LETTER OPINION
97-L-177

November 14, 1997

Mr. Gary D. Preszler
Commissioner
Department of Banking and
Financial Institutions
Suite G
2000 Schafer Street
Bismarck, ND 58501-1204

Dear Commissioner Preszler:

Thank you for your letter concerning the North Dakota State Banking Board's (State Banking Board) September 11, 1997, order that determined the sale of insurance was an activity incidental to the business of banking. On November 13, 1997, the State Banking Board modified its order to expressly authorize banks to "sell credit life or accident and health, whole or term life, and property and casualty insurance." Specifically, you ask whether the State Banking Board's order is lawful and within the Board's authority.

In 1997, the Legislature amended North Dakota Century Code (N.D.C.C.) § 6-03-02(7) and delegated the authority to determine by order or rule what constitutes an incidental banking power to the State Banking Board. See 1997 N.D. Sess. Laws ch. 78, § 4 [House Bill No. 1060]. N.D.C.C. § 6-03-02(7) (emphasis added) currently provides, in part, that a state-chartered bank has the power "[t]o exercise, as determined by the board by order or rule, all the incidental powers as are necessary to carry on the business of banking." Previously, that determination was made by a state-chartered bank's board of directors or its duly authorized officers or agents. Id. In light of this statutory change, it is my opinion that the State Banking Board is authorized to determine all the incidental powers that are necessary to carry on the business of banking and to issue that determination either by order or administrative rule.

The next issue is whether the State Banking Board's order is consistent with North Dakota law. This issue first requires examining whether the questioned activity is one of the specific enumerated activities listed in N.D.C.C. § 6-03-02(7). The listing of "incidental powers" in N.D.C.C. § 6-03-02(7) includes several activities such as the discounting and negotiating of promissory

notes and receiving deposits; however, it does not include specific language authorizing a bank to engage in insurance activities. Nonetheless, the specific listing is prefaced by the term "including," which means that the listing is not exhaustive. Thus, although the listing does not contain specific language authorizing a bank to engage in insurance activities, that activity is not excluded by this subsection. What is included as an "incidental power" in addition to those items specifically listed can be determined by reference to cases interpreting incidental powers.

"The leading case on the standards to be applied in deciding what activities are within a national bank's incidental powers is Arnold Tours Inc. v. Camp[, 472 F.2d 427 (1st Cir. 1972)]." Milton R. Schroeder, The Law and Regulation of Financial Institutions 4-17 (1995). See also American Ins. Ass'n v. Clarke, 656 F.Supp. 404, 407 (D.D.C. 1987) (An "incidental power" encompasses "those activities 'directly related to' and 'convenient or useful' to the performance of customary and expressly authorized banking services."), aff'd, 865 F.2d 278 (D.C. Cir. 1988). In setting forth the basic standard for what constitutes an "incidental power," the court in Arnold Tours, 472 F.2d at 431-32, stated:

> [W]hen one looks at past decisions it becomes apparent that the activities of national banks which have been held to be permissible under the "incidental powers" provision have been those which are directly related to one or another of a national bank's expressed powers. . . . [A] national bank's activity is authorized as an incidental power, "necessary to carry on the business of banking," . . . if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act. If this connection between an incidental activity and an express power does not exist, the activity is not authorized as an incidental power.

A similar interpretation has been given to state banking acts. See New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Department, 610 N.Y.S.2d 470, 475 (N.Y. 1994) ("incidental powers" clause "must be construed as an independent, express grant of power, intended to reflect the ever-changing demands of the banking business").

In 1963, Mr. James J. Saxon, Comptroller of the Currency, issued an administrative ruling that a bank could engage in insurance

activities as an incidental power. That ruling, however, was overturned by the United States Court of Appeals for the Fifth Circuit in Saxon v. Georgia Ass'n of Independent Ins. Agents, 399 F.2d 1010 (5th Cir. 1968). In Saxon, the court determined that Section 92 of the National Bank Act, authorizing national banks to engage in insurance activities in places of less than 5,000 population, prohibited national banks by implication from engaging in insurance activities in places where the population exceeded 5,000.

Relying upon Saxon, this office issued an opinion in 1976 that concluded, in part, "that state-chartered banks in North Dakota are not authorized by the 'incidental powers' language of Section 6-03-02[7], N.D.C.C., to engage in the business of selling insurance." 1976 N.D. Op. Att'y Gen. 5 (April 20 letter to G. W. Ellwein). However, it is important to note that North Dakota does not have a statute that prohibits state-chartered banks from engaging in insurance activities in places where the population exceeds 5,000, nor does North Dakota have a general anti-affiliation statute prohibiting banks from engaging in insurance activities. Therefore, the Saxon decision is distinguishable.

Whether an activity is convenient or useful in connection with a bank's established activities is a question of fact, and the resolution of that question has been delegated by the 1997 Legislature to the State Banking Board. It has been a long-standing position of this office not to issue opinions on questions of fact. For this reason, and the fact that the Saxon case does not provide controlling legal authority on the activities of state-chartered banks, it is my opinion that the State Banking Board is not governed by the 1976 Attorney General opinion, particularly in light of the 1997 amendment to N.D.C.C. § 6-03-02(7). However, like most administrative actions, the State Banking Board's determination that state-chartered banks may engage in certain types of insurance activities as an incidental banking power is subject to legal adjudication.

The question of a state banking board's latitude in determining a bank's "incidental powers" under a state banking act was addressed in New York State Ass'n of Life Underwriters, Inc., 610 N.Y.S.2d at 473:

> It is settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. . . . In addition, deference to an agency's construction of a statute is warranted where the

> interpretation of a statute or its application involves knowledge and understanding of underlying operational practices.

Applying this standard of review, the court reasoned:

> Clearly, the "incidental powers" clause . . . does not consist of common words of clear import, and that clause is susceptible to differing interpretation. Because the Banking Department is charged with the supervision and regulation of the business of all banking organizations, it is presumed to have the requisite knowledge and understanding of the operational practices of such banking organizations and of the Banking Law.
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> We have long been mindful that the business of banking is not static but rather must adjust to meet the needs of the customers to whom banking organizations provide a valuable service. Our courts must be cognizant of these adjustments in ruling on cases involving interpretation of the Banking Law.

Id. at 473-74. Although the New York board's decision was based in part on federal interpretations of the federal banking act, the fact those interpretations had been overturned did not affect the board's interpretation of the state banking act. Id. at 476.

The court concluded that the Banking Department's interpretation of the "incidental powers" clause to allow the sale of annuities was reasonable and entitled to deference by the courts. Id. at 473. North Dakota courts give similar deference to the decisions of state agencies. See, e.g., Cass County Electric Cooperative, Inc. v. Northern States Power Co., 518 N.W.2d 216, 220 (N.D. 1994).

There is supporting authority for the State Banking Board's determination. For example, in Sanford v. Garamendi, 284 Cal. Rptr. 897 (Cal. Ct. App. 1991), the court concluded that the repeal of California's prohibition on banks being licensed as insurance agents or brokers was intended to allow banks to be licensed as insurance agents and brokers even though the repeal did not expressly grant banks the power to do so. Because there is no express authority in California statutes for banks to be engaged in insurance activities, it must be understood that California banks are doing so as an

exercise of an incidental power. Additionally, the Ohio Department of Commerce has determined that a state-chartered bank's "acting as an insurance agency is incidental to the business of banking." Letter from Ohio Department of Commerce Division of Banks Superintendent Allison M. Meeks to Mr. Darrell Dreher (June 19, 1992).

Finally, N.D.C.C. § 6-03-38 provides that "the state banking board has power to authorize state banks to engage in any banking activity in which such banks could engage were they operated as national banks at the time such authority is granted." As mentioned above, Section 92 of the National Bank Act (l2 U.S.C. § 92) authorizes national banks to engage in insurance activities in places of less than 5,000 population. I understand that there are ninety-eight state-chartered banks in North Dakota that may engage in insurance activities pursuant to N.D.C.C. § 6-03-38. Only eight state-chartered banks would not be able to do so because they are only in places of over 5,000 population. When one places the State Banking Board's order authorizing state-chartered banks to engage in insurance activities in context with the number of such banks that are able to do so pursuant to N.D.C.C. § 6-03-38, against the number of the remaining banks in North Dakota that are not located in a place with a population under 5,000, the result is that very few state-charted banks are directly affected by the Board's order.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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