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May 5, 1977

UTAH STATE
SECURITIES COMMISSION

Mr. William P. Sargeant, Director
Utah Securities Commission
Department of Business Regulation
330 East Fourth South
Salt Lake City, Utah 84111

Re: Utah Code Ann. § 61-1-14(2)(i)
(1953), as amended

Dear Mr. Sargeant:

Utah Code Ann. § 61-1-14(2)(i) (1953), as amended,
provides:

"(i) Any offer or sale of a preorganization certificate or subscription if (i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, (ii) the number of subscribers acquiring any legal or beneficial interest therein does not exceed ten; . . ."

Your opinion request is directed to sentence (ii) and its application when the subscriber is a corporation, and if so, is the corporation itself deriving the only beneficial interest or can it be carried down to the shareholders of the corporate entity.

There is not a great deal of information dealing with this specific problem. In fact, the drafters of Utah's Uniform Act omitted a provision that was in the Uniform Act, as amended in 1958, § 402(b)(10), which provided that "no payment is made by any subscriber." In the Official Comment to § 402(b)(10) it was explained that:

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"[T]he purpose of § 402(b)(10) is to enable a new enterprise to obtain the minimum number of subscriptions required by the corporation law, the limitation is on the number of subscribers rather than the offerees. Hence there may be a publicly advertised offering of preorganization subscriptions. But there may be no payment until effective registration unless another exemption is available."

Since the Utah version deleted the third condition of the Uniform version, as set forth above, the effect was to make the Utah version of the "pre-organization subscription exemption" a "true" exemption from registration whereas under the Uniform Act (§ 402(b)(10)) that exemption merely postponed registration but did not excuse it altogether.

Therefore, interpretation of Section 61-1-14(2)(i) is difficult because most states that have adopted the Uniform Act followed its language. And since it is not a "true" exemption it would be applied differently than Utah's version, and thus these states cannot provide Utah with any interpretive guidance.

Under the Utah Business Corporation Act, Utah Code Ann. § 16-10-4(g) (1953), a corporation has the power:

"(g) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof." (Emphasis added.)

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Furthermore, Utah Code Ann. § 61-1-13(9) (1953), as amended, includes in its definition of "person" a corporation, partnership, association, etc. Since a corporation can subscribe for shares and is considered to be a person in its business relationship it is my opinion that with reference to subscribers under Section 61-1-14 (2)(i), a corporation is a single subscriber and the entity acquiring the legal and/or beneficial interest therein.

If a corporation becomes a subscriber it is the corporate entity itself that would be responsible for the subscription, and would be the owner of any stock certificates derived therefrom. The records concerning the purchase would be available at the corporation's headquarters and notice concerning the preorganization offering would be directed to the corporation.

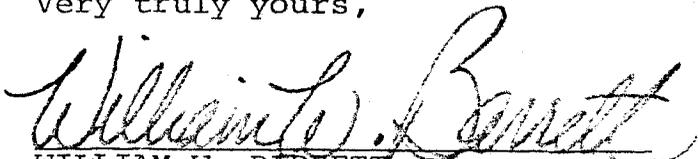
It is arguable that the purchase of preorganization certificates by a corporation is in the general interest of its shareholders. It is also arguable that the purchase of such certificates is a decision squarely within the "business judgment" of the officers of the corporation. If the purchase of pre-organization certificates is honestly believed to be in the best interests of the corporation as an entity then shareholders would be precluded from interfering in such action. If shareholders have no right of intervention it would be difficult to conclude that the business decision was for their direct legal or beneficial interests.

The fact that shareholders ultimately and indirectly acquire a legal or beneficial interest in the investment (pre-organization certificates) of the corporation does not compel the conclusion that shareholders should be deemed to be the subscriber.

Based upon the above analysis with regard to corporations, I would have to conclude that trusts and limited partnerships should be treated the same.

If there are any further questions with regard to this matter, please let me know.

Very truly yours,



WILLIAM W. BARRETT
Assistant Attorney General