

June 15, 1992

Honorable Pete T. Cenarrusa
Secretary of State
State of Idaho
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: SCIENTECH, Inc.

Dear Mr. Cenarrusa:

This is in response to your letter seeking guidance on an issue of corporate law. The question involves SCIENTECH, Inc., a minority small business and capital ownership development company administered pursuant to § 8(a) of the Small Business Act (SBA) (15 U.S.C. § 637(a)).

SCIENTECH's eligibility under § 8(a) of the SBA is contingent upon the management and business operation of SCIENTECH being controlled by a socially and economically disadvantaged individual(s). See 13 CFR § 124.104(b). Larry Ybarrondo is the individual at SCIENTECH, Inc., who meets the "socially and economically disadvantaged" definition. To allow for continued participation in the § 8(a) program, Mr. Ybarrondo must control SCIENTECH's Board of Directors.

SCIENTECH's Board of Directors currently consists of three members. Larry Ybarrondo is a member of the Board and his vote is weighted so, if necessary, his vote will constitute a majority vote controlling any decision made by the Board. SCIENTECH, Inc., would like to continue the weighted voting arrangement and retain its current Board members; however, continuation is contingent upon a determination of whether weighted voting arrangements comply with Idaho law.

CONCLUSION

A corporation is allowed to conduct its corporate business matters pursuant to its articles of incorporation and bylaws unless provisions of the articles or bylaws are in direct contravention of statutory provisions. A provision for a weighted vote by a board of directors is not precluded by the terms of Idaho's general business corporation statutes contained in chap. 1, title 30 of the Idaho Code.

ANALYSIS

The Small Business Administration has given an opinion that it believes weighted voting is precluded pursuant to Idaho statute. However, Idaho statutes provide a substantial amount of discretion to corporations to create their own internal governing mechanisms. Although there is a lack of judicial interpretation of these statutes in Idaho, courts in other jurisdictions looking to the same or similar statutes have found provisions in articles of incorporation and bylaws governing corporate management are enforceable if there is no injury or fraud to the public or to creditors and no applicable statutory or constitutional language is violated. See Sommers v. AAA Temporary Services, Inc., 5 Ill. App. 3d 931, 284 N.E.2d 462 (1972); see also William Hochstetler and Mark Svejda, *Statutory Needs of Close Corporations—Clerical Study*, JOURNAL OF CORPORATION LAW (Summer, 1985), p. 849.

The provision upon which SBA relies to reach its opinion that weighted voting is precluded is Idaho Code § 30-1-40. This section states in pertinent part as follows:

A majority of the number of directors fixed by or in the manner provided in the bylaws or in the absence of a bylaw fixing or providing for the number of directors, then of the number stated in the articles of incorporation, shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws. The act of the majority of the directors present at the meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the bylaws.

SBA's position is that Idaho Code § 30-1-40 mandates a "one man/one vote" majority. This interpretation is not clearly derived from the language of the statute. The statute defines "quorum" but allows the corporation discretion to determine through its bylaws the number of directors and the manner in which those directors' votes will constitute a majority. This flexibility is in keeping with the general tenor of Idaho corporate statutes.

Pursuant to Idaho Code §§ 30-1-27 and 30-1-54(h), a corporation is allowed the discretion to provide for regulation and management of the affairs of the corporation in its bylaws and articles of incorporation to the extent that those provisions are not inconsistent with the law. In Insituform of North America v. Chandler, 534 A.2d 257, 264-265 (1987), the Delaware Court of Chancery noted that similar general statutory provisions allowed a corporation, through its articles or bylaws, to determine and classify the voting rights of individual directors:

That effort requires us to note first that the 1974 amendment to subsection (d) did not introduce an innovation in Delaware corporation law. Prior to that time, although there was no statute expressly authorizing the

practice, it was not uncommon for corporate charters, under the general grant of Section 102(b)(1) to fix certain board positions, or a stated proportion of board seats, as being elected by a named class of stock.

....

A more fitting interpretation of the words used, in my view, ascribes to the legislature the intention to make it clear that directors elected by a class of stock might have any term or such voting rights as the certificate of incorporation might fix. While Section 102(b) . . . arguably already authorized such provisions, the statute had not theretofore expressly acknowledged, for example, that weighted voted was permissible.

534 A.2d at 265 (citations omitted).

In conclusion, it is my opinion that Idaho Code § 30-1-40 does not require a "one man/one vote" for board members of Idaho corporations. The language of the statute, as well as the language contained in §§ 30-1-27 and 30-1-54(h), provides for corporate discretion in such areas as weighted voting. Therefore, as long as the terms providing for weighted voting by the Board of Directors are properly disclosed in the articles and in the bylaws of the corporation, SCIENTECH, Inc., should be able to retain its current three-member Board of Directors with its weighted voting arrangement.

Please let me know if I can be of further assistance.

Very truly yours,

TERRY B. ANDERSON
Chief, Business Regulation
and State Finance Division