LETTER OPINION
95-L-24

February 6, 1995

Honorable John Dorso
State Representative
House Chambers
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Representative Dorso:

Thank you for your February 1, 1995, letter concerning a proposal from the Legislative Council to Representative Rick Berg outlining a procedure for North Dakota to opt-out or to opt-in to a federal banking system that, depending on legislative will, may require enacting a statute in 1995 with a contingent effective date on or before June 1, 1997.

Because the nature of your question centers on the enactment of the federal Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub.L. 103-328 (September 29, 1994), with specific emphasis on delegated state authority to authorize or prohibit interstate branching by consolidation, a short explanation of section 102 of the federal Act is provided.

Section 102 of the Riegle-Neal Interstate Banking and Branching Efficiency Act amends the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.) as follows:

> **SEC. 44. INTERSTATE BANK MERGERS.**
> (A) APPROVAL OF INTERSTATE MERGER TRANSACTIONS AUTHORIZED.--
> (1) IN GENERAL.--Beginning on June 1, 1997, the responsible agency may approve a merger transaction under section 18(c) between insured banks with different home States, without regard to whether such transaction is prohibited under the law of any State.
> (2) STATE ELECTION TO PROHIBIT INTERSTATE MERGER TRANSACTIONS.--
> (A) IN GENERAL.--Notwithstanding paragraph (1), a merger transaction may not be approved pursuant to paragraph (1) if the transaction involves a bank the home State of which has enacted a law after the date of enactment of the Riegle-Neal Interstate Banking and Branching

> Efficiency Act of 1994 and before June 1, 1997, that--
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> (i) applies equally to all out-of-State banks; and
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> (ii) expressly prohibits merger transactions involving out-of-State banks.
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> (B) NO EFFECT ON PRIOR APPROVALS OF MERGER TRANSACTIONS.--A law enacted by a State pursuant to subparagraph (A) shall have no effect on merger transactions that were approved before the effective date of such law.

Newly amended section 44 of the FDIC Act (12 U.S.C. ? 1831u) authorizes the responsible federal agency to approve a merger transaction between banks with different home states beginning on June 1, 1997, unless the state enacts a law after September 29, 1994, and before June 1, 1997, that "(i) applies equally to all out-of-State banks; and (ii) expressly prohibits merger transactions involving out-of-State banks." A bill to opt-out if passed during the 1997 legislative session would not be effective until August 1, 1997, unless it was passed as an emergency measure by a two-thirds vote. N.D. Const. art. IV, ? 13. A state law enacted pursuant to subparagraph (A) of section 44 has no effect on merger transactions that are approved before the effective date of that law under subparagraph (B). Therefore, if a bill to opt-out is passed during the 1997 legislative session, without an emergency clause, the responsible federal agency would be authorized to approve merger transactions beginning on June 1, 1997, and ending on August 1, 1997.

The Legislative Council's contingent effective date proposal seeks to preserve the state's ability to opt-out and to do so by providing a mechanism to enact a law in 1995 with a contingent effective date on or before June 1, 1997. The Legislative Council proposes that "the [1995] Legislative Assembly could pass a bill that contains three sections--one section would be an opt out section, one section would be an opt in section, and one section would be a contingent effective date." Letter From Mr. Jay E. Buringrud to Representative Rick Berg (January 27, 1995). The proposed contingent effective date section provides:

> CONTINGENT EFFECTIVE DATE. Either section 1 or section 2 of this Act becomes effective only upon

> passage by the fifty-fifth legislative assembly of a concurrent resolution declaring either section 1 or section 2 effective, and, after passage of the concurrent resolution, upon certification by the governor of this state that section 1 or section 2 of this Act, whichever is designated in the concurrent resolution, is to become effective. The resolution and certification must be filed with the secretary of state and the legislative council office by June 30 [sic], 1997. If the resolution and the certification are filed with the secretary of state and the legislative council, the section declared in the resolution and certification as effective becomes effective on June 30 [sic], 1997, and the other section does not become effective. If the fifty-fifth legislative assembly does not pass a resolution or if the governor does not provide a certification, neither section 1 nor section 2 of this Act becomes effective.

It is well settled "that the legislature may make a law to become operative on the happening of a certain contingency or future event." State v. Dumler, 559 P.2d 798, 803 (Kan. 1977). See also Bushnell v. Sapp, 571 P.2d 1100, 1104 (Colo. 1977) ("It is permissible for the legislature to trigger the operative effect of a law on the happening of a certain future event."). "However, in such cases the action must be complete in itself as an expression of the legislative will and must itself determine the propriety and expediency of the measure." Dumler, 559 P.2d at 803. Additionally, in all cases of which I am aware, the contingency itself has been clearly stated in the enactment and I know of no instance in which the contingency has been left to speculation. Accord State v. Baldwin, 438 A.2d 1135, 1140 (Vt. 1981).

"[T]he general rule is that a joint or concurrent resolution adopted by a legislature is not a statute, does not have the force or effect of law, and cannot be used for any purpose for which an exercise of legislative power is necessary." Bauer v. Lancaster County Sch. Dist. 001, 501 N.W.2d 707, 708 (Neb. 1993). See also State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 909 (N.D. 1977) ("[j]oint or concurrent resolutions neither proposing amendments to the state constitution or proposing or ratifying amendments to the Federal Constitution do not have the full force of law-they cannot be considered 'bills' . . . ."); Gunter v. Beasley, 414 So.2d 41, 43 (Ala. 1982) ("A resolution is not a law but merely the form in which the Legislature expresses an opinion. The Legislature has no power to make laws by resolution.").

I have reviewed the contingent effective date proposal and, it is my opinion, that the contingency at issue is not predicated upon some specific fact or event, or condition capable of

present identification, but rather constitutes the substantive election of the Legislative Assembly to set policy concerning the approval or disapproval of interstate bank mergers by consolidation. It is my further opinion that this may not be accomplished by a resolution because a resolution does not have the force and effect of law.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

DEC/jfl