

by a person without a transfer to him of the upland, no license to fish should be given on the basis of the State's ownership of an appurtenant, prescriptive profit *a prendre*.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: MORTON I. GREENBERG  
*Deputy Attorney General*

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NOVEMBER 30, 1959

HON. SALVATORE A. BONTEMPO  
*Commissioner, Department of Conservation  
and Economic Development*  
State House Annex  
Trenton, New Jersey

HON. EDWARD J. PATTEN  
*Secretary of State*  
State House  
Trenton, New Jersey

HON. CHARLES R. HOWELL  
*Commissioner, Department of Banking  
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State House Annex  
Trenton, New Jersey

FORMAL OPINION 1959—No. 23

GENTLEMEN:

We have been asked to determine whether a corporation organized under our General Corporation Act (Title 14, R.S.N.J.) may become licensed as a "Small Business Investment Company" under the Federal Small Business Investment Act of 1958.

The portion of the federal act (72 Stat. 694, Pub. L. No. 699, 85th Cong. August 21, 1958) which is considered in this memorandum is that which permits creation of Small Business Investment Companies (S.B.I.C.'s) organized to make long-term equity or loan funds available to small businesses, together with advisory services. The details of the entire Federal program will not be discussed except insofar as they pertain to the problem under review.

It should be pointed out that under the federal act, if there is no State legislation available under which an S.B.I.C. company can be organized, a federal charter may be obtained. This feature expires in 1961.

Set forth below are the major considerations involved in determining the questions you have raised.

(1) Conflict with R.S. 14:8-10.

R.S. 14:8-10 prohibits loans by a corporation to its stockholders, subject to the penalty that where such loans are made, joint and several liability is incurred on the

part of the recipient, and the corporation officers assenting to the loan. It is debatable whether the legislative proscription contained in this Section was originally intended to apply to transactions of the type contemplated by section 304(d) of the federal act. The language of R.S. 14:8-10, however, is clear, unambiguous and all-embracing, and we are not at liberty to read into that statute an exception.

The State of New York has amended its comparable statutory section by adding the following language:

"A small business investment company as defined in and operating pursuant to the provisions of an act of Congress entitled, 'Small Business Investment Act of 1958' shall have the power to lend money to a small business concern as defined in said act, even though such small business concern is or becomes a stockholder of such small business investment company, without violating this section."

A similar amendment would be required here before general business corporation charters can be granted. We understand that federal legislation, eliminating the mandatory stock purchase by borrowers, is being considered. Should this be enacted, of course, there will be no bar under N.J.S.A. 14:8-10.

(2) Would an S.B.I.C. if it were chartered by the State, be engaged in the business of banking?

This question is presented because of the fact that Section 301, subdivision (d), paragraph 9, of the Small Business Investment Act of 1958 provides that a corporation organized under that act shall have power "to act as depository or fiscal agent of the United States when so designated by the Secretary of the Treasury."

N.J.S.A. 17:9A-213 specifically provides that only a banking institution shall exercise within the State of New Jersey the power to receive money on deposit (N.J.S.A. 17:9A-26(1)) and the power to act as the fiscal agent of the United States (N.J.S.A. 17:9A-25 (13)). Thus if Section 301 of the Small Business Investment Act of 1958 is read as requiring that an S.B.I.C. must have these powers, New Jersey could not charter such a corporation. Section 103(3) of the Small Business Investment Act of 1958, however, excludes from compliance with the provisions of 301 a State-chartered investment company. This section reads in pertinent part as follows:

"(3) the terms 'small business investment company' and 'company' mean a small business investment company organized as provided in title III, including (except for purposes of section 301 and section 308(f)) a State-chartered investment company which has obtained the approval of the Administrator to operate under the provisions of this Act as provided in section 309 and a company converted into a small business investment company under section 401 of this Act."

That Section 301(d) (9) of the Small Business Investment Act is applicable only to a corporation chartered by the Small Business Administration rather than a State-chartered corporation is further supported by a reading of the regulations promulgated by the Small Business Administration, dated December 1, 1958 (23 F.R. 9383). Section 107.301-1 thereof lists the charter requirements of a corporation chartered by a State and does not include the powers enumerated in Section 301(d) (9).

It is our opinion therefore that the granting of a State charter to an S.B.I.C. would not violate the provisions of the Banking Act of New Jersey. N.J.S.A. 17:9A-1 *et seq.*

(3) Does the New Jersey Investment Companies Act (N.J.S.A. 17:16A-1 *et seq.*) govern S.B.I.C. licensees?

This question is raised only because of the similarity in names which has led to some confusion between the federal act and N.J.S.A. 17:16A.

The New Jersey Investment Companies Act defines an "investment company" substantially as any corporation, partnership or individual which engages principally in the business of making, issuing, or guaranteeing investment contracts. An "investment contract" is defined as any agreement or writing whereby the company making, issuing, or guaranteeing the same undertakes to pay a holder or his assignee a fixed or determinable cash sum on a fixed or determinable date in consideration for a contractually fixed payment. The use of the word "making" is as a word of art similar to its use in negotiable instruments law. An S.B.I.C., however, would be the holder, and not the maker of any such agreement.

Only if an S.B.I.C. were to secure its investment capital through the methods detailed in N.J.S.A. 17:16A, and then only if it be deemed to be principally engaged in such business, would it be subject to that act.

(4) We have also given consideration to the question whether a corporation organized as a Business Development Corporation under the provisions of the New Jersey Business Development Corporation Act of 1957 (N.J.S.A. 17:52-1, *et seq.*) may be eligible for licensing as an S.B.I.C. under the Federal Small Business Investment Act.

The corporations formed under these two programs share many common objectives. Each statute, nevertheless, lays down widely varying powers, methods of organization and control, as well as limitations upon persons who may participate. Apart from the difficulties inherent in administration by multiple regulatory bodies, these variations would make necessary substantial legislative changes before Business Development Corporations could be licensed as, or converted into, S.B.I.C.'s under the Federal act.

#### CONCLUSIONS

1. Corporate charters under Title 14 must be denied where powers under the Federal Small Business Investment Companies Act are sought, unless federal or State legislation is enacted to eliminate the problem created by N.J.S.A. 14:8-10.

2. Should such legislation be enacted, there would be no problem of conflict with the Banking Act inasmuch as State-chartered S.B.I.C.'s do not have depository powers or fiscal agency powers. Should such powers be granted, they would be in conflict with N.J.S.A. 17:9A-213.

3. Unless a Small Business Investment Company secures its capital for investment through the methods detailed in N.J.S.A. 17:16A-1, it is not subject to that statute.

4. Barring substantial legislative change, Business Development Corporations organized under the provisions of N.J.S.A. 17:52-1 *et seq.* do not conform to the requirements laid down by the Federal Small Business Investment Act for S.B.I.C. licensees.

5. Until appropriate legislative amendments are enacted application for S.B.I.C. charters may be made directly to the federal government.

Very truly yours,

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