

Opinion of the Commission on Section
61-1-13 (10) (f) of the Utah Uniform
Securities Act with respect to Spin-offs

It has recently come to the attention of the Commission that Section 61-1-13 (10) (f) may be ambiguous with respect to transactions commonly known as spin-offs. Certain of these transactions are excepted from the definition of "sale," and hence from registration, by subsection (iii) of this section. However, there are certain transactions which the Commission feels fall outside both subsection (ii) and (iii) and are therefore subject to registration.

In the opinion of the Commission, Section 61-1-13 (10) (f) (iii) applies only to those transactions which fall under Article 2 of the Business Corporation Act; that is, those transactions which provide for rights of appraisal for dissenting shareholders pursuant to a class vote. The legislature apparently contemplated that appraisal rights, pursuant to the statute, were sufficient protection for the shareholders in these situations.

Further, in the opinion of the Commission, Section 61-1-13 (10) (f) (ii) applies only to those transactions which fall under Section 16-10-41 of the Business Corporation Act: that is, dividends payable in cash, property of the corporation's own shares out of earned surplus. Distributions in partial liquidation, under Section 16-10-42, which are payable from the stated capital or capital surplus of the corporation and which must be authorized by the shareholders either in the article of incorporation or by a two-thirds vote, are not covered by Section 61-1-13 (10) (f) (ii). These transactions, dividends and liquidating distributions, are fundamentally distinct in that only the latter involves an impairment of the shareholders' equity. Since the shareholder, in a liquidating distribution, is changing the fundamental investment he has made in the corporation insofar as his equity interest is reduced and is without the appraisal rights provided in other transactions, the Commission is of the opinion that the legislature intended that these transactions be subject to the registration provisions of the Act.

Therefore:

1. Where the corporation proposes to distribute securities of another entity in partial liquidation pursuant to Section 16-10-42; and

2. Such distribution is not authorized by the articles of incorporation and is to be authorized by shareholder vote pursuant to Section 16-10-42 (b); and

3. The shareholder vote is to authorize the purchase of the securities out of the stated capital or capital surplus of the corporation and the distribution of such shares; then

4. Prior to the mailing of the proxy material or any notice of said action, the shares of such other corporation are to be registered with the Commission (unless exempt under the provisions of Section 61-1-14) and the offering documents so registered are to be given to each shareholder entitled to vote at the time such shareholder is first given notice of the transaction.