April 2, 2003

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Re: **Nevada Division of Insurance ("Division") regulation of national banks offering Debt Cancellation Contracts and Debt Suspension Agreements (collectively referred to as Debt Protection Program "DPP")**

Dear Mr. Alexander:

Your written request for an opinion has been referred to me for a response.

In your letter, you indicated that certain property and casualty insurers desire to file and to have approved in Nevada contractual liability policies and at this time they are not able to secure approval of this type of contract by the State of Nevada, Department of Business and Industry, Division of Insurance (Division).

You further stated that:

> *A DPP CLP insures the contractual liability that arises when a national bank offers to one of its customers a DPP. Nevada takes the position that it cannot approve such policies since the Division does not approve DPPs as insurance policies offered by banks. The reason for the disapproval is based on the fact that banks are not insurers and therefore cannot underwrite DPPs as insurance products. Our discussion on the federal issues that preempt state insurance department authority over such contracts and the authority of the functional federal regulator to control contracts will focus on national banks; however, we would be remiss if we did not commence this discourse by noting that there are several distinct types of federal lending institutions that are currently allowed to offer DPPs. We urge you to include in your resolution of the issues that we are discussing all federal lending institutions that have received from their functional regulator approval to offer to their customers DPPs.*

> *DPPs cancel, suspend or waive a debtors obligation to pay to the bank the agreed to payment(s) upon the happening of specified events. The bank usually charges a separate and identifiable charge to the debtor. This bank contract relates directly to the central authority of a national bank to make a loan and the bank's ability to release its borrower from the agreed to contractual liability. The OCC has noted that "[T]his type of contractual provisions is no less a part of lending than any of the various other terms (covenants, security interests, etc) that are part of a loan. OCC Interpretive letter 903 (January 2001), p.3. The Office of Thrift Supervision has said that [t]he authority to compromise or forgive a loan is ..fundamental to the lending business." OTS Op. Chief Counsel (September, 1993).*
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> *While DPPs may resemble insurance, Nevada fails to take account of the distinct regulatory treatment afforded when national banks offer such insurance "equivalents." The OCC has held that offering DPPs is within the necessary and incidental powers of a national bank. 12 CFR § 7.1013. However, contrary to Nevada's assertion, the OCC does not consider DPPs to be insurance products; instead, the OCC construes them as banking products, to be products that are governed by Part 37 and other applicable Federal law and regulation, and are not to be governed by State Law. See OCC Rule, 12 CFR 37.1. In promulgating Part 37, the OCC has remarked, "since DCCs and DSAs are banking products, they are governed by this part 37 and not by 12 CFR Part 14 (consumer protections for depository institution sales of insurance)."*

Your reliance on the Barnett Bank case is well placed. As you stated: "'As the United States Supreme Court has observed, grants of both enumerated and incidental powers to national banks historically have been interpreted "as grants of authority not normally limited by, but rather ordinarily preempting contrary state law.' Barnett Bank of Marion Co. N.A. v. Nelson, 517 U.S. 25 (1996)."

However, I must disagree with you that DPPs are contractual obligations and differ from insurance products. There is a transfer of risk based upon a fortuitous event. If the bank is merely canceling, suspending or waiving a part of the loan and not assuming the responsibility of making the debtor's loan payments, that may not be insurance. But, you have indicated that the risk of loss is borne by an insurer should the debt be subject to cancellation due to some unforseen or fortuitous action by the debtor. The solvency of the bank does not seem to be the issue.

I accept that the NAIC has concluded in its letter to the OCC of June 18, 2001, that the states did not regulate DPPs as insurance as of January 1, 1999. In addition, as of January 1, 1999, a state could not regulate DPPs as insurance. First Nat'l Bank of Eastern Arkansas v. Taylor, 907 F.2d 775 (8th Cir. 1990). Section 2(b) of the Graham, Leach, Bliley Act (GLBA) does not expressly or implicitly consider DCCs and DSAs to be "insurance." Notwithstanding the NAIC position, Nevada has long maintained that DPPs are insurance and are subject to regulation by the Division.

Section 104 of GLBA addresses the power of a state to regulate the insurance activities of a national bank and, in doing so, expressly affirms that McCarran-Ferguson remains the law of the land. The NAIC itself has appropriately stated that §302 and the definition of "insurance" therein, "[i]s specifically limited to defining what products a bank may or may not underwrite under federal banking law." NAIC Definition of Insurance White Paper, p.2 (2000). In its White Paper, the NAIC Working Group also correctly observed that: "*The issues involved in determining the scope of the 'business of insurance' within the meaning of the McCarran-Ferguson Act or ERISA are distinct from the issues involved in determining which contracts are 'insurance products' within the meaning of GLBA*." Id., p. 1 (2000).

I accept as correct the following statements contained in your letter:

> *It is well settled that Congress is presumed to be aware of the law in the arena in which it legislates. Thus, in interpreting GLBA, one must presume that Congress was aware that for nearly 40 years, the OCC has deemed the issuance of DPPs as authorized under the National Bank Act. One must also presume that Congress was equally aware that, despite challenges by state insurance regulators, the federal courts have held that a bank's offering of DPPs does not constitute the "business of insurance" within the meaning of McCarran-Ferguson, and thus was not subject to state insurance regulation. First Nat'l. Bank v. Taylor, 907 F.2d 775 (8th Cir. 1990).*
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> *In declaring that McCarran-Ferguson remains the law of the land, Congress intended to preserve these determinations. Moreover, by defining an "authorized product" as one which the OCC had determined in writing as being within a bank's powers, Congress obviously sought to respect and ratify the OCC's (and the courts') prior determinations that a national bank could offer DPPs as principal. The purpose of §302 is to delineate those products that a national bank may, and may not underwrite. In classifying those products, §302 separates products regulated as insurance as of January 1, 1999 and prohibits a bank from providing such products as principal. §302(a) and (c)(1). However, GLBA excludes from this prohibition those "authorized products" that, as of January 1, 1999, the OCC had determined a national bank could offer as principal. §302(a) and (b).*
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> *Since 1964, the OCC has repeatedly declared and in September 2002*

reaffirmed its position that the offering of DPPs to be a necessary and incidental power under the National Bank Act. The act say "that national banks may exercise "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiation promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits; by buying and selling exchanges, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes." 12 U.S.C. 24 (Seventh). The OCC's determination is even codified in the Code of Federal Regulations. 12 CFR , Section 7.1013. When the OCC's determinations have been challenged, the courts have paid considerable deference to the Comptroller's interpretation of the National Bank Act, observing that:

"It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws. See First National Bank v. Missouri, 263 U.S. 640, 658, 68 L. Ed. 486, 44 S. Ct. 213 [1924]; Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 403-04, 93 L. Ed. 2d 757, 107 S. Ct. 750 (1987) (quoting Investment Co. Institute v. Camp, 401 U.S. 617, 626-27, 28 L. Ed. 2d 367, 91 S. Ct. 1091 (1971)). The Comptroller's determination as to what activities are authorized under the National Bank Act should be sustained if reasonable. Id., Clarke p. 409. First Nat'l. Bank v. Taylor, 907 F.2d 775 at 777-778 (8th Cir. 1990); See Steele v. First Deposit National Bank et al, 732 So.2d 301, 304 (Ala. Civ. App. 1999); See also Smiley v. Citibank, N.A., 517 U.S. 735, 739 (1996) ('It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering. . . . [T]hat practice extends to the judgments of the Comptroller of Currency with regard to the meaning of the banking laws.')".

Furthermore, federal law requires the OCC to examine national banks (U.S.C. 481), to require reports of conditions from national banks, and to take enforcement actions against national banks that fail to adhere to applicable federal law and regulations (12 U.S.C. 1818). Finally, the OCC's debt cancellation and debt suspension regulation prohibits national banks from engaging in certain sales practices, requiring certain fee arrangements, requiring certain consumer disclosures prior to the purchase of DPPs, and requires proper reserves against the liability generated by these products. Any attempt by Nevada, or any state, to regulate DPPs by national banks would inevitably conflict with these federal laws and regulations.

The foregoing leads me to the conclusion that Nevada does have authority to determine that DPPs are insurance. As such, insurers authorized to transact insurance in Nevada may only

offer DPPs if such product is approved by the Division.

However, it also leads me to conclude that federal law controls the conduct of nationally chartered banks. Federal law clearly preempts the state of Nevada from taking any action inconsistent therewith. As such, the Division cannot and will not approve nor disapprove any DPP covering or issued to nationally chartered banks.

It is my opinion that the Division may consider and approve contractual liability policies or DPPs as insurance products. Your clients should submit DPPs policies for Division approval prior to making them available.

Should you have any questions, please contact me at the above address.

Very truly yours,

DON AIMAR, ESQ.
Insurance Counsel

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