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OFFICE OF THE
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February 1, 2002

Opinion No. 02-013

Bank Ownership of Title Insurance Companies

QUESTIONS

1. Under Tenn. Code Ann. § 45-2-607(d), a state bank may invest in various enterprises. Subdivision (d)(6) of the statute provides that "[a]ny state or national bank or subsidiary which engages in an activity that subjects it to licensure and/or regulation under other than title 45, chapter 2 [governing banks], shall be subject to licensure and/or regulation on a basis that does not discriminate by the appropriate regulatory agency which licenses and/or regulates non-banks which engage in the same activity."

a. Does this statute prohibit an agency from administering statutes that discriminate against banks or their subsidiaries in licensing non-bank activity controlled by statutes outside Title 45?

b. What administrative entity or person is charged with interpreting and determining whether an agency has engaged in the type of discrimination prohibited by Tenn. Code Ann. § 45-2-607(d)(6)?

2. Under Tenn. Code Ann. § 56-35-131, a title insurance agency must abide by one of three different conditions in order to obtain a license to engage in the title insurance business. If the agency is not operated by an attorney or a law firm, then it may operate only if it derives forty percent or less of its gross operating revenues from "controlled business" — that is, business referred to or produced by the activities of its owners — or if it will be operated as a "subsidiary of a financial institution with its primary business being that of accepting deposits and making real estate loans and subject to regulation, inspection, and supervision of the United States government or an agency thereof." Does Tenn. Code Ann. § 45-2-607(d)(6) require the Department of Commerce and Insurance to treat a title insurance company owned by banks as the subsidiary of a financial institution under the third condition?

3. Assume that a limited liability corporation with fifteen members with equal ownership, each of which is a state or national bank, wishes to engage in a title insurance business in Tennessee.

a. Is such an entity a "subsidiary" of a state or national bank within the meaning of Tenn. Code Ann. § 45-2-607(d)?

b. Is such an entity a "subsidiary of a financial institution with its primary business being that of accepting deposits and making real estate loans and subject to regulation, inspection, and supervision of the United States government or an agency thereof" within the meaning of Tenn. Code Ann. § 56-35-131?

4. Does the Tennessee Bank Reform Act of 1996, 1996 Tenn. Pub. Acts Ch. 768, change the operation of Tennessee title insurance laws?

5. Does the Gramm-Leach-Bliley Financial Modernization Act (GLB), P.L. 106-102, change the operation of Tennessee title insurance laws?

OPINIONS

1. a. A definitive answer to the scope of Tenn. Code Ann. § 45-2-607(d)(6) depends on the particular facts and circumstances and the statute or regulation being administered. But we conclude that the General Assembly did not intend to prohibit the Department of Commerce and Insurance from enforcing the restrictions on bank holding company ownership of a title insurance agency or conditions on continued licensure of a title insurance agent.

b. The agency that regulates the particular type of activity at issue is the one charged by Tenn. Code Ann. § 45-2-607(d)(6) to license and/or regulate any state or national bank or subsidiary on a basis that does not discriminate within the meaning of that statute.

2. No. This Office has concluded that Tenn. Code Ann. § 56-35-131(a)(2) only applies to savings and loan associations.

3. a. Based on the facts presented, such an entity is not a "subsidiary" of a state or national bank within the meaning of Tenn. Code Ann. § 45-2-607(d).

b. No. This Office has concluded that Tenn. Code Ann. § 56-35-131(a)(2) only applies to savings and loan associations.

4. This statute does not prevent the Department of Commerce and Insurance from enforcing the anti-affiliation standards at Tenn. Code Ann. § 56-6-201 or the requirements for licensing of a title insurance agent at Tenn. Code Ann. § 56-35-131.

5. Both Tenn. Code Ann. § 56-6-201, prohibiting a bank holding company from owning or controlling an insurance agent, and Tenn. Code Ann. § 56-35-131(a)(1), limiting the amount of business income a title insurance agent may receive through owners and affiliates, are preempted by federal law, including GLB, to the extent these statutes prohibit or significantly interfere with a national bank's exercise of its authority to control or own an interest in a title insurance agency. The state "wild-card" statute

therefore permits state banks to engage in the same activities. The extent to which these statutes are preempted in other contexts would depend on the particular activity or arrangement.

ANALYSIS

This opinion addresses the effect of 1996 amendments to Tennessee banking laws, and 1999 amendments to national banking laws, on the authority of banks, their subsidiaries, or their affiliates, to own or engage in the business of title insurance in Tennessee. Assuming that all applicable statutory and regulatory criteria are met, a national bank may own or control a subsidiary that acts as a title insurance agent. Thus, under Tenn. Code Ann. § 45-2-601, the State's "wild-card statute," state banks may also own or control a subsidiary that acts as a title insurance agent under the same conditions national banks would be permitted to engage in that activity.

Introduction: State Statutory Restrictions on the Business of Title Insurance

Tenn. Code Ann. § 45-2-607 lists permissible investments for banks. Under subsection (d), and after notice to the Commissioner of Financial Institutions, a bank may invest in various enterprises, including limited liability corporations, engaged in certain activities permissible for federally chartered financial institutions, activities of a financial nature, or other activities approved by the Commissioner of Financial Institutions. Subdivision (6) of this subsection provides:

> Any state or national bank or subsidiary which engages in an activity that subjects it to licensure and/or regulation under other than title 45, chapter 2, shall be subject to licensure and/or regulation on a basis that does not discriminate by the appropriate regulatory agency which licenses and/or regulates non-banks which engage in the same activity.

a. Anti-affiliation Statute

The Department of Commerce and Insurance regulates the business of insurance. Under Tenn. Code Ann. § 56-6-201(a):

> No insurance agent or broker licensed under the provisions of this chapter, who is owned or controlled directly or indirectly by, or who is employed by, a bank holding company, a bank which is a subsidiary of a bank holding company, or any other subsidiary or affiliate of a bank holding company, shall negotiate any policy of insurance other than credit life insurance, credit accident and health insurance and comprehensive physical damage insurance on motor vehicles, mobile homes, and recreational vehicles.

b. Title Insurance Agents

The Department of Commerce and Insurance regulates the issuance of title insurance under Tenn. Code Ann. §§ 56-35-101, *et seq.* Under this statutory scheme, a title insurance company must receive a certificate of authority to conduct a title insurance business in Tennessee. Tenn. Code Ann. § 56-35-106. In addition, except with regard to licensing and appointing agents under Tenn. Code Ann. §§ 56-35-201 and 56-35-204:

> . . . the commissioner shall refuse to issue any new license or certificate to any title insurance company, title insurance agent, or title insurance agency, unless the applicant therefor shall agree to abide by any one (1) of the following terms and conditions:
>
> (1) The gross operating revenues for any fiscal year attributable to the placement or issuance of policies or contracts of title insurance derived from all sources of controlled business shall not exceed forty percent (40%) of the gross operating revenues of such company, agent or agency;
>
> (2) The company, agent or agency will be operated as a subsidiary of a financial institution with its primary business being that of accepting deposits and making real estate loans and subject to regulation, inspection, and supervision of the United States government or an agency thereof; or
>
> (3) The title insurance agency or agent is to be operated by an attorney, a single partnership of attorneys, or a single professional corporation of attorneys as an ancillary part of the general practice of law.

Tenn. Code Ann. § 56-35-131(a). This Office has previously concluded that Tenn. Code Ann. § 56-35-131(a)(2) applies only to savings and loan associations, and does not include banks. Op. Tenn. Atty. Gen. 87-145 (September 1, 1987). The term "controlled business" as used in Tenn. Code Ann. § 56-35-131(a)(1):

> . . . describes that portion of a title insurance company's, title insurance agent's or title insurance agency's business in this state with which there is connected in any way, directly or indirectly:
>
> (A) Producers of title insurance business who have financial interests in such title insurance company, title insurance agent or title insurance agency;
>
> (B) Associates of such producers; or

> (C) Associates who have financial interests in such title insurance company, title insurance agent or title insurance agency.

Tenn. Code Ann. § 56-35-102(a)(3). "Financial interest" means "any interest, legal or beneficial, such that the holder thereof is or will be entitled to a share of the net profits or net worth of the business in which such interest is held." Tenn. Code Ann. § 56-35-102(a)(4). "Producer of title insurance business" means:

> (A) The insured or one (1) of the insureds under a policy of title insurance (except that, if the interest of the insured is held in a fiduciary capacity, the true or beneficial owner of the interest shall be deemed the insured for the purposes of this definition); or
>
> (B) Any person engaged in the trade, business, occupation or profession of:
>
> (i) Buying, selling, or leasing, or brokering or acting as agent in the buying, selling or leasing of interests in real property;
>
> (ii) *Making,* brokering or acting as agent in the making of *loans secured by interests in real property;*
>
> (iii) Building or developing for sale or lease real property, either improved or unimproved;
>
> (iv) Providing escrow or closing services in connection with the transfer of interests in real property or the making of loans secured by interests in real property, other than as a title insurance agent or a title insurance agency, or as a full-time employee of a title insurance company, a title insurance agent or a title insurance agency; or
>
> (v) Practicing law, other than as a full-time employee of a title insurance company, a title insurance agent or a title insurance agency.

Tenn. Code Ann. § 56-35-102(a)(7) (Emphasis added). A bank engaged in the business of making loans secured by interests in real property would appear to fall within (B)(ii) and would therefore be a "producer of title insurance business" within the meaning of this statute. Therefore, under Tenn. Code Ann. § 56-35-131(a), a title insurance agency owned by one or more banks cannot obtain a license unless only forty percent or less of its gross revenues are derived from title insurance sales to customers in connection with a real estate loan by the bank.

In 1999, the Division of Insurance in the Department of Commerce and Insurance received an application for a license as a title insurance agency. The applicant was a Tennessee limited liability company managed by a board. The members of the company are non-affiliated state and national banks, and each owns no more than one unit. The members of the company elect the management board, which hires employees to operate the company's day-to-day management. The request indicates that the state bank investments in the company were approved by the Commissioner of Financial Institutions as "minority non-subsidiary investments" under the provisions of Title 45, Chapter 2, Part 6. The application indicated that the limited liability company was a subsidiary of a financial institution.

1. Regulation "On a Basis That Does Not Discriminate" under the Bank Reform Act of 1996

The first question concerns the effect of Tenn. Code Ann. § 45-2-607(d) on state title insurance statutes. This provision was enacted in 1996 as part of 1996 Tenn. Pub. Acts Ch. 768, The Bank Reform Act of 1996. Recitals to the act indicate that it was passed to prepare for more liberal interstate federal and state banking laws. The recitals state that its purpose was to encourage banks to locate in Tennessee by allowing them to compete on an equal footing with other businesses that offer financial products or services and compete directly with state-chartered financial institutions. Section 17 of the act expressly authorizes a bank to "organize, participate in or own an ownership interest in a limited liability company, or limited liability partnership," under the provisions of the banking laws. 1996 Tenn. Pub. Acts Ch. 768, § 17, now codified at Tenn. Code Ann. § 45-2-602(a)(2).

Section 19 of the act added subsection (d) to Tenn. Code Ann. § 45-2-607 on investment authority. This provision authorizes banks to invest in the stock or assets of companies, including limited liability companies which are or will be:

> (A) Primarily engaging in activities permissible for federally chartered financial institutions, their authorized subsidiaries or bank holding companies under applicable laws, rules, regulations or orders;
>
> (B) Primarily engaging in activities of a financial nature, including, but not limited to, the transmission or processing of information, data or payments relating to such activities, all forms of securities activities not otherwise authorized, together with such other activities as the commissioner shall determine and which may be permissible for other bank and non-bank financial institutions chartered by Tennessee or other states by regulation or order; or
>
> (C) Engaging in any other activities approved by the commissioner.

Tenn. Code Ann. § 45-2-607(d)(1)(A), (B) & (C). Subsections (2) through (5) provide for approval of the activity by the Commissioner of Financial Institutions. Subsection (6) provides:

> Any *state or national bank* or *subsidiary* which *engages* in an activity that subjects *it* to licensure and/or regulation under other than title 45, chapter 2, shall be subject to licensure and/or regulation on a basis that does not discriminate by the appropriate regulatory agency which licenses and/or regulates non-banks which engage in the same activity.

Tenn. Code Ann. § 45-2-607(d)(6) (emphasis added) (the "Discrimination Clause"). Other sections of the act amend statutes regarding branching, charters, transfers of fiduciary accounts, bank loans, and other banking matters.

The Department of Financial Institutions has promulgated regulations under this statute. Tenn. Rules and Regs. Ch. 0180-19. Under Rule 0180-19-.02(1)(q), the term "subsidiary" means:

> . . . a corporation, limited liability company, or similar entity all or a part of the stock of which is owned by a bank *principally for the purpose of participating in the active management of the business of such corporation as distinguished from the purpose of deriving profit from the appreciation in value of such stock or from dividends paid thereon.*

(Emphasis added). The term "active management" means the parent bank owns more than fifty percent (50%) of the voting shares (or similar type of ownership interest) of a subsidiary. Rule 0180-19-.02(1)(a).

Based on the language in Tenn. Code Ann. § 45-2-607(d)(6), and on implementing regulations promulgated by the Commissioner of Financial Institutions, we think the requirement of regulation "on a basis that does not discriminate" applies to a bank or a subsidiary in which that bank owns more than fifty percent of the voting shares or similar type of ownership interest. This is based on the definition of "subsidiary" as an entity the stock of which is owned by a bank principally for the purpose of participating in the *active management* of the business of the entity, Rule 0180-19-.02(1)(q), and on the definition of "active management" to mean the parent bank owns more than fifty percent of the voting shares or similar type of ownership interest of a subsidiary. Rule 0180-19-.02(1)(a). We do not think the Discrimination Clause in § 45-2-607 was intended to affect the manner in which any state agency regulates an entity that, like the limited liability corporation described in the opinion request, is owned equally by several different banks, none of which owns fifty percent or more interest in the company.

The question remains, then, how this provision operates with regard to entities that actually are banks or bank subsidiaries within the meaning of the Discrimination Clause and implementing regulations. In this context, the question is whether the Discrimination Clause in effect requires the Department of Commerce and Insurance not to enforce Tenn. Code Ann. § 56-6-201 regarding bank holding company ownership of insurance companies, or the requirements in Tenn. Code Ann. § 56-35-131(a) to the extent these provisions "discriminate" against banks.

Interpreting the statute in this manner would have the effect of repealing these provisions in the insurance laws to the extent that they prohibit or, arguably, even have a disparate impact on the ability of banks to engage in the title insurance business. As a general matter, repeals of statutes by implication are not favored and a later act, if repugnant and irreconcilable on a particular point with a prior act, will operate as a repeal by implication of such prior act only to the extent of such repugnancy and conflict. *Reams v. Trostel Mechanical Industries, Inc.*, 522 S.W.2d 170, 173 (Tenn. 1984). Further, it is a well-settled rule of statutory construction that a more specific and detailed statute prevails over more general statutes. *See Frye v. Memphis State University*, 671 S.W.2d 467, 468-69 (Tenn. 1984); *Watts v. Putnam County*, 525 S.W.2d 488, 492 (Tenn. 1975). Thus, if provisions of different titles or chapters of the Code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter. *Harris v. Harris*, 849 S.W.2d 334 (Tenn. 1993). In addition, the Discrimination Clause does not, by its terms, clearly instruct regulators to ignore statutes that expressly limit or that disparately burden the ability of banks to participate in a business. For example, it does not state "Notwithstanding any law to the contrary . . .", and it requires regulators to regulate banks "on a basis" that does not discriminate. Of course, a definitive answer to the question would also depend on the particular line of business in which the bank or its subsidiary wishes to engage and the statute or practice alleged to "discriminate." But we think a court would conclude that this provision was not intended to repeal Tenn. Code Ann. § 56-6-201. Further, we think a court would conclude that, by enforcing the requirements of Tenn. Code Ann. § 56-35-131(a) against a bank or subsidiary of a bank engaged in the title insurance business, the Commissioner of Commerce and Insurance would satisfy the requirement under Tenn. Code Ann. § 45-2-607(d)(6) of regulating banks "on a basis that does not discriminate."

Legislative history of the Bank Reform Act of 1996 supports this conclusion. Once it is determined that the proper interpretation of a statute is left open to dispute, it is appropriate to turn to legislative history of the statute for guidance. *Chapman v. Sullivan County*, 608 S.W.2d 580 (Tenn. 1980); *University Computing Company v. Olsen*, 677 S.W.2d 445 (Tenn. 1984). Representative Hargrove, one of the House sponsors of the bill, asked Tim Amos from the Tennessee Bankers' Association to answer questions about the bill when it was discussed before the House Commerce Committee on March 4, 1996. Mr. Amos responded to several questions from Representative Turner about the intended scope of the bill, particularly Section 17 authorizing banks to own interests in limited liability corporations and limited partnerships. Mr. Amos explained:

> Section 17 amends an existing section of the law that authorizes banks to essentially engage in any activity that banks can engage in in a bank subsidiary, it's just a matter of corporate convenience. *Now that limited liability companies and limited liability partnerships are an approved type of business entity in Tennessee, this just adds language into that existing section that says in addition to doing it in a corporation, you can do it into the other types of approved entities,* limited liability companies, limited liability partnerships.

House Commerce Committee, March 4, 1996 (Remarks of Tim Amos) (emphasis added). Mr. Amos indicated that an example of the type of business engaged in through a bank subsidiary, limited liability company, or partnership would include check processing operations or a computer service center providing services to three or four banks within the same bank holding company. The following exchange then took place:

> Rep. Turner: Okay, are we talking about computer companies, small companies like that, but what about big business like insurance?
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> Mr. Amos: *The bill doesn't authorize insurance to any greater degree than banks can already engage in the insurance business*, and as you know that's a question that is before the U.S. Supreme Court right now, and whether or not national banks have the ability to engage in the insurance business, we already have a wild-card in a different section in the law that's not even addressed in this bill that authorizes state banks to engage in the same lines of business that a national bank can, and so if the Supreme Court makes a determination that that's a valid line of business then banks will be in that business. If the Supreme Court says that they can't be in that business, then they won't be in that business.
>
> Rep. Turner: I appreciate that explanation, but what I'm asking is, what does this bill do, I'm not asking about the Supreme Court, I'm not asking about the federal government, I'm asking about this legislation before this committee today. *Does this in any way allow the banks of Tennessee to involve themselves with developing business with insurance companies and doing insurance business?*
>
> Mr. Amos*: No.*

House Commerce Committee, March 4, 1996 (remarks of Tim Amos and Representative Turner) (emphasis added). Thus, it is evident that the act was not itself intended to accord banks the authority to engage in the business of insurance under state law. For this reason, we think that a court would conclude that Tenn. Code Ann. § 45-2-607(d)(6) does not prevent the Department of Commerce and Insurance from continuing to enforce statutory prohibitions on affiliations or ownership under Tenn. Code Ann. § 56-6-201, or conditions on continued licensure of title insurance agents.

Further, we think that enforcement of the requirements contained in Tenn. Code Ann. § 56-35-131 does not "discriminate" against banks or in favor of non-banks who engage in the title insurance business within the meaning of the Discrimination Clause. None of the three disjunctive conditions for continued

licensure in the title insurance business singles out banks or bank subsidiaries for treatment different from that accorded to non-banks.

The request also asks which agency is charged with interpreting and determining whether an agency has engaged in the type of discrimination prohibited by the Discrimination Clause. The statute states that a bank or bank subsidiary engaged in an activity that subjects it to licensure or regulation under any statutory scheme other than Title 45, Chapter 2, "shall be subject to licensure and/or regulation on a basis that does not discriminate *by the appropriate regulatory agency which licenses and/or regulates non-banks which engage in the same activity*." Tenn. Code Ann. § 45-2-607(d)(6) (emphasis added). If a bank or bank subsidiary contends that the regulator of a particular activity is regulating the bank or bank subsidiary on a basis that is prohibited by the Discrimination Clause, we think such issue is between the bank or bank subsidiary and the regulator of that activity. We do not think the General Assembly meant to authorize the Department of Financial Institutions to determine whether another state agency is administering a statutory scheme other than Title 45, Chapter 2, on a discriminatory basis.

2. Status of LLC Equally Owned by Different Banks as a Subsidiary of a Financial Institution under Tenn. Code Ann. § 56-35-131(a)(2)

As previously discussed, under Tenn. Code Ann. § 56-35-131, a title insurance agency must meet one of three different conditions to obtain a license to engage in the title insurance business. If the agency is not operated by an attorney or a law firm, then it may operate only if it derives forty percent or less of its gross operating revenues from "controlled business" — that is, business referred to or produced by the activities of its owners and affiliates — or if it will be operated as a "subsidiary of a financial institution with its primary business being that of accepting deposits and making real estate loans and subject to regulation, inspection, and supervision of the United States government or agency thereof." The question is whether Tenn. Code Ann. § 45-2-607(d)(6) regarding bank subsidiaries requires the Department of Commerce and Insurance to treat a title insurance company as the "subsidiary of a financial institution" under the third condition. As discussed above, we think a court would conclude that, by enforcing the condition in Tenn. Code Ann. § 56-35-131(a)(2), the Department of Commerce and Insurance would be regulating "on a basis that does not discriminate" against banks within the meaning of Tenn. Code Ann. § 45-2-607(d)(6). Further, our Office has concluded that Tenn. Code Ann. § 56-35-131(a)(2) was only intended to cover savings and loan associations. Op. Tenn. Atty. Gen. 87-145 (September 1, 1987). Of course, in view of our conclusion below that the restriction in Tenn. Code Ann. § 56-35-131(a)(1) is probably preempted under federal law, this issue is moot at least with regard to financial subsidiaries authorized under the Gramm-Leach-Bliley Act.

3. Limited Liability Corporation Owned by Different Members as a "Subsidiary"

a. "Subsidiary" under Tenn. Code Ann. § 45-2-607

As discussed above, this opinion specifically concerns the status of a limited liability corporation that is equally owned by different banks. The first question is whether such an entity is a "subsidiary" of a state or national bank within the meaning of Tenn. Code Ann. § 45-2-607(d). As discussed above, regulations promulgated under that statute define the term "subsidiary" as follows:

> "Subsidiary" shall mean a corporation, limited liability company, or similar entity all or a part of the stock of which is owned by a bank *principally for the purpose of participating in the active management of the business of such corporation as distinguished from the purpose of deriving profit from the appreciation in value of such stock or from dividends paid thereon.*

Rule 0180-19-.02(a)(q) (emphasis added). The term "active management" means "the parent bank owns more than fifty percent (50%) of the voting shares (or similar type of ownership interest) of a subsidiary." Rule 0180-19-.02(1)(a). It does not appear that an entity equally owned by different banks falls within this definition. Since, based on the facts presented, no one bank owns more than fifty percent of the shares of the limited liability company, no one bank can be "participating in the active management of the business" of the company within the meaning of the regulations. Thus, this LLC is not a subsidiary under applicable state banking law.

b. "Subsidiary of a Financial Institution" under Tenn. Code Ann. § 56-35-131(a)(2)

The next question is whether a limited liability corporation owned by different banks, including both national and state banks, falls within Tenn. Code Ann. § 56-35-131(a)(2), which provides:

> . . . the commissioner shall refuse to issue any new license or certificate to any title insurance company, title insurance agent, or title insurance agency, unless the applicant therefor shall agree to abide by any one (1) of the following terms and conditions:
>
> * * * *
>
> (2) The company, agent or agency will be operated as a subsidiary of a financial institution with its primary business being that of accepting deposits and making real estate loans and subject to regulation, inspection, and supervision of the United States government or an agency thereof[.]

As discussed in Question 2 above, this Office has determined that this provision only applies to savings and loan associations. An entity owned by one or more banks therefore cannot meet this condition.

4. Effect of Tenn. Code Ann. § 45-2-607 on Insurance Laws

The next question is whether Tenn. Code Ann. § 45-2-607 affects the operation of state insurance laws. As discussed above, we do not think it prevents the Department of Commerce and Insurance from enforcing the anti-affiliation standards at Tenn. Code Ann. § 56-6-201 or the requirements for licensing of a title insurance agent at Tenn. Code Ann. § 56-35-131.

5. Effect of the Gramm-Leach-Bliley Financial Modernization Act on Title Insurance Statutes

The request asks whether the Gramm-Leach-Bliley Financial Modernization Act, P.L. 106-102, effective November 12, 1999 ("GLB") changes the operation of Tennessee statutes governing title insurance. Under the Tennessee "wild-card" statute, Tenn. Code Ann. § 45-2-601, banks chartered by the State of Tennessee may engage in the same activities as national banks under the same circumstances. Therefore, if national banks may own a subsidiary that engages in the business of title insurance, state banks may also do so, subject to the same limits.

Although the request refers to the authority of a bank to engage in the "business of title insurance," the specific example you describe involves a company that is acting as title insurance agent, and not as an underwriter. In order to simplify our analysis of the GLB, this opinion will address only the authority of national banks to act directly as a title insurance agent or to own a company that acts as a title insurance agent.

a. Authority of a National Bank to Act as a Title Insurance Agent

Under Section 303 of GLB, now codified at 15 U.S.C. § 6713, a national bank is generally prohibited from directly engaging in any activity involving the underwriting or sale of title insurance. But the statute does not extend this prohibition to the subsidiaries and affiliates of a national bank. Under subsection (F), a national bank may sell title insurance as an agent in a state in which a state bank is authorized to sell title insurance as agent, but subject to the same restrictions as state banks. As cited above, Tenn. Code Ann. § 56-6-201 prohibits any entity directly owned or controlled by a bank from selling or underwriting all but a few types of insurance. State law therefore does not authorize a state bank to sell title insurance as an agent. As a result, national banks in Tennessee are prohibited under GLB from directly engaging in any activity involving the underwriting or sale of title insurance.

b. Preservation of State Law Regulating Title Insurance

GLB expressly preserves from preemption some state title insurance laws. But we do not think that this provision preserves Tennessee laws that prevent or restrict affiliates of a bank from selling or underwriting title insurance. 15 U.S.C. § 6713(e) provides:

> RULE OF CONSTRUCTION. — No provision of this Act or any other Federal law shall be construed as superseding or affecting a State law which was in effect before November 12, 1999, and which prohibits title insurance from being offered, provided, or sold in such State, or from being underwritten with respect to real property in such State, by any person whatsoever.

The Joint Explanatory Statement of the Committee of Conference, appearing in the Conference Report on GLB, summarized the section on title insurance restrictions as follows:

> Federally chartered banks are prohibited from engaging in any activity involving the underwriting or sale of title insurance, except that national banks may sell title insurance products in any State in which state-chartered banks are authorized to do so (other than through a "wild-card provision"), so long as such sales are undertaken "in the same manner, to the same extent, and under the same restrictions" that apply to such state-chartered banks. Certain currently and lawfully conducted title insurance activities of banks are grandfathered, and *existing State laws prohibiting* ***all persons*** *from providing title insurance are protected.*

House of Representatives, Conference Report on S. 900, Gramm-Leach-Blilely Act, 145 Cong. Rec. H11255-01, 11297 (November 2, 1999) (Joint Explanatory Statement of Committee of Conference) (emphasis added). The State of Iowa prohibits the sale of title insurance. Iowa Code Ann. § 515.48.10. Moreover, if Section 6713(e) is read as preserving any state law restricting the right of some entities to sell title insurance, the act is internally contradictory. As discussed below, Section 104(d)(2)(A) of GLB expressly incorporates the legal standards for preemption set forth in *Barnett Bank of Marion County N.A. v. Nelson*. Under that case, no state may significantly interfere with the ability of a national bank or its affiliate to engage in any insurance sales, solicitation, or crossmarketing activity. 15 U.S.C. § 6713(e) does not purport to overrule *Barnett Bank* with respect to title insurance sales; instead it provides that "[n]o provision of this Act or any other Federal law shall be construed" to supersede or affect certain state laws. Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible. *American Tobacco Company v. Patterson*, 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). Further, statutory interpretations which yield internal inconsistencies or render some portion of the text superfluous are to be avoided. *Smith v. Babcock*, 19 F.3d 257 (6th Cir. 1994). We think the apparent contradiction and ambiguity are avoided if 15 U.S.C. § 6713(e) is intepreted to refer only to state laws that prohibit the sale of title insurance by any and all persons, not to those that allow its sale by some persons but prohibit it to others. Since Tennessee law does not prohibit all persons from providing title insurance, this provision is irrelevant to our analysis.

Subsection (c) of this statute contains a grandfathering provision. Under (c)(1), in general, a national bank, and a subsidiary of a national bank, may conduct title insurance activities which such national

bank or subsidiary was actively and lawfully conducting before November 12, 1999. Based on our research, the grandfathering provision does not appear to apply to the arrangement addressed in this opinion. Based on the facts set forth above, the banks in question are not directly acting as title insurance agents. Further, it does not appear that the limited liability company — which is owned by different banks — is a subsidiary of a bank within the meaning of the statute. 15 U.S.C. § 6713(d); 12 U.S.C. § 1841(d).

c. Authority of Financial Subsidiaries to Sell Title Insurance

Under GLB, financial subsidiaries of national banks are authorized to engage in a broad range of activities that are "financial in nature" or incidental to a financial activity. 12 U.S.C. § 24a. The statute provides:

> A national bank may control a financial subsidiary, or hold an interest in a financial subsidiary, only if —
>
> (A) the financial subsidiary engages only in —
>
> (i) activities that are *financial in nature or incidental to a financial activity* pursuant to subsection (b); *and*
>
> (ii) activities that are permitted for national banks to engage in directly (subject to the same terms and conditions that govern the conduct of the activities by a national bank);
>
> (B) the activities engaged in by the financial subsidiary *as a principal* do not include —
>
> (i) insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death (*except to the extent permitted under section 6712 or 6713(c)* [the grandfather clause cited above] *of Title 15)* . . ..
>
> * * * *
>
> (iii) any activity permitted in subparagraph (H) or (I) of section 1843(k)(4) of this title, *except activities described in section 1843(k)(4)(H) of this title that may be permitted in accordance with section 122 of the Gramm -Leach-Bliley Act* [12 U.S.C.A. 1843 note];

GLB § 121, codified at 12 U.S.C. § 24a(a)(2) (emphasis added). Thus, a national bank may own a subsidiary that engages in either or both of two types of activites: those that are financial in nature or incidental to a financial activity, and those in which a bank may participate directly. A national bank may not own a financial subsidiary that engages in title insurance as a principal except to the extent permitted under 15 U.S.C. § 6712 or § 6713(c). That exception does not apply to acting as a title insurance *agent*.

The statute defines "financial subsidiary" as follows:

> The term "financial subsidiary" means any company that is controlled by 1 or more insured depository institutions *other than a subsidiary that* —
>
> (A) engages *solely* in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks; or
>
> (B) a national bank is *specifically authorized by the express terms of a Federal statute* (other than this section), and not by implication or interpretation, to control, such as by section 25 or 25A of the Federal Reserve Act [12 U.S.C.A. §§ 601 to 604 or 611 to 631] or the Bank Service Company Act [12 U.S.C.A. § 1861 et seq.].

GLB § 121, codified at 12 U.S.C. § 24a(g)(3) (emphasis added). Since national banks are generally expressly prohibited under GLB from directly acting as a title insurance agent, and no federal statute expressly authorizes national banks to control a title insurance agent, the two exceptions to the definition do not appear to apply. It therefore appears that a "financial subsidiary" would include any company that acts as a title insurance agent and is controlled or owned by one or more insured depository institutions.

The question then becomes whether acting as a title insurance agent is an activity that is "financial in nature or incidental to a financial activity" under 12 U.S.C. § 24a(b). That statute provides:

> (b) Activities that are financial in nature
>
> (1) Financial activities
>
> (A) In general
>
> An activity shall be financial in nature or incidental to such financial activity only if —
>
> (i) such activity has been defined to be financial in nature or incidental to a financial activity for bank holding companies pursuant to section 1843(k)(4) of this title; or
>
> (ii) the Secretary of the Treasury determines the activity is financial in nature or incidental to a financial activity in accordance with subparagraph (B).

Subparagraph (B) provides for guidelines for the Secretary of the Treasury in defining activities under (b)(1)(A)(ii).

12 U.S.C. § 1843(k)(4) provides in relevant part:

> For purposes of this subsection, the following activities shall be considered to be financial in nature:
>
> * * * *
>
> (B) *Insuring*, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death, or providing and issuing annuities, and *acting as principal, agent, or broker for purposes of the foregoing*, in any State.

12 U.S.C. § 1843(k)(4)(B) (emphasis added). The Comptroller of the Currency — a part of the United States Department of the Treasury — has adopted rules that expressly include acting as a title insurance agent as an activity financial in nature or incidental to a financial activity. That regulation provides:

> (e) Authorized activities. A financial subsidiary may engage only in the following activities:
>
> (1) Activities that are financial in nature and activities incidental to a financial activity, . . . including:
>
> * * * *
>
> (ii) Engaging as agent or broker in any state for purposes of insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, death, *defects in title*, or providing annuities as agent or broker;

12 C.F.R. § 5.39(e)(1)(ii)(emphasis added). *See also* O.C.C. Corporate Decision No. 2000-14 (August 17, 2000) (financial subsidiaries are authorized to act as an insurance agent for all types of insurance, including title insurance, in any state). It therefore appears that, under GLB, a national bank may control or own an interest in a company that acts as a title insurance agent.

d. Preemption of State Law Restricting Title Insurance Activities

The question then becomes the effect of GLB on state laws that restrict the ability of banks to control or own an interest in title insurance agents. As our discussion below indicates, we think a court would conclude that both Tenn. Code Ann. § 56-6-201, prohibiting a bank holding company from owning or controlling an insurance agent, and Tenn. Code Ann. § 56-35-131(a)(1), limiting the amount of income

a title insurance agent may receive through owners and affiliates, are preempted by GLB. GLB generally provides that no state may prevent or restrict a depository institution or any of its affiliates from being affiliated or associated with a person as authorized or permitted under federal law. GLB § 104(c)(1), now codified at 15 U.S.C. § 6701(c)(1). With respect to affiliations between depository institutions, or any affiliate thereof, and any insurer, Section 104(c)(2) expressly permits states to exercise certain types of authority regarding change of control. Neither of the state statutes in question appears to fall within these exceptions. Section 104(d) of GLB deals directly with insurance sales. The statute provides:

> (d) Activities
> (1) In general
> Except as provided in paragraph (3), and except with respect to insurance sales, solicitation, and cross marketing activities, which shall be governed by paragraph (2), no State may, by statute, regulation, order, interpretation, or other action, prevent or restrict a depository institution or an affiliate thereof from engaging directly or indirectly, either by itself or in conjunction with an affiliate, or any other person, in any activity authorized or permitted under this Act and the amendments made by this Act.
>
> (2) Insurance sales
> (A) In general
> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996), no State may, by *statute,* regulation, order, interpretation, or other action, *prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales,* solicitation, or crossmarketing activity.

GLB § 104(d)(2)(A), now codified at 15 U.S.C. § 6701(d)(1) & (2)(A) (emphasis added).

Thus, the statute expressly preserves the ruling in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 116 S.Ct. 1103 (1996). In that case, the United States Supreme Court found that 12 U.S.C. § 92, which authorized national banks located in towns with a population of 5,000 or less to sell insurance, preempted a Florida statute prohibiting any licensed insurance agent "associated with, . . . owned or controlled by . . . a financial institution" from engaging in insurance agency activities. The Court rejected the argument that the state statute was preserved from preemption under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). That statute generally preserves from preemption any state law relating specifically to the business of insurance. The Court concluded that McCarran-Ferguson did not preserve a state law from preemption by a federal law that itself related specifically to the business of insurance. The Court found

that 12 U.S.C. § 92, expressly granting the power to engage in insurance activities to national banks under specific circumstances, did relate specifically to the business of insurance. For this reason, the Florida statute, which would prevent national banks from exercising their powers under that federal law, was not preserved by McCarran Ferguson.[1]

GLB Section 104(d)(2)(B) expressly preserves state laws that fall within thirteen different categories. 15 U.S.C. § 6701(d)(2)(B). Neither of the two Tennessee laws in question appears to fall within any of these categories. The statute provides, further, that the more lenient standard of judging whether state laws are preempted set forth in Section 304(e) of GLB does not apply to any law enacted before September 3, 1998, that does not fall within any of the thirteen preserved categories. GLB § 104(d)(2)(C)(i), now codified at 15 U.S.C. § 6701(d)(2)(C)(i). Under Section 104(e), a state may regulate the insurance activities of a depository institution or its affiliate authorized or permitted under federal law, even if that regulation prevents or significantly interferes with those activities, so long as the law is not discriminatory. But this provision only applies to laws that do not fall into any of the thirteen preserved categories and that were enacted after September 3, 1998. GLB § 104(d)(2)(C)(iii). Section 104(d)(2)(C)(iii) provides:

> Construction
> Nothing in this paragraph shall be construed —
>
> > (I) To limit the applicability of the decision of the Supreme Court in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996) with respect to any State statute, regulation, order, interpretation, or other action that is not referred to or described in subparagraph (B) [listing the thirteen preserved categories of law].

GLB § 104(d)(2)(C)(iii)(I), now codified at 15 U.S.C. § 6701(d)(2)(C)(iii)(I). Each of the two statutes in question was enacted before September 3, 1998, and is therefore preempted to the extent it prevents or significantly interferes with the authority of a national bank to control or own an interest in a financial subsidiary that acts as a title insurance agent.

I. Tenn. Code Ann. § 56-6-201: Restrictions on Bank Holding Company Ownership

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[1] In addition, Courts of Appeals for the United States have upheld rulings by the Comptroller of the Currency that a bank with a branch located in a town of 5,000 or less may market insurance through that branch to customers located throughout the state. *Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C.Cir. 1993); *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995). Of course, GLB now generally prohibits a national bank from acting as a title insurance agent directly, unless it meets certain conditions. Banks and their subsidiaries actively and lawfully operating as title insurance agents on November 12, 1999, may continue to do so under the grandfathering clause. GLB § 303(c), 15 U.S.C. § 6713(c).

Under *Barnett Bank* and later cases decided before GLB was enacted, Tenn. Code Ann. § 56-6-201 restricting bank holding company ownership or control of insurance companies or agents was probably preempted to the extent it "significantly interferes" with the power of national banks located in towns of 5,000 or less to engage in insurance activities. We think that GLB clearly preempts Tenn. Code Ann. § 56-6-201 to the extent that the statute significantly interferes with the power of national banks to control or own an interest in a financial subsidiary that acts as a title insurance agent. Through the operation of the state "wild-card" statute, the statute also no longer restricts state banks to the extent it significantly interferes with their power to control or own an interest in such a financial subsidiary.

II. Restrictions on Related Business

The question then becomes whether federal law, including GLB, would also preempt the restrictions under Tenn. Code Ann. § 56-35-131(a)(1) to the extent they would "significantly interfere" with bank control or ownership of an interest in a limited liability company engaged in title insurance agency as referred to in the opinion request. The LLC is owned by a group of different banks, none of which apparently owns a majority or controlling interest. Even before GLB was enacted, the Office of the Comptroller of the Currency had, in conditional approval letters, permitted a national bank to purchase a forty-nine per cent (49%) non-controlling interest in a limited liability company to be licensed as a title insurance agency. Application by Huntington National Bank, Columbus, Ohio - Conditional Approval No. 308 (April 8, 1999), 1999 WL 342499 (O.C.C.).[2] That letter indicates the OCC's view that national banks, even before GLB became effective, were legally permitted to make a non-controlling investment in a limited liability company provided the following four standards are met:

> (1) the activities of the entity or enterprise in which the investment is made must be limited to activities that are part of, or incidental to, the business of banking (*or otherwise authorized for a national bank*);
>
> (2) the bank *must be able to prevent the enterprise or entity from engaging in activities that do not meet the foregoing standard or be able to withdraw its investment;*
>
> (3) the bank's loss exposure must be limited, as a legal and accounting matter, and the bank must not have open-ended liability for the obligations of the enterprise; *and*

[2] It appears that this bank's right to engage in the activities approved in this conditional approval are the subject of the litigation in *Association of Banks in Insurance, Inc. v. Duryee*, __ F.3d __, No. 99-3917, 2001 WL 1338416 (6th Cir. Nov. 1, 2001).

> (4) the investment must be convenient or useful to the bank in carrying out its business and *not a mere passive investment unrelated to that bank's banking business*.

As discussed above, GLB now expressly authorizes a national bank to own or control a company that acts as a title insurance agent. We think a court would probably conclude that, under GLB, *Barnett Bank*, and later cases, the restriction on related business imposed on title insurance companies and agents under Tenn. Code Ann. § 56-35-131(a)(1) is preempted to the extent it "significantly interferes" with the power of banks to control or own a company that acts as a title insurance agent, either under the law in effect before the enactment of GLB, or under GLB. *See*, e.g., *Association of Banks In Insurance, Inc. v. Duryee*, __ F.3d __, No. 99-3917, 2001 WL 1338416 (6th Cir. Nov. 1, 2001); *New York Bankers Association v. Levin*, 999 F.Supp. 716 (S.D.N.Y. 1998). In *Duryee*, the United States Court of Appeals for the Sixth Circuit reviewed a state law limiting the amount of insurance an insurance agent could transact with customers for whom it also served as "agent, custodian, vendor, bailee, trustee, or payee." The Court noted that the statute effectively limited insurance business that a bank could transact with its customers. 2001 WL 1338416 at 7. The Court found that this statute was preempted by federal law under *Barnett Bank* because it significantly interfered with the authority of national banks based in towns of 5,000 or less to sell insurance.[3]

Our conclusion is also consistent with an opinion issued by the Kansas Insurance Department on February 1, 2001. In that opinion, the Department addressed a state law that placed a restriction similar to that imposed under Tenn. Code Ann. § 56-35-131(a)(1) on title insurance companies. The Commissioner of Insurance concluded that the state statute prevented or significantly interfered with the ability of a depository institution or affiliate to engage in title insurance sales and was, therefore, preempted under Section 104(d)(2)(A) of GLB.

Thus, we think a court would conclude that the restrictions on business income imposed under Tenn. Code Ann. § 56-35-131(a)(1) are preempted by GLB to the extent they prevent or significantly interfere with a national bank's authority to control or own an interest in a financial subsidiary that acts as a title insurance agent. Under the state "wild-card" law, then, state banks may also control or own a financial subsidiary that acts as a title insurance agent under the same

conditions national banks would be permitted to engage in the same activity.

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[3] The Court also concluded that the law — which had been enacted since September 3, 1998 — was also preempted under the nondiscrimination standards in Section 104(e) of GLB. But the Court noted that GLB had not been passed when the District Court ruled on the preemption arguments. The Court of Appeals therefore remanded the case to the District Court for "further consideraction under the new Act." 2001 WL 1338416 at 12. The significance of the Appeals Court ruling under GLB, therefore, is not clear. In any case, it is inapplicable to the analysis in this opinion because the Tennessee statutes in question were all enacted before 1998 and are not subject to analysis under the nondiscrimination standard.

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