



State of Utah
DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES

Michael O. Leavitt
Governor
Douglas C. Borba
Executive Director
Mark J. Griffin
Division Director

160 East 300 South
Box 146760
Salt Lake City, Utah 84114-6760
(801) 530-6600 • FAX (801) 530-6980
NET: brsec.security@email.state.ut.us

December 22, 1997

Mr. Martin R. Miller
Willkie Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, NY 10022-4677

Re: **Willkie Farr & Gallagher**
Request for Interpretive Opinion
File # B00022607

Dear Mr. Martin:

This letter is in response to your request for an interpretive opinion from the Utah Division of Securities ("Division"). You asked the Division to opine whether federal covered securities, as defined by § 61-1-13(12) of the Utah Uniform Securities Act, ("Act"), Utah Code Ann. (1997), which technically qualify for a self-executing exemption under § 61-1-14 of the Act, remain subject to the notice filing requirements of § 61-1-15.5 of the Act.

For the reasons stated below, it is the opinion of the Division that a notice filing would not be required under § 61-1-15.5 of the Act if an election is made to register or seek an exemption for the securities and all requirements of the registration or exemption are met.

In October, 1996, the National Securities Market Improvements Act ("NSMIA") amended § 18 of the Securities Act of 1933, ("1933 Act"), to preempt states from requiring registration or imposing certain requirements or restrictions on a security that is a "covered security" or will be a "covered security" upon completion of the transaction. States did retain the ability to require notice filings for most types of covered securities. However, although NSMIA prohibits states from requiring registration for a covered security, NSMIA does not prohibit an issuer from voluntarily subjecting itself to the registration or exemption requirements of a state, particularly when the registration or exemption provision requires less from the issuer than a notice filing.

On May 5, 1997, the Utah Uniform Securities Act was amended to account for changes made by NSMIA. Section 61-1-13 was amended to define "federal covered security," which was given the meaning found in Section 18(b) of the 1933 Act. Section 61-1-15.5 was added to provide the Division with the authority to require notice filings for covered securities by rule or

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order. Finally, § 61-1-7 was amended to read:

It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter, the security or transaction is exempted under Section 61-1-14, or the security is a federal covered security for which a notice filing has been made pursuant to the provisions of Section 61-1-15.5.

Utah's general registration requirement, which provides that a security or transaction must be registered or exempt prior to offering or selling the security, was merely changed to provide a third option, that of being a federal covered security which has complied with the notice filing requirements, if any. If you meet one of the three prongs, you do not need to satisfy either of the remaining two prongs. Therefore, if an individual wants to offer or sell a federal covered security, but the security or transaction qualifies for a self-executing exemption, such person may voluntarily subject itself to the registrations requirements of the Act and rely on the self-executing exemption without making a notice filing.

A conflict does occur when an individual tries to "mix and match" registration, exemption, and notice filing requirements. An exclusive election needs to be made. For example, if an issuer intends to affect a merger and decides to subject itself to the registration requirements and seek confirmation of an exemption under § 61-1-14(2)(p) of the Act, the issuer cannot refuse to provide the documents and materials required by the exemption by claiming the status of a covered security. In such a case, the exemption will be denied and the individual should follow the requirements for covered securities. Likewise, an issuer cannot claim status as a covered security and then elect to substitute the requirements of an exemption over the notice filing requirements for covered securities.

In short, for all persons that elect to offer or sell securities in Utah, the securities or transaction must either be registered, exempt, or be a federal covered security for which any applicable notice filing requirement is satisfied. If the securities or transaction involve a federal covered security, the person offering or selling the securities must make an exclusive election whether to claim the status of a federal covered security and provide a notice filing (if applicable), or to comply with any applicable registration or exemptive provisions.

Very truly yours,



S. Anthony Taggart
Assistant Director

WILLKIE FARR & GALLAGHER

New York
Washington, DC
London
Paris

October 9, 1997

By Federal Express

Mr. Gary Bowen
Department of Commerce
Division of Secretaries
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111

Re: Existing statutory self-executing exemptions and
filing requirements for securities offerings of
Regulation D and other "Covered Securities"

Dear Mr. Bowen:

As we discussed last week, on behalf of a number of clients of our firm, I would ask for confirmation in writing of our conversation from the Division of Securities of the inapplicability of new filing requirements found in section 61-1-15.5 of the of the Utah Uniform Securities Act (the "Act") to securities and transactions exempt under 61-1-14 of the Act.

Section 16-1-15.5 of the Act specifies filing requirements for federal covered securities pursuant to the Act. "Federal Covered securities" are defined in Section 61-1-13(12) of the Act to have the meaning given to that term in Section 18(b) Securities Act of 1933 (the "1933 Act").

Section 16-1-7 of the Act provides that no person shall offer or sell any security in the state unless the security is registered, the security or transaction is exempt under Section 61-1-14 of the Act, or the security is a Federal Covered Security provided such person complies with applicable filing requirements in 61-1-15.5 of the Act.

As we discussed, our concern is that a reading of 6-1-15.5 of the Act could allow the division by rule or order require a filing even though a self-executing exemption is available for an offering of securities in Utah pursuant to Section 6-1-14. One example we discussed was an offer or sale of securities made pursuant to 6-1-1(1)(h), which provides an exemption for offers and sales to institutions, which would under such an interpretation still require a

One Citicorp Center
153 East 53rd Street
New York, NY 10022-4677
212 821 8000
Fax: 212 821 8111

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filing pursuant to 61-1-15.5(2) if the security is one for which a form D is filed with the Securities and Exchange Commission (the "SEC").

In our conversation last week, you indicated that your office would not require a filing for a "federal covered security" under 61-1-15.5 of the Act if the security or transaction was exempt under 6-1-14 of the Act. As we discussed it appears that the intent of the changes to the Act were to conform with, and to provide guidance for the mechanics of the filings preserved for the states, by the National Securities Market Improvement Act of 1996 ("NSMIA"). I believe that this was the intent for two reasons.

First, I would not think that the Utah legislature meant to require a filing for an offering which has another existing self-executing exemption. As we discussed, to require such filings for otherwise exempted securities would impose an additional burden on federal covered securities which did not exist before the change in the Act. The purpose of NSMIA as mentioned in the legislative history and commentary was not to add additional requirements on already exempt offerings of securities but to rationally streamline regulation of securities¹.

¹ For example, the Conference Report to Accompany H.R. 3005 provides in the Joint Explanatory Statement of the Committee of Conference the following:

The development and growth of the nation's capital markets has prompted the Congress to examine the need for legislation modernizing and rationalizing our scheme of securities regulation to promote investment, decrease the cost of capital, and encourage competition. In particular, the system of dual Federal and state securities regulation has resulted in a degree of duplicative and unnecessary regulation. Securities offerings and the brokers and dealers engaged in securities transactions are all currently subject to a dual system of regulation that, in many instances, is redundant, costly, and ineffective.

With respect to securities offerings, the Managers have allocated regulatory responsibility between the Federal and state

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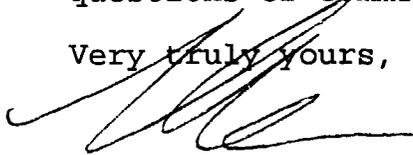
Second, I believe it is apparent from the configuration of 61-1-7 of the Act that the addition of covered securities to that section was merely to provide a third way to offer and sell securities legally in Utah. Because "federal covered securities" are designated in 61-1-7 as a third alternative for offering securities and 6-1-7 specifically references the new notice filing section 61-1-15.5 as the method for relying on that third alternative, I believe the other two alternatives, exempt securities and exempt transactions should still be available to offer securities, without the necessity of making the filings to rely on the "covered securities" preemption.

Therefore, we ask that the Division of Securities issue a statement of policy or otherwise confirm in writing that it interprets Section 61-1-14 and 61-1-15.5 in a manner as to not require a filing for a federal covered security which has available for its offer and sale an exemption under 61-1-14 of the Act.

As we discussed I have enclosed a check for \$120.00 in payment of the fee for this request.

Please feel free to contact me at (212) 821-8690 with any questions or comments you may have.

Very truly yours,



Martin R. Miller

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governments based on the nature of the securities offering. Some securities offerings, such as those made by investment companies, and certain private placements are inherently national in nature, and are therefore subject to only Federal regulation.