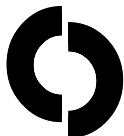

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

**Interpretive Letter #1021**
**March 2005**
**12 USC 24(7)**

February 17, 2005

Subject: **[ *Bank* ], [ *City, State* ]**
Investment in Fixed Rate Annuities

Dear **[ ]**:

This is in response to your request for confirmation that **[ ]** ("Bank"), **[ *City, State* ]**, had authority to purchase, for its own account, two fixed rate annuity contracts (Fixed Rate Annuities" or "Annuities") issued by a specified insurance and annuity company (the "Company"). Based on the information and the representations you provided, we conclude that the Bank had authority to acquire the Fixed Rate Annuities pursuant to its authority in 12 U.S.C. § 24(Seventh) to discount and negotiate evidences of debt, subject to the conditions set forth below.

**BACKGROUND**

**A. Fixed Rate Annuities Purchased by the Bank**

The Bank purchased two Fixed Rate Annuity contracts on October 5, 2001 in the amounts of $5,000,000 and $20,000,000 respectively. A Bank employee was named as annuitant on the policies.[1] The Bank is the sole owner and beneficiary of the Annuities.

The Annuities represent general obligations of the Company. Investments in the fixed account are supported by the assets in the general account of the Company and are subject to the claims of its general creditors. Payment of the obligations is not tied to the performance of any other

[1] If the annuitant dies before the annuity commencement date (the date the first income payment is due (October 5, 2030)), the Company will pay the Bank the full value of the policies in the manner described in the contracts.

instrument. The Annuities have a 3% minimum interest rate that is guaranteed for one year.[2] In addition, the Company may, in its sole discretion, pay an additional "excess interest" at a rate it determines.

Under the policies purchased by the Bank, the Bank may surrender (terminate) the policies at any time before the maturity date[3] (October 5, 2030) and receive immediate access[4] to the full value of the policies, including principal and accrued interest with no surrender charges or penalties.[5]

The Bank considers the Fixed Rate Annuities an attractive alternative to similar investment options, including certificates of deposit and corporate bonds. The Bank has noted that the Company's debt obligations have been awarded an Aa1 rating by Moody's and a AA+ rating by Standard and Poor's. The Bank believes its financial exposure on the Annuities it purchased is substantially lower than that of similar financial investment instruments purchased by the Bank. In addition, the interest rate it receives on the Annuities is higher than the interest rate it would receive from such investments. Thus, the Bank believes its investment in the Annuities has more attractive returns than similar investments relative to the risk.

### B. Characteristics of Fixed Rate Annuities Generally

An annuity is a contract where the purchaser makes one or more payments in exchange for a subsequent series of payments for a fixed term or for life. The contract usually involves some combination of the following features: (1) tax deferral; (2) a guaranteed rate of return; (3) flexible investment features; (4) early withdrawal (surrender charges); (5) death benefits; and (6) annual fees and compensation.[6]

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[2] Although the annuity contracts purchased by the Bank are referred to as variable annuities, the contracts give the owner of the policies the option of choosing whether the products it purchases will have a fixed rate or a variable rate of interest. The contract offers investors the right to elect a number of annuity options in return for a single or multiple premium/investment payment. The contract owner may, for example, be permitted to direct that payments accumulate solely in a variable account that invests in equities, a variable account that invests in corporate bonds, a fixed account, or in a combination of variable and fixed accounts. In this case, the Bank has elected to make a single premium payment into a fixed account and has committed it will not convert to a variable return status.

[3] The maturity date is referred to contractually as the "annuity commencement date."

[4] Under the policy, the Company may defer payment for up to six months (when permitted by law) in the event the New York Stock Exchange is closed for trading (other than for the usual business day) or the Securities Exchange Commission restricts trading or determines that an emergency exists.

[5] The full value of the policy represents the accumulation value of the policy and the sum of all premium payments. However, some states impose a state premium tax against either the accumulation value of the annuity policy or the premium payments. The insurance companies issuing the annuity policies deduct these taxes as incurred according to state regulations. We understand that the policies the Bank purchased in this case are not subject to any state premium taxes. National banks purchasing fixed rate annuities are advised to consult with the insurance company issuing the policy to determine whether state premium taxes apply.

[6] Sousa, *An Annuity Primer – Setting the Context for Variable Annuities*, Bank Securities Journal 12 (Jan./Feb. 1995); H. Carstensen, *Tips for Marketing and Selling Variable Annuities*, Bank Securities Journal 31-32 (Jan./Feb. 1995).

There are four parties to an annuity:  the issuer, the contract owner, the annuitant, and the beneficiary.  The annuitant and the contract owner are usually the same person, but they do not have to be.  The beneficiary is the person who receives a death benefit from the annuity upon the death of the contract owner. The annuity contract sets forth the obligations of the issuer and the specific terms of the contract.[7]

Annuities are often classified as either “fixed” or “variable,” although the current marketplace offers numerous types of annuities and hybrid products.  Fixed rate annuities earn a guaranteed rate of interest for a specific period of time.  Funds invested in a fixed rate annuity are placed in a fixed account of the insurance company and are supported by the assets in the general account of the insurance company and subject to the claim of general creditors.[8]  As such, they represent a general obligation of the insurance company.  Payment of the obligation depends on the creditworthiness of the insurance company and is not tied to the performance of any other instrument.

In contrast, variable rate annuities represent an interest in a segregated portfolio of assets of the issuer and are not subject to the claims of general creditors.  Funds invested in a variable annuity are placed in a “separate account” of the insurance company and invested in common stocks or other securities, depending upon the investment objective of that account.[9]  Unlike fixed rate annuities, variable annuities do not have a set rate of interest or earnings. The accumulated value of the annuity depends upon the performance of the separate account as an investment fund and the investment management ability of the issuing company.  Principal and interest are not guaranteed.

## ANALYSIS

National banks may purchase debt obligations under their authority to discount and negotiate evidences of debt.  Fixed rate annuities are, in substance, debt obligations of the issuing insurance company.  Accordingly, the Bank has authority to purchase fixed rate annuity contracts, subject to prudential limits.

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[7] The annuitant is the person whose life governs the duration of the payments from the annuity instrument.  When the annuitant reaches an established age, the issuer of the annuity pays out sums on terms set forth in the contract, either in a lump sum or at periodic intervals, generally for the remainder of the annuitant’s life.  Payments are made to the contract holder.  If the annuitant dies before annuity payments begin, the issuer will pay the beneficiary the value of any premiums paid by the annuitant plus interest (less any withdrawals).  The beneficiary may also be entitled to payments if the annuitant dies after annuity payments begin if the issuer has guaranteed that payments will continue for a set period of time.  In that situation, if the annuitant dies after annuity payments have begun but before the guaranteed period of payments ends (in this case ten years), the issuer will make payments to the beneficiary for the remainder of the guaranteed income payment period.

[8] The general assets of the insurance company include all of the insurance company’s assets other than those allocated to a separate account.  Fixed rate annuities are not allocated to a separate account.

[9] Variable rate annuities typically offer a range of investment or funding options.  These funding options may include stocks, bonds, and money markets.

### A. Fixed Rate Annuities Are Essentially Debt Obligations of the Issuer

The Annuities purchased by the Bank are, in essence, debt obligations of the Company.[10] The Annuities are supported by the assets in the general account of the Company and subject to the claims of its general creditors. Payment of the obligations depends on the creditworthiness of the Company and is not tied to the performance of any other instrument. And like other debt instruments, such as corporate bonds, annuities involve an obligation to make a stream of payment over time.[11]

National banks have authority under the National Bank Act to purchase and hold debt obligations. Section 24(Seventh) expressly authorizes national banks to conduct the business of banking, including "by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt."[12] This authority has long included the power to invest in a variety of debt and debt-like financial investment instruments.[13]

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[10] Many courts have held that an annuity contract creates a debtor-creditor relationship. *See John Hancock Mut. Life Ins. Co. v. Helvering*, 128 F.2d 745, 751 (D.C. Cir. 1942); *Hughes v. Sun Life Assurance Co. of Canada*, 159 F.2d 110, 113(7th Cir. 1946); *Chatham v. City Hospital*, 325 F. Supp. 614 (S.D. Ga. 1971); *Moses v. Manufactures Life Ins. Co.*, 298 F.Supp. 321 (E.D. S.C. 1968); *Roth v. Kaptowsky*, 393 Ill. 484, 66 N.E.2d 664, 669 (1946); *Crossman Co. v. Rauch*, 263 N.Y. 264, 188 N.E. 748, 751 (1934).

[11] *See NationsBank of North Carolina, N.A. v. Variable Life Annuity Co.*, 115 S. Ct. 810, 814 n.2 (*VALIC)*, supra. Fixed rate annuities also functionally resemble certificates of deposit. A fixed annuity contract for a fixed term resembles a certificate of deposit that pays interest and automatically withdraws principal at a rate calculated to reduce the balance to zero at the end of the annuity term. An annuity with a life term resembles a life interest in a certificate of deposit. The owner of a life interest in a certificate of deposit has the right to receive income from the account for life, after which ownership of the account reverts to the owner of the remainder. See R. Cunningham, Law of Property § § 2.16, 4.11 (1984). This is precisely the same right that the owner of a life-term annuity has. National banks may purchase and hold certificates of deposit without limit based on the 12 U.S.C. 24(Seventh) "incidental powers" provisions. OCC Interpretive Letter No. 384 (May 19, 1987).

[12] 12 U.S.C. § 24(Seventh). The courts have long held that the term "discount" includes purchases of notes and other evidences of debt. *See, e.g.*, *National Bank v. Johnson*, 104 U.S. 271 (1881); *Steward v. Atlantic National Bank*, 27 F.2d 224, 228 (9th Cir. 1928); *Morris v. Third National Bank*, 142 F. 25 (8th Cir. 1905); *Danforth v. National State Bank of Elizabeth*, 48 F. 271 (3d Cir. 1891). *See also* 12A *Words and Phrases* 285-95 (West 1954 and Supp. 1986). And negotiation is a form of transfer, disposition or sale. *Black's Law Dictionary* 934 (5th ed. 1979); 28 *Words and Phrases* 758-766 (West 1955 & Supp. 1986). Thus, the OCC has concluded that the authority to discount and negotiate evidences of debt includes the authority to purchase and sell debt and debt-like instruments. *See e.g.,* OCC Conditional Approval No. 262, *Interpretations and Actions*, Dec. 1997, Vol. 10, No. 12.

[13] *See* Interpretive Letter No. 833 (July 8, 1998), *reprinted in* [1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-287; Interpretive Letter No. 834, (July 8, 1998), *reprinted in* [1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-288; Interpretive Letter No. 600 (July 31, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,427; Interpretive Letter No. 182 (March 10, 1981), *reprinted in* [1981-1982 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,263.

For example, the OCC has concluded that a national bank could acquire privately placed assets-backed securities under its authority to negotiate evidences of debt.[14] Similarly, the OCC recently concluded that a national bank could acquire and hold certain preferred stock of an unrelated company under its authority to discount and negotiate evidences of debt.[15]

These decisions demonstrate that the legal authority to purchase a financial instrument does not depend upon the label that financial instrument is given. Instead, the OCC looks to the nature of the instrument and activity involved to determine permissibility. In this case, it is clear that the Bank's annuity investment is essentially a debt obligation of the Company to the Bank. National banks are authorized to invest in debt obligations under the authority to discount and negotiate evidences of debt. Accordingly, the Bank may invest in the fixed rate annuities because they are essentially debt obligations of the issuer.[16]

### B. Fixed Rate Annuities Are Not Insurance

Fixed rate annuities are primarily a vehicle for investment, not an insurance product. Generally, investors who purchase annuities are not seeking to pool a catastrophic risk such as death, injury or property damage, but are instead seeking a guaranteed, long-term return on their assets. The element of mortality risk, which is present in some annuities, including the annuities purchased by the Bank, derives from the investor's willingness to price a contractual arrangement based on the length of the investor's life in order to increase the return the investor will receive during the investor's lifetime. This risk is essentially an investment risk, not an insurance risk.[17]

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[14] Interpretive Letter No. 600, *supra*. The OCC determined that the asset-backed securities did not meet the marketability requirements for investment securities, but could be purchased under the authority to negotiate evidences of debt.

[15] *See* Interpretive Letter No. 941 (June 11, 2002), *OCC Interpretations and Actions, August 2002*. The OCC has also concluded that trust preferred securities are debt-like instruments that may be purchased as investment securities or under the authority to discount and negotiate evidences debt. *See* Interpretive Letter No. 777, *supra* and Interpretive Letter No. 908, *supra*.

[16] The fixed rate annuities would not qualify as investment securities pursuant to 12 C.F.R. Part 1, however, because they are not transferable and therefore would not meet the marketability requirement for investment securities. The OCC has previously concluded that a debt instrument that does not qualify as an investment security, may qualify for purchase pursuant to a bank's authority to discount and negotiate evidence of debt. *See e.g.* OCC Interpretive Letter No. 908, *reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-433 (April 23, 2001) (trust preferred securities that do not qualify as investment securities may be purchased under the authority in 12 U.S.C. § 24(Seventh) to discount and negotiate evidence of debt).

[17] *See Helvering v. Le Gierse*, 312 U.S. 531, 542 (1941) ("Any risk that the prepayment [premium] would earn less than the amount paid to the respondent as an annuity was an investment risk similar to the risk assumed by a bank; it was not an insurance risk . . . ."). *In Re Howerton*, 21 Bankr. 621, 623 (1982) ("Both life insurance and annuity contracts may take various forms but the heart of the distinction between them is this: life insurance is a promise to pay a sum certain on the death of the insured and an annuity is essentially a form of investment which pays periodically during the life of the annuitant or during a term fixed by contract rather than on the occurrence of a future contingency."); *See e.g.*, *Daniel v. Life Ins. Co. of Virginia*, 102 S.W.2d 256, 260 (Tex Civ. Appl 1937) ("An annuity is essentially a form of investment, and uniformly held to be such, regardless of the fact that in its usual form payments are contingent upon continuity of the life of the grantee."); 1 J. Appleman, *Insurance Law and Practice*; § 84 (1981) ("annuity contracts must be recognized as investments rather than insurance."). *See also SEC*

The Supreme Court recognized the investment nature of annuities in *VALIC:*

> By making an initial payment in exchange for a future income stream, the customer is deferring consumption, setting aside money for retirement, future expenses, or a rainy day . . . an annuity is like putting money in a bank account, a debt instrument, or a mutual fund . . . . In sum, modern annuities, though more sophisticated than the standard savings bank deposits of old, answer essentially the same need.[18]

Indeed, the great weight of authority supports the position that annuities are not insurance, because they do not incorporate the element of indemnification against risk. Courts considering the status of annuities as "insurance" have held that annuities are not insurance for purposes of federal tax law, several state laws, bankruptcy law and other laws.[19] Legal encyclopedias also agree that, because annuities do not involve indemnification against risk of loss, they are not insurance.[20] Thus, limitations on national banks purchasing life insurance as an investment are not applicable here.[21]

### C. Purchasing Fixed Rate Annuities is not Prohibited by 12 U.S.C. § 24(Seventh)[22]

Twelve U.S.C. § 24(Seventh) addresses the ability of a national bank to purchase, underwrite or deal in securities. Specifically, section 24(Seventh) provides in relevant part:

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*v. United Benefit Life Ins. Co.*, 387 U.S. 202-207-208 (1966) ("In fixing the necessary premium [for a fixed annuity] mortality experience is a subordinate factor and the planning problem is to decide what interest and expense rates may be expected. There is some shifting of risk from policyholder to insurer, but no pooling of risks among policyholders. In other words, the insurer is acting in a role similar to that of a savings institution . . .").

[18] *VALIC,* supra.

[19] *See e.g., New York State Association of Life Underwriters, Inc. v. New York State Banking Department*, 83 N.Y. 2d 353, 632 N.E. 2d 876 (1994); *New Britain National Bank v. Life Insurance Co. of Connecticut*, 6 Conn. Cir. 674, 305 A.2d 296 (1972).

[20] *See* 44 C.J. S. § 2(b) ("Generally an annuity contract is not a contract of insurance); 43 Am Jur. 2d Insurance § 5 ("Contracts for annuities differ materially from ordinary life insurance policies, and are not generally regarded as such.).

[21] The OCC has taken the position that national banks are not authorized to purchase life insurance simply as an investment. *See* OCC Bulletin 2004-56 (December 7, 2004); Unpublished OCC Interpretive Letter from William Glidden (Oct. 28, 1987).

[22] Section 24(Seventh) codifies section 16 of the Glass-Steagall Act. The Glass-Steagall Act is the popular name for essentially four provisions in the Banking Act of 1933. Section 16 of the Act places limits on underwriting and dealing in securities and stock by national banks. Section 21 (12 U.S.C. § 378) prohibits organizations that are engaged in underwriting and other securities activities from simultaneously engaging in the business of receiving deposits. The two other provisions, section 20 (12 U.S.C. § 377) and Section 32 (12 U.S.C. § 78) have been repealed.

> . . . .The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely on the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: Provided, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. . . .

This provision does not restrict the Bank's purchase of fixed rate annuities, however, because fixed rate annuities are not "securities" for purposes of section 24(Seventh).[23] Section 24(Seventh) does not define the term "securities," nor does it mention annuities. And neither the OCC nor the courts have directly concluded whether fixed rate annuities are "securities" for purposes of section 24(Seventh).[24] The Securities Act of 1933 specifically exempts annuities from the definition of "security, however."[25] Although the treatment of fixed rate annuities under the federal securities laws is not determinative of whether those instruments are securities under section 24(Seventh), it is relevant in assessing how Congress viewed fixed rate annuities at the time section 24(Seventh) was enacted.[26] As the Supreme Court has explained, the meaning of a term in other legislation passed roughly at the same time with the shared purpose of restoring confidence in the nation's financial markets provides "considerable evidence' of the 'ordinary meaning' Congress attached to the same term in the Glass-Steagall Act.[27] The 1933 Act's exemption for fixed rate annuities provides 'considerable evidence' that Congress did not view fixed rate annuities as securities for purposes of the Glass-Steagall Act.

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[23] The annuity policies purchased by the Bank are called 'variable annuities' and are considered securities under the federal securities laws. As noted above, however, owners of these annuities have the option of choosing whether the annuities will have a fixed rate or variable rate of return. The Bank has chosen a fixed rate option and has committed that it will not convert to a variable rate. As a result, we treat these annuities as fixed rate annuities for purposes of the Glass-Steagall Act.

[24] The OCC has previously found it unnecessary to determine the status of fixed rate annuities under the Glass-Steagall Act, because national banks were engaged solely in brokering fixed rate annuities, a permissible activity for a national bank regardless of whether the annuities are Glass-Steagall Act securities. *See e.g.* Interpretive Letter No. 499 (Feb. 12 1990), *reprinted in* [1989-90 Transfer Binder] Fed. Banking L. Rep. ¶ 83,090. The Supreme Court, in *VALIC*, also did not address whether fixed rate annuities were securities for purposes of the Glass-Steagall Act. Instead, the Court accepted the OCC's conclusion that national banks had authority to broker fixed rate annuities because fixed rate annuities are the functional equivalent of other financial investment instruments national banks are permitted to broker.

[25] The Securities Act of 1933 exempted all annuities from the definition of "security." *See* 15 U.S.C. § 77c(a)(8). At the time the 1933 Act was enacted, however, insurance companies offered only fixed rate annuity contracts. As a result, only fixed rate annuities are regarded as exempt from the 1933 Act. *See SEC v. Variable Life Ins. Co.*, 359 U.S. 65 (1959). *See also*, SEC Rule 151, 17 C.F.R. § 230.151 ("safe harbor" that is intended to provide a clear exemption from the 1933 Act requirements for all fixed rate annuity products).

[26] *See* S. Rp. No. 85, 73d Cong., 1st Sess. (May 3, 1933) 15, *reprinted in* Federal Bar Association, Securities Law Committee, I Federal Securities Laws; Legislative History 1933-1982, 138, 152 (1983).

[27] *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 159 n. 11.

Accordingly, the Bank is authorized to purchase and hold the Fixed Rate Annuities pursuant to the authority in 12 U.S.C. § 24(Seventh) to discount and negotiate evidences of debt. Banks using their authority to discount and negotiate evidences of debt must make this election prior to purchasing the fixed rate annuities. In addition, the Bank's purchase will be subject to the legal and prudential limits discussed below.

### D. Legal Limits and Prudential Requirements

The Bank's investment in the annuities will be subject to the limitations applicable to loans and other debt obligations.[28] Accordingly, the Bank's purchase of the Fixed Rate Annuities may not exceed 15% of the Bank's capital and surplus.[29] The Bank also must establish internal concentration limits for its combined holdings of fixed rate annuities from all issuers.[30]

In addition, the Bank must adhere to the prudential requirements in OCC Bulletin 2002-19 and Banking Circular No. 181 (Rev.).[31] In that regard, prior to purchasing the annuities, the Bank must conduct an independent analysis to determine that the fixed rate annuities will meet the Bank's own internal underwriting standards. The Bank should exercise the same credit due diligence as it would for other debt obligations.[32] At a minimum, this requires that the Bank:

1) perform a full financial statement analysis on the obligor;

2) assess the issuer's industry position, pricing power, management strength, etc;

3) assess and evaluate the issuer's source of repayment and collateral value (if any);

4) gain appropriate credit approvals (e.g., from a loan committee);

5) assign a risk rating;

6) ensure the lending policy addresses the type of exposure the bank plans to acquire;

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[28] *See* 12 U.S.C. § 84 and 12 C.F.R. § 32.

[29] *See* 12 U.S.C. § 84(a)(1) and 12 C.F.R. § 32.3(a).

[30] Among other things, the Bank should consider the concentration of credit guidelines (OCC Bulletin 95-7 "Concentrations of Credit," February 9, 1995) when establishing internal limits.

[31] *See* OCC Bulletin 2002-19 "Supplemental Guidance: Unsafe and Unsound Investment Portfolio Practices", May 22, 2002, and OCC Banking Circular 181 (Rev.) "Purchases of Loans in Whole or in Part-Participations", August 2, 1984, *reprinted in* [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 63-506.

[32] The OCC will be critical of bank practices that permit the bank to acquire assets pursuant to their authority to discount and negotiate, but fail to use prudent credit underwriting and ongoing monitoring practices. If a bank has not performed appropriate credit due diligence, the OCC may consider such transactions to be violations of 12 U.S.C. § 24(7), as well as unsafe and unsound practices.

7) review the credit exposure on an ongoing basis and update the risk rating as appropriate.

The Bank must maintain its analysis on an ongoing basis and must have continued access to appropriate credit and portfolio performance data as long as it holds the fixed rate annuities.[33]

**CONCLUSION**

Based on the information and the representations you provided and for the reasons explained above, the Bank may invest in fixed rate annuities for its own account, subject to the following conditions:

1. The Bank is permitted to invest in only those annuity products with a fixed rate of interest that represent a general obligation of the issuing insurance company and that are not tied to the performance of any other instrument.

2. The Bank may not exercise any option it may have to convert its Fixed Rate Annuities to a variable return status.

3. Under the terms of the annuity contract, the Bank must be permitted to surrender (terminate) the policies at any time before the maturity date and receive immediate access to the full value of the policies, including principal and accrued interest with no surrender charges or penalties. The Bank may not invest in any annuity product that imposes surrender charges or penalties for early surrender of the policy.[34]

4. The Bank's investment in the annuity products will be subject to a legal lending limit of 15% of the Bank's capital and surplus per issuer. The Bank also should establish and comply with internal concentration limits on its combined holdings of fixed rate annuities from all issuers.

5. The Bank must adhere to the prudential requirements in OCC Bulletin 2002-19 and OCC Banking Circular No. 181 (Rev.) and conduct an independent analysis to determine that the purchase of the fixed rate annuities meets the Bank's own internal underwriting standards.

Please be advised that these conditions are deemed to be "conditions imposed in writing by the agency in connection with the granting of any application or other request" within the meaning of 12 U.S.C. § 1818. As such, the conditions are enforceable under 12 U.S.C. § 1818.

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[33] The Bank also should obtain the employees' informed consent to be named as annuitants. We understand that prior to consenting to be annuitants, the Bank's employees were advised that their consent was voluntary. In addition, the Bank advised the employees that the employees would not be the owner or beneficiary of the annuities.

[34] Investment in fixed rate annuities that impose penalties for, or other restrictions on, early termination may not be a prudent investment for a national bank. This opinion addresses only those fixed rate annuities contracts that permit termination of the annuity policy at any time with immediate access to the full value of the policies, with no surrender charges or penalties.

If you have any questions, please contact Beth Kirby, Special Counsel, Securities and Corporate Practices Division at 202-874-5210.

Sincerely,

/s/ *Daniel P. Stipano*

Daniel P. Stipano
Acting Chief Counsel
Comptroller of the Currency