



State of Utah

DEPARTMENT OF COMMERCE DIVISION OF SECURITIES

Protecting Investors; Promoting Commerce

Michael O. Leavitt
Governor

Douglas C. Borba
Executive Director

S. Anthony Taggart
Division Director

160 East 300 South
P.O. Box 146760
Salt Lake City, Utah 84114-6760
(801) 530-6600 • FAX (801) 530-6980
e-mail: security@br.state.ut.us
http://www.commerce.state.ut.us

September 27, 2000

Mr. C. Kay Bryson
Utah County Attorney
100 East Center Street, Suite 2100
Provo, UT 84606

Re: Referral of Criminal Cases by the Utah Division of Securities
Request for Interpretative Opinion
File # B00219947

Dear Mr. Bryson:

This letter is in response to a request from your office for an interpretive opinion pursuant to § 61-1-25(5) of the Utah Uniform Securities Act ("Act"). The Utah Division of Securities, ("Division"), was asked to opine whether § 61-1-21.5(3) of the Act provides that the attorney general, county attorney, or district attorney of the appropriate jurisdiction may initiate the prosecution of a criminal action under the Act only by referral from the Division.

For the reasons stated below, it is the opinion of the Utah Division of Securities that the attorney general, county attorney, or district attorney of the appropriate jurisdiction may initiate the prosecution of a criminal action under the Act without a referral from the Division.

Analysis

The Act is comprised of a set of laws that regulate the offer and sale of securities in Utah. This regulation is accomplished by three main provisions: 1) registration of securities, 2) licensing of the salespersons and brokerage firms, and 3) prohibition of fraud. The Division is charged with the statutory responsibility of administering and enforcing the Act. While the Division has the sole authority to administer the registration and licensing functions, the Division shares the responsibility of enforcing the Act.

The Division's primary enforcement powers are found in §§ 61-1-19 and 61-1-20 of the Act. Section 61-1-19 authorizes the Division to make public or private investigations to determine whether any person has violated the Act. Section 61-1-20 authorizes the Division to commence administrative and civil actions to enforce the Act. There is no provision in the Act that enables the Division or its director to bring a criminal action on behalf of the state.

However, § 61-1-21.5(3) of the Act does provide the Division with the ability to refer evidence to the attorney general, county attorney or district attorney. Therefore, while it is clear that the Division has the sole authority to bring an administrative or civil action under the Act on behalf of the state, the Division does not have the authority to bring criminal actions under the Act on the state's behalf. Rather, the Division routinely refers evidence collected in the course of an investigation to the attorney general, county attorney, or district attorney for possible criminal prosecution. Those prosecuting agencies then make a decision whether to criminally prosecute under the Act on behalf of the state of Utah.

The criminal penalties for violating the Act are found in § 61-1-21 of the Act. Section 61-1-21 makes it a criminal offense to willfully violate any provision of the Act, including willful violations of the provisions dealing with registration, licensing and fraud. While § 61-1-21.5(3) enables the Division to refer evidence to a criminal prosecutor, this section also requires the attorney general, county attorney, or district attorney of the appropriate jurisdiction to provide legal services to the Division in connection with criminal actions under the Act. This provision has two main purposes, 1) it requires the appropriate criminal prosecution agency to provide legal services to the Division for such matters as obtaining search warrants and other tasks related to criminal cases, and 2) it makes it clear that the prosecuting agencies are responsible for the legal services and their associated costs where the Division is involved in a criminal case.

Section 61-1-21.5(3) does not limit the attorney general, county attorney, or district attorney from bringing a criminal action without referral from the Division. The purpose of this section is to provide the Division with assistance when the Division becomes involved in criminal cases. In fact, the attorney general, county attorneys and district attorneys derive their authority to bring criminal prosecutions for violations of the Act from a source outside of the Act.

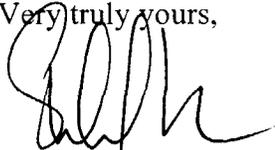
Any criminal action for a violation of a state statute must be prosecuted in the name of the state of Utah and prosecuting attorneys are given the sole authority to prosecute such actions on behalf of the state. UCA § 77-1-5 Pursuant to UCA § 67-5-1, the attorney general is authorized to prosecute all causes to which the state is a party, including criminal offenses. County attorneys are deemed public prosecutors and are required to "conduct on behalf of the state all prosecutions for public offenses committed within [their] county." UCA § 17-18-1(1)(a) Likewise, Utah law makes district attorneys public prosecutors and provides that they shall "prosecute in the name of the state all violations of criminal statutes of the state." UCA § 17-18-1.7(1)(a)

There is no provision in Utah law which requires a public prosecutor to obtain permission, approval or referral from a third party or investigative agency to criminally prosecute a public offense on behalf of the state. Rather, public prosecutors have the sole discretion and

Mr. C. Kay Bryson
September 27, 2000
Page 3

authority to determine which criminal actions to prosecute. A referral, including a referral under § 61-1-21.5(3), is merely one mechanism of many that may bring the evidence of a criminal act to the attention of the public prosecutor and is not meant to limit a public prosecutor.

Very truly yours,

A handwritten signature in black ink, appearing to read 'S. Anthony Taggart', written over a faint printed name.

S. Anthony Taggart
Director