra* notes 161-223 and accompanying text for more detail on the changing landscape of financial services and the conflict between banks and insurance companies.

103. *See ADC*, 84 F.3d at 837 (citing Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103 (1996); Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954); Easton v. Iowa, 188 U.S. 220 (1903)).

104. 15 U.S.C. § 1012(b) (1994).

105. *ADC*, 84 F.3d at 838 (citing 15 U.S.C. § 1012(b) (1994)).

sues: (1) whether the pertinent sections of the Insurance Code were enacted for the purpose of regulating the business of insurance; (2) whether the pertinent provisions of the Bank Act specifically related to the business of insurance; and (3) whether the Retirement CD was properly considered the business of insurance.[106]

The court relied upon *SEC v. National Securities, Inc.*[107] for a definition of the "business of insurance." The *National Securities* Court held that "statutes aimed at protecting or regulating [the relationship between insurer and insured], directly or indirectly, are laws regulating the 'business of insurance.' "[108] The *National Securities* Court further held that laws regulating the business of insurance were laws which "possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance."[109] The *ADC* court found that the Illinois Insurance Code prohibited companies from selling insurance in Illinois without prior approval of the Department of Insurance in order to regulate insurance and protect the residents of Illinois from the acts of unauthorized insurers.[110] Thus, the *ADC* court held that the pertinent provisions of the Illinois Code were enacted to regulate the relationship between insurers and insureds and were, therefore, properly regulating the "business of insurance."[111]

The second issue before the court was whether Section 24 of the National Bank Act "specifically relate[d] to the business of insurance" under section 1012(b) of the McCarran-Ferguson Act. Under the National Bank Act, banks' power to sell annuities is based on the power to accept deposits and enter into contracts.[112] The court contrasted the general power to accept deposits with the power to sell annuities granted by 12 U.S.C. § 92 in the *Barnett Bank* opinion.[113] In that case, the Supreme Court concluded that Section 92 of the Bank Act expressly permitted national banks to sell insurance in towns with populations of 5000 or less, and contained specific rules governing that activity.[114] In light of the *Barnett Bank* decision, the court concluded that the grant of power in the *ADC* case was not a grant of

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106. *See id.*

107. 393 U.S. 453 (1969).

108. SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969).

109. *Id.*

110. *See ADC*, 84 F.3d at 838. The Illinois Insurance Code provision at issue is 215 ILL COMP. STAT. 5/24 (West 1993).

111. *ADC*, 84 F.3d at 838.

112. *See* 12 U.S.C. § 24(seventh) and (third).

113. Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103 (1996).

114. *See ADC*, 84 F.3d at 843 (citing Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103, 1111-12 (1996)).

specific power to sell or otherwise engage in the business of insurance.[115]

Circuit Judge Cumming extensively explored the third issue—whether the sale of annuities was properly considered the business of insurance. Not surprisingly, the Illinois Insurance Code "expressly includes annuities in its definition of life insurance."[116] However, the "meaning of 'insurance' under the [McCarran-Ferguson Act] is a federal question" and required an independent analysis.[117]

The plaintiffs, ADC and Blackfeet, had relied upon *NationsBank of N.C. v. Variable Annuities Life Ins. Co.*[118] to assert that the Supreme Court had already declared that annuities were not the "business of insurance."[119] The *ADC* majority did not read the *NationsBank* holding as broadly and distinguished it from *ADC* in two ways. First, the court stated that the *NationsBank* "holding was limited to the brokering, not underwriting, of annuities."[120] Second, the *NationsBank* holding "was limited to whether federal law precluded a national bank from brokering annuities, not whether a bank doing so . . . would be subject to state regulation."[121]

Unpersuaded by the plaintiffs' reliance on *NationsBank*, the court turned to a tripartite standard announced by the Supreme Court in both *Union Labor Life Ins. Co. v. Pireno*[122] and *Group Life & Health Ins. Co. v. Royal Drug Co.*[123] The criteria set forth in *Pireno* were: "(1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured;

115. *See ADC*, 84 F.3d at 843.

116. *Id.* at 838; 215 ILL. COMP. STAT. 5/4(a) (West 1993).

117. *ADC*, 84 F.3d at 838 (quoting SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 69 (1969)).

118. 513 U.S. 251 (1995).

119. *ADC*, 84 F.3d at 839.

120. *Id.* The *NationsBank* Court is quoted as stating that the Comptroller of the Currency specified that NationsBank would act only as agent and would not have a principal stake in the annuities in order not to incur any interest rate or actuarial risk. This would keep the practice within traditional banking practices. Note, however, that under new OCC regulations, a bank may set up an operating subsidiary and potentially enter the annuities market as principal and agent. To do this, the bank would be required to obtain prior approval from the OCC and meet certain eligibility requirements. *See infra* notes 186-214 and accompanying text for an discussion of the new OCC regulations. Also note that the new rules would not help Blackfeet in this situation since they sought to sell and underwrite the annuities *without* the formation of an operating subsidiary.

121. *ADC*, 84 F.3d at 839.

122. 458 U.S. 119 (1982).

123. 440 U.S. 205 (1979).

and (3) whether the practice is limited to entities within the insurance industry."[124]

The *ADC* court stated that the "most important" factor in determining what constitutes the "business of insurance" was whether it spread policyholder risk.[125] The court then engaged in an analysis of life insurance and annuities as "mirror images" of each other, with the common element of both being the assumption of mortality risk.[126] The court did not see payment upon death and payments until death as significantly different. Instead, it viewed the common use of actuarial tables as an indication of the prevalence of mortality risk.[127] It concluded that "the Retirement CD spreads policyholder risk in a manner similar to typical insurance and thus satisfies the first criterion of the *Pireno* test."[128]

The court quickly dispensed with the second and third prongs of the *Pireno* test.[129] It concluded that the second prong of the test was satisfied because the Retirement CD is the "very document that evidences" the relationship between insurer and insured and is therefore an "integral part" of that relationship.[130] The third prong was also met since virtually all annuities are sold by insurance companies. The court explained that states regulate annuities under insurance laws because consumer protection interests mandate that both insurance and annuity issuers maintain sufficient reserves and careful planning to remain solvent for their policyholders.[131] Satisfying the *Pireno* test allowed the Retirement CD to be properly classified as the "business of insurance" for purposes of the McCarran-Ferguson Act.[132]

The court resolved the three issues before it by holding that: (1) the relevant Illinois Insurance Codes were enacted for the purpose of regulating the business of insurance;[133] (2) the Bank Act does not spe-

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124. *ADC*, 84 F.3d at 839 (citing *Pireno*, 458 U.S. at 129).

125. *Id.* at 840.

126. *See id.* The court defined the assumption of mortality risk as the risk assumed by the life insurance issuer that the policyholder will die before paying enough in premiums to cover the policy payout and the risk assumed by the annuity issuer that the annuitant will outlive his or her life expectancy and consume more annuity payments than the annuitant invested (plus interest). *See id.* at 840-41.

127. *See id.* at 841.

128. *Id.* at 842.

129. *See id.*

130. *Id.*

131. *See id.*

132. *Id.* at 843.

133. *See id.* at 838.

cifically relate to the business of insurance;[134] and (3) the Retirement CD, as an annuity, is properly classified as the business of insurance.[135] Given these conclusions, the court held that the McCarran-Ferguson Act reversed the rule of federal preemption and allowed the Illinois Insurance Code to trump the National Bank Act as interpreted by the Comptroller of the Currency.[136]

The dissent by Judge Flaum focused on two areas to which the majority devoted little attention: (1) current literature and case law,[137] and (2) the nature of annuities as consumer products.[138] Judge Flaum recognized the limitations of the *NationsBank* holding.[139] However, he chose to glean more from the opinion than did the majority. For example, Judge Flaum said that "the *NationsBank* Court accepted the conclusion of the Comptroller of the Currency that annuities are widely recognized as 'investment products.' "[140] He also pointed out that Justice Ginsburg, writing for a unanimous Court in *NationsBank*, described annuities as the setting aside of money for retirement or a "rainy day"—the deferral of consumption for a future income stream.[141] In addition, he noted that the Court likened annuities to sophisticated bank accounts, and the Court stated that banks, by offering annuities to their customers, "are essentially offering financial investment instruments of the kind congressional authorization permits them to broker."[142]

134. *See id.* at 843.

135. *See id.* at 838-43.

136. *See id.* at 844.

137. Included in "current literature" are legal encyclopedias, insurance treatises, and legal and popular dictionaries.

138. *See ADC*, 84 F.3d at 845-65 (Flaum, J., dissenting).

139. *See id.* at 847. The majority correctly noted that the *NationsBank* holding was limited to the selling of annuities as an agent and did not involve state regulation. *See id.*

140. *Id.* (citing NationsBank of N.C. v. Variable Ann. Life Ins., 115 S. Ct. 810, 814 (1995)).

141. *See ADC*, 84 F.3d at 847.

142. *Id.* Judge Flaum also addressed several other conclusions advanced by the *NationsBank* Court. These conclusions included: (1) annuities should not be classified as insurance solely because they are sold predominantly by insurance companies; *see id.* at 847-48 (citing *NationsBank*, 115 S. Ct. at 814); (2) regulation of annuities under state insurance law is largely contextual (since most are sold by insurance companies), *see ADC*, 84 F.3d at 848 (citing *NationsBank*, 115 S. Ct. at 814); (3) the "key feature of insurance is that it indemnifies against loss" while annuities "serve an important investment purpose and are functionally similar to other investments that banks typically sell;" *see ADC*, 84 F.3d at 848 (citing *NationsBank*, 115 S. Ct. at 817); and (4) "mortality risk" is not the hallmark of whether a product is properly considered "insurance." *See ADC*, 84 F.3d at 848 (citing *NationsBank*, 115 S. Ct. at 816).

The *ADC* dissent followed its analysis of *NationsBank* with a comprehensive analysis of modern literature and case law comparing insurance and annuities.[143] Unlike the majority, the dissent concluded that legal and popular literature fail to classify annuities and insurance in the same category and that "the selling of a specialized annuity by a national bank is not 'the business of insurance.' "[144] The dissent also addressed two points regarding the law relied upon by the majority.[145] These points included the Supreme Court's underemphasis of mortality risk as a dispositive characteristic of insurance, and the definition of risk spreading as the transfer of "insurance risk." Specifically, the dissent addressed the risk of loss or damage due to a contingent event.[146]

The dissent also recognized another element in the Retirement CD analysis: context. Aside from *NationsBank*, most of the cases cited and relied upon by the majority were ones which specifically considered the activities of insurance companies.[147] The only case to come before the Supreme Court which involved the state regulation of a non-insurance company under the McCarran-Ferguson power to regulate "the business of insurance" was *Barnett Bank*, which invoked McCarran-Ferguson's express exception for federal legislation which deals "specifically" with the business of banking.[148]

Compared to the dissent, the majority's analysis seemed strained and, at times, circular. One limitation it faced was recognized by the dissent. The *ADC* majority was attempting to apply "insurance" law precedent to a non-insurance company's activity.[149] The court gave only brief consideration to the Illinois Insurance Code before concluding that it was enacted for the purpos of regulating the business of insurance.[150] While this conclusion seems intuitively correct, it took the Illinois Code at face value and did not inquire into the specific intent of the Code provisions in question. The Chief Counsel for the OCC interpreted provisions in the Texas Insurance Code which

143. *See ADC*, 84 F.3d at 848-58.

144. *Id.* at 848.

145. As was already discussed, the dissent understood *NationsBank* to be relevant authority that contradicted the majority's conclusions.

146. *See ADC*, 84 F.3d at 853-55.

147. *See id.* at 855-58. The three prong *Pireno* test, for example, was "directed at . . . an insurance company practice—not a practice by a non-insurance company . . . . The Retirement CD, at least on its face, does not involve 'policyholders,' a 'policy relationship,' an 'insurer,' or an 'insured.' " *Id.* at 857.

148. *Id.* at 858 n.25.

149. *See id.* at 855-58.

150. *See id.* at 838.

also limited national banks' ability to sell annuities as not intending to regulate "the business of insurance," but instead to regulate national banks by effectively negating the existing corporate authority of national banks to sell annuities.[151]

The *ADC* majority also relegated the expansive literature on insurance and annuities to a footnote.[152] The majority described these sources as relatively inconclusive with regard to the specific issue of "whether annuities are properly considered 'insurance' for the purposes of the McCarran-Ferguson Act and state regulation."[153] The fact that no source specifically dealt with the McCarran-Ferguson Act did not rob the work of relevance. The general question before the court was whether annuities were insurance products or investment products. Any application of that question to the specific intent of the McCarran-Ferguson Act should have been done after starting with reliable and authoritative background. Without this background, the majority applied the *Pireno* test in a vacuum.[154]

The dissent forcefully argued that, when addressing the "business of insurance," the Supreme Court has been more concerned with "insurance risk," the risk of loss or damage from a contingent event, than with mortality risk.[155] In addition, the majority's analysis never adequately addressed the actual nature of an annuity. The Supreme Court has recognized that annuities are purchased as investment vehicles, oftentimes for retirement savings.[156] Consumers generally do not purchase insurance with the same goals in mind.[157] By equating insurance with investments, the majority incorrectly assessed consumer purchasing rationale.[158]

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151. OCC Interpretive Letter 749, [Current Binder] Fed. Banking L. Rep. (CCH) ¶ 81-114 (Sept. 13, 1996); *see infra* notes 161-214 and accompanying text for further discussion of recent OCC interpretation and action in the banking and insurance areas.

152. *See ADC*, 84 F.3d at 840 n.4.

153. *Id.*

154. *See id.* at 839-43 (discussing the *Pireno* test).

155. *Id.* at 853-55. Insurance guards against loss from fire, theft, accident, or other contingent events. The mortality risk emphasized by the majority is one recognized by insurers in setting prices and interest rates.

156. *See* NationsBank of N.C. v. Variable Ann. Life Ins., 115 S. Ct. 810, 816 (1995). *See supra* notes 22-82 for a comparison of popular retirement investment vehicles.

157. Consumers do not purchase life insurance to provide for retirement, they buy it to provide for their families should they die.

158. The majority describes a lifetime annuity purchase as insurance against "no longer having sufficient money produced by [one's] assets" to be compared favorably with life insurance, which guards against no longer having the money earned by a dead breadwinner. *ADC*, 84 F.3d at 841. It also argues that life insurance and the Retirement CD both insure against a single, contingent event: life insurance against the loss of life and the Retirement CD against a decline in the market, since it locks in a guaranteed rate of

The *Pireno* test does not adequately or convincingly address the unique and novel issues presented in the *ADC* case.[159] By constraining the bulk of its argument to the *Pireno* test, the majority unnecessarily ignored broader legal and popular authority. Perhaps the dissent explained this best when it stated: "Neither the majority nor the appellee has provided legal authority for the proposition that a state can regulate as the 'business of insurance' an activity by a national bank that the Comptroller of the Currency has specifically found to be 'the business of banking.' "[160]

IV. RECENT OCC ACTION

The battle over annuity sales and underwriting left the courts in the Fall of 1996 and returned to the legislature. Two separate OCC actions increased the power of national banks and began an administrative effort at financial services modernization. The first OCC action was OCC Interpretive Letter #749.[161]

This Letter addressed many of the same issues that the *ADC* court considered and took issue with the holdings of the Seventh Circuit.[162] The OCC's position, as set forth in the Letter, is that Section 24 of the National Bank Act[163] preempts Texas insurance laws, which prevent national banks from selling annuities as agents.[164] The OCC

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return. *See id.* The argument that the Retirement CD is insurance against a single event—a decline in the market—is strained and ignores both the intent of consumers in buying the Retirement CD (tax deferred investment for retirement) and the fact that annuities are not always heralded for rates that outperform the market or guard against a recession or spiraling interest rates. *See also* QUINN, *supra* note 24, at 766 (discussing the impact of fees on an annuity's actual rate of return).

159. For example, the satisfaction of the second and third prongs of the *Pireno* test are not convincingly argued by the majority. The fact that the Retirement CD is the "document which evidences" a relationship between its issuer and the investor simply classifies it as a contract. *ADC*, 84 F.3d at 842. The court must first conclude that the Retirement CD's annuity features make it "insurance" before any "policy relationship" can exist between the "insurer and the insured." The dissent aptly pointed out that the *Pireno* test is limited by the fact that it was articulated for participants in an insurance contract, not an investment relationship. *Id.* at 857. The third prong was more fatally circular. The majority stated that the third prong was met "because the Retirement CD is an annuity, virtually all of which are issued by insurance companies." *Id.* at 842. That conclusion directly contradicted the Supreme Court, which stated that "[t]he sale of a product by an insurance company does not inevitably render the product insurance." *NationsBank*, 115 S. Ct. 810, 814. The dissent explained the third prong correctly: "It simply restates the very question before us: should the selling of [annuities] be limited to entities within the insurance industry?" *ADC*, 84 F.3d at 857.

160. *ADC*, 84 F.3d at 864-65.

161. *See* OCC Interpretive Letter 749, *supra* note 151.

162. *See ADC*, 84 F.3d at 864-65.

163. 12 U.S.C. § 24(seventh) (1994).

164. *See id.*

concludes that the McCarran-Ferguson Act does not insulate the relevant Texas Insurance Code provisions from preemption because annuities are not "insurance" within the meaning of the McCarran-Ferguson Act, and, even if annuities were insurance for the purposes of McCarran-Ferguson, "laws that have the effect of negating or impairing corporate powers of an entire class of entity—in this case the authority of national banks to sell annuities—are not laws 'regulating the business of insurance' within the meaning of the McCarran-Ferguson Act."[165]

The OCC first asserted that the National Bank Act gave national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking."[166] The Comptroller of the Currency already concluded that the National Bank Act granted banks the power to sell fixed and variable annuities as agents.[167] The OCC interpreted *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Company*[168] as upholding the Comptroller's interpretation that section 24 of title 12 of the U.S.C. gave banks the power to serve as agents for fixed and variable annuities.[169] Acting upon the assumption that banks have the power to sell annuities, the OCC Letter turned to the issue of the McCarran-Ferguson preemption.

As noted in *ADC*, the McCarran-Ferguson Act protects certain state insurance-related laws from federal preemption.[170] In this case, the McCarran-Ferguson Act would insulate the Texas Insurance Code provisions from federal preemption if the Texas restrictions on the sale of annuities by banks regulated the business of insurance. The OCC's position is that annuities are not insurance products and that the relevant Texas Insurance Code provisions are not regulating the business of insurance. Instead, according to the OCC, they are attempting to regulate the power of national banks as a "class of entities."[171]

The OCC's argument that annuities are not insurance began with the Supreme Court's opinion in *SEC v. Variable Annuity Life*

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165. OCC Intrepretive Letter 749, *supra* note 151.

166. *Id.*; *see also* 12 U.S.C. § 24(7).

167. *See id.*

168. 513 U.S. 251 (1995).

169. OCC Interpretive Letter 749, *supra* note 151.

170. 15 U.S.C. § 1012 (1994).

171. *See* OCC Interpretive Letter 749, *supra* note 151. The Texas Insurance Code sections specifically addressed by Ms. Williams in the OCC *Letter* are Sections 3.01, 3.75 and 21.07-1.

Insurance Co. of America.[172] In *SEC*, the Court held that variable annuities are not insurance for purposes of the McCarran-Ferguson Act.[173] The OCC acknowledged that the holding did not specifically address the case of fixed annuities as insurance, but contended that the vast majority of authorities would come to the conclusion that neither type of annuity is insurance.[174] The OCC also briefly looked at the purpose of annuity contracts from the point of view of the consumer, an analysis which the *ADC* majority did not adequately undertake. The OCC specifically noted that annuitants are not seeking to indemnify themselves against loss but instead to guarantee to themselves a long-term return on their investment.[175] The OCC suggested that "[m]ost commonly, annuities are marketed as a tax-sheltered means of saving for retirement."[176] The OCC concluded this portion of its analysis by stating that "modern annuities, though more sophisticated than the standard savings bank deposits of old, answer essentially the same need. By providing customers with the opportunity to invest in one or more annuity options, banks are essentially offering financial investment instruments of the kind congressional authorization permits them to broker."[177]

The OCC then expressly attacked the *ADC* decision, stating that it "fundamentally mistook these essential distinctions between annuities and insurance."[178] Three of the court's reasons for defining annuities as insurance were briefly addressed and dismissed, and the *ADC* court's decision was summarized as "analytically flawed to a profound degree."[179] The OCC finished this portion of its statement with the argument that "[a]nnuities are not part of the 'business of insurance' simply because they have historically been offered primarily by insurance companies."[180]

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172. SEC v. Variable Annuity Life Insurance Co. of America, 359 U.S. 65 (1959).

173. *See* OCC Interpretive Letter 749, *supra* note 151.

174. A large portion of the OCC Interpretive Letter 749 is devoted to an analysis of popular and legal authority dedicated to annuities and insurance. The sources cited are very similar to those relied upon by the *ADC* dissent and include: (1) dictionaries (BLACK'S LAW DICTIONARY, WEBSTER'S INTERNATIONAL DICTIONARY, RANDOM HOUSE DICTIONARY, the OXFORD ENGLISH DICTIONARY); (2) legal encyclopedias (C.J.S. and AM. JUR.); (3) case law regarding mortality risk, investment risk and federal tax law; and (4) legal treatises (COUCH ON INSURANCE and APPLEMAN, INSURANCE LAW AND PRACTICE).

175. *See* OCC Interpretive Letter 749, *supra* note 151.

176. *Id.*

177. *Id.* (citing NationsBank v. Variable Ann. Life Ins., 115 S. Ct. 810, 814 (1995)).

178. *Id.*

179. *Id.*

180. *Id.* This closely parallels the dissent in *ADC*. *See* American Deposit Co. v.

The OCC also stated that the Texas Insurance Code provisions which effectively prohibited national banks from selling annuities did not regulate the business of insurance. The OCC found that "[s]tate regulation that negates or impairs the existing corporate activity of an entire class of entity is regulation of that type of *entity*, not regulation of the *activity* that constitutes the 'business of insurance.' "[181] The "core of the 'business of insurance' is the relationship between insurer and insured . . . [for example,] the type of policy which could be issued, its reliability, interpretation, and enforcement."[182] The OCC argued that examples of activities which could be considered within the business of insurance were listed by the *National Securities* Court as the fixing of rates, selling and advertising of policies, and licensing of companies and agents.[183] The OCC concluded that the Texas Insurance Code provisions "regulate neither the 'transferring or spreading [of] a policyholder's risk,' nor any other practice that is 'an integral part of the policy relationship between the insurer and the insured.' "[184] As such, they did not regulate the business of insurance, but instead sought to regulate the activities of national banks, a power not vested in state insurance authorities.

The actual scope of the OCC Interpretive Letter extended only to the sale of annuities by national banks acting as agents. The *ADC* court held that Illinois may regulate the sale of the Retirement CD due to the McCarran-Ferguson preemption of the National Bank Act. In effect, the *ADC* court allowed Illinois to prohibit the sale of the Retirement CD *and* other annuity products by national banks. Although issuance and underwriting of the annuity product is touched upon throughout the decision, the *ADC* court fails to include the same language in its holding, perhaps allowing that prohibition to

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Schachter, 84 F.3d 834, 847-48 (1995) (Flaum, C.J., dissenting).

181. OCC Interpretive Letter 749, *supra* note 151 (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 770 (1993) (" '[T]he business of insurance' should be read to single out one activity from others, not to distinguish one entity from another.")).

182. *Id.* (citing SEC v. National Securities, Inc., 393 U.S. 453, 459 (1969)).

183. *See id.* (citing *National Securities, Inc.*, 393 U.S. at 460).

184. This conclusion applies the standard announced by the Supreme Court in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) and relied upon by the *ADC* majority. Additionally, the OCC builds on this conclusion using a standard issued in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), *cert. denied*, 134 L. Ed. 2d 519 (1996). The OCC stated:

> Excluding national banks as a group from even qualifying to obtain licenses to sell annuities does not transfer or spread policyholder risk; it is not an integral part of the relationship between an insurer and its insured, and it is not aimed at a practice limited to entities within the insurance industry.

OCC Interpretive Letter 749, *supra* note 151.

be implied.[185]

The second OCC action which augmented the power of national banks was the release of new regulations regarding operating subsidiaries.[186] Under the new regulations, national banks can create operating subsidiaries which can engage in a wide range of activities, including activities for which the parent bank would be ineligible.[187] A detailed report on the full range of activities and applications available to banks under the OCC's new regulations is beyond the scope of this Comment. However, highlighting the regulations and their anticipated effect on instruments like the Retirement CD and on the conflict between banks and insurance companies is necessary to appreciate the shifting environment in which the banking industry will find itself in the near future.

Under the new regulations, a national bank must obtain OCC approval before establishing, acquiring, or commencing new activities within an operating subsidiary.[188] Most notably, the regulations allow the OCC to require a legal analysis of the proposed venture in cases of novel, complex, or legally unresolved activities or issues.[189] The OCC also encourages pre-filing meetings with OCC staff in these cases.[190] Once approved, the subsidiary may engage in a broad range

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185. Underwriting and issuing an annuity is obviously the first step before marketing and sale can take place. It also involves an assumption of risk of loss on the issuer's part tied directly to the annuitant outliving his or her life expectancy, resulting in a diminished return or loss to the issuer as the lifetime payments continue. Since the sale of an annuity does not entail that same risk, it can be implied that, by allowing the regulation and prohibition of annuity sales, annuity underwriting would also be prohibited as an activity needing the same or even more regulation due to the higher risk to the institution and, as an extension, to its customers.

186. The full text of the new regulations is to be published in 12 C.F.R. § 5.34 (1996) and became effective December 31, 1996. For the purpose of context, the rules appear in Title 12—Banks and Banking; Chapter I—Comptroller of the Currency, Department of the Treasury; Part 5—Rules, Policies, Procedures for Corporate Activities; Subpart C—Expansion of Activities; § 5.34 Operating Subsidiaries.

187. *See* 61 Fed. Reg. 64006 (1996) (to be codified at 12 C.F.R. § 5.34).

188. *See* 61 Fed. Reg. 64006 (1996) (to be codified at 12 C.F.R. § 5.34(b) and 12 C.F.R. § 5.34(e)(1)(i)(A)). Under these subsections, the bank must provide the OCC with comprehensive information about the subsidiary and its proposed operation in the initial application. "Necessary" information includes: a complete description of the bank's investment in the subsidiary, the proposed activities of the subsidiary, and the locale for the subsidiary's activity (i.e. at the main office, a branch or elsewhere). The actual application procedure will differ depending on the activity.

189. The inclusion of this provision will allow the OCC to accomplish two important tasks: (1) prudently addressing and evaluating the still politically and legally troublesome topics like insurance underwriting and the Retirement CD; and (2) proactively curbing any attempt to abuse the depth and breadth of the new regulations.

190. *See* 61 Fed. Reg. 64006 (1996) (to be codified at 12 C.F.R. § 5.34(e)(1)(i)(A)).

of activities, including "activities which are not permissible for the parent bank itself."[191]

The new regulations detail the application and approval process.[192] Several application procedures are available to a national bank depending on the activity in which it wishes the operating subsidiary to engage. The three main types of application and OCC review are (1) notice process for "adequately capitalized" or "well capitalized" national banks,[193] (2) expedited review,[194] and (3) no application or notice required.[195] Additional requirements exist for subsidiaries which intend to exercise investment discretion[196] or which intend to exercise powers which the parent bank would be unable to exercise itself.[197]

While the banking industry cheered the new OCC regulations, the initial Congressional response was significantly less enthusiastic.[198] The House Banking Committee Chairman Jim Leach accused the OCC of attempting to enhance its own regulatory position in relation to that of the Federal Reserve Board (Fed), which oversees bank holding companies.[199] In fact, Leach stated that "[t]he Treasury is ex-

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191. Wilke & Frank, *supra* note 15, at A2. The new OCC regulations state: "A national bank may establish or acquire an operating subsidiary to conduct or may conduct in an existing operating subsidiary, activities that are part of or incidental to the business of banking, as determined by the Comptroller of the Currency, pursuant to 12 U.S.C. § 24(seventh) . . . ." 61 Fed. Reg. 64006 (1996) (to be codified at 12 C.F.R. § 5.34(d)(1)).

192. *See* 61 Fed. Reg. 64006 (1996) (to be codified at 12 C.F.R. § 5.34(e) and (f)).

193. The general application process will be described in 12 C.F.R. § 5.34(e)(2)(i). The operating subsidiary activities which require this form of notice and application will be detailed extensively in 12 C.F.R. § 5.34(e)(2)(ii). "Adequately capitalized" and "well capitalized" are defined in part 6 of title 12 of the Code of Federal Regulations.

194. The general application process will be described in 12 C.F.R. § 5.34(e)(3)(i). This expedited review method allows the bank to assume approval if it does not hear otherwise from the OCC within 30 days from the receipt of the application by the OCC. The OCC may also "impose additional conditions in connection with any approval under this section." The activities allowed under an expedited review application to be detailed in 12 C.F.R. § 5.34(e)(3)(ii).

195. No application or notice is required if the bank is adequately or well capitalized and meets the conditions described under 12 C.F.R. § 5.34(e)(4)(i)-(iv). These conditions basically entail prior and continuing approval of both an operating subsidiary and its activities.

196. *See* 61 Fed. Reg. 64006 (1996) (to be codified at 12 C.F.R. § 5.34(e)(5)).

197. *See* 61 Fed. Reg. 64006 (1996) (to be codified at 12 C.F.R. § 5.34(f)). The additional requirements include public notice and comment for activities previously unapproved by the OCC and specific corporate requirements such as physical separateness for the subsidiary, different names for the bank and its subsidiary to avoid consumer confusion, adequate capitalization for the subsidiary and separate corporate formalities.

198. *See* Wilke & Frank, *supra* note 15, at A2.

199. The Fed responded to the OCC regulations with its own regulatory proposal that would eliminate restrictions on its constituent state banks, thereby facilitating their ability

tremely concerned [about] the role of the Comptroller's office. It feels that if you give authority through holding company umbrellas, its role will diminish substantially, whereas if you give powers to the bank itself, its role will increase substantially."[200] Leach also expressed concern that further empowering banks would add to their incentive to derail legislative efforts at financial modernization.[201] Senate Banking Committee Chairman Alfonse D'Amato said that he "was 'deeply concerned' and charged that the rules could 'subject federally insured banks to excessive risks and expose bank-insurance funds, and therefore taxpayers, to unnecessary liability.'"[202] D'Amato added that "[t]he comptroller's action detracts from the emerging consensus in favor of comprehensive reform and can only lead to controversy and protracted litigation."[203]

Insurance and security industry representatives have also been critical of bank expansion in general, citing interrelated issues of consumer protection and fair competition.[204] Consumer protection issues cover a wide range of potential problems, including Senator D'Amato's concern over exposing federally insured funds to excessive risk as banks enter new fields with inherently different, and greater, risks. Industry groups cite other problems with the commingling of banking and other industries. Three of these problems are tying, coercion, and customer confusion.[205] Tying and coercion are related and involve the potential bundling of loan and insurance products.[206] Tying and coercion can arise either intentionally, during the loan application process, or unintentionally, as a result of the consumer's desire to please the bank during loan negotiations.[207] Crucial to these concepts is the premise that consumers are in a vul-

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to compete with the OCC's national banks. Two examples of restrictions under review are: (1) the Fed requirement that a bank own 100% of its operating subsidiary (versus the OCC's 80% requirement); and (2) the extent to which a state bank can invest in partnerships and limited liability companies (like national bank provisions in the new OCC regulations). If the removal of the restrictions is approved, state banks in the 41 states with "wild card" statutes would find themselves essentially on par with national banks. Wild card statutes allow state chartered banks to engage in any activity done by a national bank. *See Fed Proposal Cutting Restrictions on State Banks*, CFO ALERT, Dec. 16, 1996.

200. Morrison, *supra* note 1, at 2 (statement of Jim Leach).

201. *See id.*

202. Wilke & Frank, *supra* note 15, at A2.

203. *Id.*

204. *See* Dave McDaniel, *Banks Face Sales Barriers As Agents Lobby States*, BEST'S REVIEW—LIFE-HEALTH INSURANCE EDITION, Sept. 1, 1996.

205. *See id.*

206. *See id.*

207. *See id.*

nerable position when applying for much needed credit and may see the bundling of insurance offerings with loan applications as a prerequisite for loan approval or at least a factor which might improve their application status. In addition, customers may be confused and believe that bank-offered insurance carries the same FDIC protection that deposits carry.[208]

However, neither the Congressional criticism nor that of insurance and security industry opponents addresses the issue of oversight, generally, or of the OCC provisions for oversight promulgated in the new regulations, specifically. Issues of tying and consumer confusion have been addressed by the OCC in provisions that would require banks' subsidiaries to be physically separate and carry different names when engaging in activities not permissible for the parent bank.[209] Representative Leach's proposals would give the Fed oversight responsibilities for the new investment bank holding companies and the Securities and Exchange Commission (SEC) oversight of any securities activity within the holding companies.[210] The financial modernization bill would also incorporate the new OCC regulations.[211] These delegations of authority seem to include an inherent approval of administrative oversight for the protection of consumers.

Absent distrust of the OCC's ability to oversee new bank activities and guard against excessive consumer risk, Congress' initial response as well as that of competing industry groups must be interpreted warily. Congress expressed concern about the OCC making sweeping rule changes without Congress' express delegation of authority. It also closely monitored competition between the OCC and the Fed for bank charters and oversight authority. The insurance and securities industries want a level playing field in the form of equal expansion possibilities for each group. Congress questioned the legality of the OCC's actions since they were taken without prior Congressional authorization. The OCC commented that it had delayed finalizing the new rules for over a year to give Congress a chance to act.[212] During that year, Congressional leaders failed to harness a political consensus, and consequently, the financial modernization bill was stalled.[213] Thus, the OCC stepped in to initiate the

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208. *See id.*

209. *See* 61 Fed. Reg. 64,006 (1996) (to be codified at 12 C.F.R. § 5.34).

210. *See* Morrison, *House Banking Chairman*, *supra* note 1, at 7-8.

211. *See id.* at 5.

212. *See Banks in U.S. Can Now Enter New Businesses*, WALL ST. J. EUR., Nov. 21, 1996 [hereinafter *Banks in U.S.*].

213. *See* Wilke & Frank, *supra* note 15, at A2.

process of modernization itself.

The new regulations will open business opportunities which have long been available to European banks.

> Starting with the London Stock Exchange's Big Bang in 1986, deregulation has progressively opened up banks' access to securities trading on national stock exchanges. In many European countries, banks also sell not only life-insurance policies but household insurance and a range of other products. The concept, known as Allfinanz in Germany and banque-assurance in French, is based on the idea that consumers increasingly will want to do the bulk of their financial business with a single institution, providing it can offer them quality service at competitive prices, rather than dealing with a range of suppliers.[214]

All of these issues—turf, authority, oversight, world competitiveness, and inter-industry fairness—will be considered by the one-hundred-fifth Congress under the consensus-building efforts of Representative Leach and Senator D'Amato.

V. CONCLUSION

A snapshot of the law surrounding the Retirement CD may seem blurry. In fact, the gradual meshing of the banking and insurance industries has created much uncertainty. The Retirement CD has been rendered ineffective as a retirement investment and stands as a casualty in the turf war between banks and insurance companies. Under the holding of *ADC*, the Retirement CD is preempted by state insurance law in the Seventh Circuit. Because the United States Supreme Court denied certiorari in *ADC*,[215] the Court denied the Retirement CD consistent status nationally, thereby rendering it vulnerable to state-by-state restriction. In addition, some degree of marketability was lost when Congress stripped the Retirement CD of FDIC insurance. Most significantly, the proposed IRS denial of tax-deferred status effectively removed the last advantages of the Retirement CD as a retirement savings vehicle.[216]

The new OCC regulations certainly bolster the hopes of entities like Blackfeet and ADC to enter the annuity market and compete with the traditionally powerful insurance companies.[217] However, the

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214. *Banks in U.S., supra* note 212.

215. *See* American Deposit Corp. v. Schacht, 117 S. Ct. 185 (1996) (denying the petition for certiorari).

216. For further discussion, see *supra* note 30.

217. The OCC regulations may be found at section 5.34 of title 12 of the Code of Fed-

new regulations do not offer relief from the Seventh Circuit ruling since a separate and distinct operating subsidiary would still be required.[218] For relatively small national banks, like Blackfeet, the formation of a new subsidiary might still be an impediment to entry into the marketplace.

It is also not clear how far the OCC regulations go toward bank expansion and financial modernization.[219] Some see the move as a broad step forward. Treasury Secretary Robert Rubin said the new rules will stimulate competition, leading to lower costs for consumers and making financial services more widely available and will also "reduce risk and strengthen the banking system over the long term."[220] Other experts are more guarded with their optimism. H. Rodgin Cohen commented, "[t]he Comptroller is the gatekeeper and he has removed the padlock from the gate. How wide he opens the gate remains to be seen. I do not think we're going to see some sort of revolution occur quickly."[221]

Financial modernization holds the key to the future of hybrid investments like the Retirement CD and the expansion of banks into insurance activities. However, the best tool available to ascertain the depth and breadth of the financial modernization package which is ultimately passed by Congress is a crystal ball. Too many factors remain in flux. To pass a truly comprehensive reform, three major players will need to come to the table and leave satisfied: the banking industry, the insurance industry, and the securities industry. Representative Leach's vision of banking industry reluctance to compromise could come true. The gains made by the banking industry from *Barnett*, *NationsBank*, and OCC and Fed regulations far outweigh the potential losses from *ADC*.[222] Insurance and securities lobbyists will definitely demand parity and competitive equality before allowing significant reform to pass unfettered. It is conceivable that another session of Congress may pass without significant ad-

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eral Regulation.

218. *See ADC*, 84 F.3d at 837.

219. The OCC regulates only nationally chartered banks. The Fed oversees about 1,000 of the state-chartered banks (many of which would benefit from the removal of restrictions proposed by the Fed). The FDIC oversees the rest of the approximately 6,700 state-chartered banks.

220. Wilke & Frank, *supra* note 15, at A2.

221. Id.

222. The primary loss for national banks under *ADC* is state regulation of the Retirement CD, at least in the Seventh Circuit. At most, selling and underwriting annuities by national banks could be threatened by the decision. However, the new OCC regulations address this activity favorably by allowing it to be done by operating subsidiaries following OCC approval.

vancement as banks guard their gains and await the early returns from battles within the states and any lawsuits in which state insurance regulators challenge the OCC's stance on McCarran-Ferguson preemption. However, Congress will demand some measure of cooperation and compromise from the banks and good faith negotiation would be more likely to facilitate retention of present gains than would outright resistance.

Although the scope, effectiveness, and legality of the new OCC regulations have been questioned, Representative Leach has said that the new regulations will be incorporated into his revamped financial modernization bill.[223] Even if some of the broader provisions are overruled by Congress, the OCC actions and the corresponding Fed response have fired a shot over the bow of would-be Congressional financial reformers. The administrative agencies have spoken and the Supreme Court appears content with *Barnett* and *NationsBank* for the time being. The ball is now in Congress' court.

JOHN JAYE

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223. *See* Morrison, *House Banking Chairman*, *supra* note 1, at 5.