State of Utah

DEPARTMENT OF COMMERCE

DIVISION OF SECURITIES

Protecting Investors; Promoting Commerce

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March 5, 2002

Mr. Mazen Asbahi
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601

RE: Investment Adviser Licensing Requirements
File # B00306748

Dear Mr. Asbahi:

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 your clients' supervised persons would be required to license in Utah as investment adviser representatives if your clients are federal covered advisers, maintain a place of business in Utah, and conduct business only with institutional clients. Based upon the representations provided in your letter and for the reasons stated below, it is the Division's opinion that your clients' supervised persons are not required to license as investment adviser representatives under Utah law.

Section 61-1-3 of the Utah Uniform Securities Act ("Act") states:

> [I]t is unlawful for any person to transact business in this state as an investment adviser or as an investment adviser representative unless: (a) the person is licensed under this chapter; or (b) the person's only clients in this state are investment companies as defined in the Investment Company Act of 1940, other investment advisers, federal covered advisers, broker-dealers, banks, trust companies, savings and loan associations, insurance companies, employee benefit plans with assets of not less than $1,000,000, and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as are designated by rule or order of the director; or (c) the person has no place of business in this state and during the preceding twelve-month period has had not more than five clients, other than those specified in Subsection (3)(b), who are residents of this state.

In 1996, Congress amended the Investment Advisers Act of 1940 ("1940 Act") and added section 203A. Section 203A divided the responsibility of regulating investment advisers and supervised persons between the federal and state governments. Specifically, § 203A(b)(1)(A) provides:

> No law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person that is registered under section 203 as an investment adviser, or that is a supervised person of such person, except that a State may license, register, or otherwise qualify any investment adviser representative who has a place of business located within that State.

Despite the restrictions on state authority regarding supervised persons of federal covered advisers, § 203A(b)(1)(A) provides an exception which permits the Division to license, register or qualify any "investment adviser representative" who has a place of business in Utah. However, the definition of "investment adviser representative" differs slightly under Utah and federal law. For example, the federal definition excludes some supervised persons from the definition based upon whether or not the clients of the supervised persons are natural persons, while Utah's definition does not.[1] The issue, then, turns upon which definition should be applied in Utah for purposes of interpreting § 203A(b)(1)(A).

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[1]Under federal law, "investment adviser representative" is defined in Rule 203A-3 under the 1940 Act as: "A supervised person of the investment adviser: (i) Who has more than five clients who are natural persons. . .; and (ii) more than ten percent of whose clients are natural persons. . .."

However, Utah law defines the same term in § 61-1-13(16) of the Act as:

> any partner, officer, director of, or a person occupying a similar status or performing similar functions, or other individual, except clerical or ministerial personnel, who: (a) (i) is employed by or associated with an investment adviser who is licensed or required to be licensed under this chapter; or (ii) has a place of business located in this state and is employed by or associated with a federal covered adviser; and (b) does any of the following: (i) makes any recommendations or otherwise renders advice regarding securities; (ii) manages accounts or portfolios of clients; (iii) determines which recommendation or advice regarding securities should be given; (iv) solicits, offers, or negotiates for the sale of or sells investment advisory services; or (v) supervises employees who perform any of the foregoing.

It is the opinion of the Division, that for the purpose of interpreting § 203A(b)(1)(A) of the 1940 Act, the federal definition of investment adviser representative found in Rule 203A-3 under the 1940 Act should be applied. However, for all other purposes the Utah definition should apply.

Based upon the facts in your letter, your clients are in the process of registering as federal covered advisers under §203 of the 1940 Act and have places of business in Utah, but your clients' supervised persons do not meet the federal definition of investment adviser representatives. Therefore, the state of Utah is preempted from requiring your clients' supervised persons to license as investment adviser representatives under Utah law. If the nature of your clients' business were to change such that your clients' supervised persons were to be included in the federal definition of "investment adviser representative," the supervised persons would be required to license as investment adviser representatives under Utah law.

Please note that this opinion relates only to the circumstances described above. Because this opinion is based on representations made to the Division, it should be further noted that any different facts or conditions of a material nature might require a different conclusion.

Very truly yours,
UTAH DIVISION OF SECURITIES

Paula W. Faerber
Staff Attorney

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Dept. of Commerce Div. of Securities

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January 3, 2002

VIA FEDERAL EXPRESS

Paula Faerber
Utah Division of Securities
Box 146760
Salt Lake City, Utah 84114-6760

Re: Request for Opinion on State Investment Adviser Representative Licensing Requirements

Dear Ms. Faerber:

We are requesting an interpretive opinion on behalf of our clients, several affiliated investment advisers with an expected place of business in the state of Utah (the "Companies"). The Companies are in the process of registering with the Securities and Exchange Commission (the "SEC") as investment advisers under the Investment Advisers Act of 1940 (the "Advisers Act"). While each of the Companies will have a place of business in the state of Utah, the investment advisory clients will be limited solely to institutional clients. We are requesting an opinion of your office confirming that Supervised Persons (as defined below) of the Companies are not required to be licensed in Utah as investment adviser representatives pursuant to Section 61-1-3 of the Utah Uniform Securities Act. Enclosed, please find a cashier's check payable to the Utah Division of Securities in the amount of $120 as required under the Utah Uniform Securities Act. In addition, we represent pursuant to Rule 164-25-5(B)(2)(e) of the Utah Uniform Securities Act that according to our actual knowledge, there are no legal actions, judicial or administrative, which relate, directly or indirectly to the facts set forth herein.

A. State and Federal Jurisdiction Over Investment Advisers After Enactment of the National Securities Market Improvement Act of 1996– Background

The regulatory environment governing investment advisers changed significantly after the enactment of the National Securities Markets Improvement Act of 1996 ("NSMIA"). Prior to NSMIA, investment advisers were regulated directly by both the SEC and each state in which the adviser transacted business. Title II of NSMIA, The Investment Advisers Supervision Coordination

Act (the "Coordination Act"), amended the Advisers Act, in part, to end the overlap between federal and state regulation. Through NSMIA, Congress generally reallocated federal and state authority over investment advisers, with the SEC responsible for larger advisers and the states primarily responsible for smaller advisers. By doing so, Congress sought to reduce the costs associated with overlapping regulation and more efficiently allocate the resources of the SEC and the states.[1] In general, for an investment adviser registered at the federal level, states retain limited authority over the entity and its personnel.

B. Federal Preemption

Section 61-1-3(3) of the Utah Uniform Securities Act generally states that it is unlawful for any person to transact business in the state of Utah as an investment adviser or as an investment adviser representative[2] unless that person is licensed with the state of Utah or meets certain exemptions from licensing set forth in Sections 61-1-3(3)(b) and (c)[3]. In addition, the Utah Uniform

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[1] Investment Advisers Act Release No. IA-1633 (May 15, 1997) (adoption of rules implementing amendments to the Advisers Act) ("Adopting Release").

[2] "Investment adviser representative" is defined under the Utah Uniform Securities Act as:

> [A]ny partner, officer, director of, or a person occupying a similar status or performing similar functions, or other individual, except clerical or ministerial personnel, who: (a)(i) is employed by or associated with an investment adviser who is licensed or required to be licensed under this chapter; or (ii) has a place of business located in this state and is employed by or associated with a federal covered adviser; and (b) does any of the following: (i) makes any recommendations or otherwise renders advice regarding securities; (ii) manages accounts or portfolios of clients; (iii) determines which recommendation or advice regarding securities should be given; (iv) solicits, offers, or negotiates for the sale of or sells investment advisory services; or (v) supervises employees who perform any of the foregoing. Section 61-1-13(16) of the Utah Uniform Securities Act.

[3] Section 61-3-3(3) states:

It is unlawful for any person to transact business in this state as an investment adviser or as an investment adviser representative unless: (a) the person is licensed under this chapter; or (b) the person's only clients in this state are investment companies as defined in the Investment Company Act of 1940, other investment advisers, federal covered advisers, broker-dealers, banks, trust companies,

(continued...)

Securities Act excludes from its definition of "investment adviser" any investment adviser registered under the Adviser's Act.[4] However, no such Utah exclusion exists for investment advisory representatives consistent with federal law and Section 203A(b)(1)(A).

Section 203A(b)(1)(A) of the Advisers Act states:

> No law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person that is registered under section 203 as an investment adviser, or that is a supervised person of such person, *except that a State may license, register, or otherwise qualify any investment adviser representative who has a place of business located within that State.* [emphasis added].

This Section generally prohibits states from requiring the registration, licensing or qualification of the investment adviser or a Supervised Person[5] of an investment adviser where that investment adviser is registered under Section 203 of the Advisers Act. However, the state may register, license or otherwise qualify any investment adviser representative who has a place of business located within that state. The Companies are in the process of registering with the SEC as investment advisers under Section 203 of the Advisers Act. Therefore, whether the state may require investment adviser representative licensing turns on two issues: (1) the definition of an "investment adviser representative" and (2) whether the investment adviser representative has a place of business located within the state. Since each of the Companies intends to maintain a place of business within the state, the analysis is limited to the definition of "investment adviser representative."

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[3] (...continued)
savings and loans associations, insurance companies, employee benefit plans with assets of not less than $1,000,000 and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control, or other institutional investors as are designated by rule or order of the director [to our knowledge, no such rule has been adopted]; or (c) the person has no place of business in this state and during the preceding twelve-month period has had not more than five clients, other than those specified in Subsection (3)(b), who are residents of this state.

[4] Section 61-3-13(15)(iv).

[5] Section 202(a)(25) of the Advisers Act defines "supervised person" as any partner, officer, director (or other person occupying a similar status or performing similar functions), or employee of an investment adviser, or other person who provides investment advice on behalf of the investment adviser and is subject to the adviser's supervision and control.

Rule 203A-3(a) under the Advisers Act defines "investment adviser representative" as a Supervised Person of an investment adviser who: (i) has more than five clients who are natural persons and (ii) more than ten percent of whose clients are natural persons. Therefore, where an investment adviser representative does not meet (i) the five natural persons test and (ii) the ten percent natural persons test, the person does not fall within the exception set forth in Section 203A(b)(1)(A) which grants states the authority to require the registration, licensing and qualification of an investment adviser representative. In other words, a person employed by a federally registered investment adviser and who advises solely institutional clients can never be an "investment adviser representative" that a State can license under the Advisers Act.

The SEC received extensive comments regarding its adoption of a definition of "investment adviser representative" since the term is not defined by the Coordination Act. Understanding that by defining the term "investment adviser representative" the SEC would generally preempt state regulatory authority over federally registered investment adviser representatives, the North American Securities Administrators Association ("NASAA") objected to the notion that the SEC retained authority to define the term. The SEC rejected this comment and addressed it in the Adopting Release stating, among other reasons, that had the SEC incorporated state law with respect to the definition of "investment adviser representative," the SEC would have contradicted Congress' intent to limit the application of state law to Supervised Persons who primarily advise institutional clients. As noted by the SEC, if a state adopted a sufficiently broad definition of the term, the very Coordination Act would lose its preemptive effect. Rather, the SEC adopted Rule 203A-3(a) in connection with its general aim to provide the states an ability to regulate those investment adviser representatives who serve a large number of "retail clients."[6]

Because the employees of the Companies intend to advise only institutional clients, they will not have five natural persons as clients and 0% of each representative's clients will be natural persons. Therefore, the investment advisers who are employed by the Companies do not meet the five natural persons test or the ten percent natural persons test and, therefore, do not qualify as "investment adviser representatives" for purposes of Section 203A(b)(1)(A) of the Advisers Act. Since the employees are not "investment adviser representatives" for purposes of Section 203A(b)(1)(A), we believe the general preemption of state licensing applies to such Supervised Persons and that Section

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[6] NASAA also objected to the use of the term "natural persons" in the definition of "investment adviser representative" as too narrow, if, as the SEC suggests, the intent underlying adopting the definition was to allocate to the states regulatory authority over retail clients since retail clients also include small businesses. This argument was also rejected by the SEC. See Investment Advisers Act Release No. IA-1633 (May 15, 1997) (adoption of rules implementing amendments to the Advisers Act) ("Adopting Release") and NASAA Comment Letter (February 13, 1997).

61-1-3 of the Utah Uniform Securities Act which purports to require licensing of investment adviser representatives should be interpreted consistent with the Advisers Act. We are requesting your opinion concurring with this analysis.

To assist you with your review of this issue, we have enclosed a copy of the Advisers Act materials referenced in this letter. If you have any questions or would like to discuss any issues raised herein, please do not hesitate to call Scott A. Moehrke at (312) 861-2199 or me at the number above.

Sincerely,

Mazen Asbahi

cc: Todd Stevens
Scott A. Moehrke