

**COMMISSIONERS**  
GARY PIERCE, Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR



MATTHEW J. NEUBERT  
DIRECTOR

SECURITIES DIVISION  
1300 West Washington, Third Floor  
Phoenix, AZ 85007  
TELEPHONE: (602) 542-4242  
FAX: (602) 388-1335  
E-MAIL: securitiesdiv@azcc.gov

**ARIZONA CORPORATION COMMISSION**

January 19, 2012

James E. Brophy, Esq.  
Ryley Carlock & Applewhite  
One North Central Avenue, Suite 1200  
Phoenix, AZ 85004

Re: American Pharmacy Cooperative, Inc.  
A.R.S. § 44-1801(26)

Dear Mr. Brophy:

On the basis of the facts set forth in your letter of January 17, 2012, and in reliance upon your opinion as counsel, the Securities Division will not recommend enforcement action for violation of the Securities Act of Arizona should the transaction take place as set forth in your letter.

As this position is premised upon the facts set forth in your letter, it should not be relied on for any other set of facts or by any other person.

We have attached a photocopy of your letter containing the facts upon which this position is based.

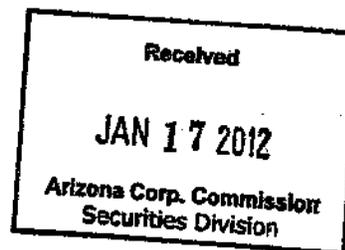
Very truly yours,

  
MATTHEW J. NEUBERT  
Director of Securities

Attachment

James E. Brophy  
Direct Line: 602-440-4807  
Direct Fax: 602-257-6907  
E-mail: [jbrophy@rcalaw.com](mailto:jbrophy@rcalaw.com)

January 17, 2012



Ms. Cheryl T. Farson  
General Counsel  
Securities Division  
Arizona Corporation Commission  
1300 West Washington Street, Third Floor  
Phoenix, Arizona 85007

Re: American Pharmacy Cooperative, Inc. Request for a No Action Letter

Dear Ms. Farson:

We are writing on behalf of American Pharmacy Cooperative, Inc., formerly known as Alabama Pharmacy Cooperative, Inc. (the "Cooperative"), an Alabama corporation. We request on its behalf a "no action" letter from the Arizona Corporation Commission, Securities Division (the "Securities Division"), in accordance with A.R.S. § 44-1826, confirming that the Securities Division will not take enforcement action against the Cooperative if the Cooperative sells ownership interests within the State of Arizona. The basis for such "no action" letter is that the registration and exemption requirements of the Securities Act of Arizona (the "Act") will not apply to the Cooperative's sale of ownership interests in the form of stock because such interests do not constitute "securities" within the meaning of A.R.S. § 44-1801(26) of the Act.

#### Background and Facts

Alabama Pharmacy Cooperative, Inc. was incorporated pursuant to the Alabama Business Corporations Act on March 14, 1985. Its name was changed to American Pharmacy Cooperative, Inc., by filing the prerequisite Articles of Amendment on May 25, 1999. Upon receipt of the no action letter requested herein, the Cooperative will apply for a certificate of authority to transact business as a foreign corporation in the State of Arizona.

The Cooperative was formed for the purpose of enabling member retail pharmacists (individually, a "Member," and collectively "Members") to aggregate their purchasing power and negotiate discounts on the purchase of pharmaceutical products. Currently, the Cooperative has 1,329 Members that operate 1,198 pharmacies in 24 states and the U.S. Virgin Islands. Each Member is a stockholder of the Cooperative, as defined and described

Ms. Cheryl T. Farson  
General Counsel  
Securities Division  
Arizona Corporation Commission  
January 17, 2012  
Page 2

**RYLEY CARLOCK**  
& A P P L E W H I T E  
*Attorneys*

below. A current list of the states in which Members of the Cooperative do business, the number of stockholders, and the number of retail pharmacies participating in the Cooperative, is attached at Exhibit A. The Cooperative has obtained “no action” or other favorable advisory letters from various states in which it is qualified to do business that are substantially similar to the no action letter being requested from the Securities Division. Examples of such letters from the states of Kansas, Minnesota, Iowa, New Jersey, and South Dakota are attached at Exhibit B.

Under the Articles of Incorporation and the Bylaws of the Cooperative, all Members must be engaged in the retail business of selling pharmaceuticals. Copies of the Cooperative’s Articles of Incorporation and Bylaws are attached as Exhibit C. Each Member pays the purchase price, presently \$1,000.00, to become a Member and receives 100 shares of the “common stock” of the Cooperative (the “Shares”) evidencing its membership. Each Member is entitled to only one vote on all Cooperative matters, regardless of the volume of business it does through the Cooperative. The Shares are nontransferable and cannot be negotiated, pledged, assigned, or otherwise transferred, except that the Cooperative is obligated to redeem and each departing Member is obligated to sell to the Cooperative all of the Member’s Shares at the price paid for the Shares in the event that (i) the Member dies or is a non-surviving party to a merger; (ii) the Member ceases to operate a retail pharmacy store; (iii) the Member ceases to do business through the Cooperative; or (iv) the Cooperative’s board of directors determines that the Member is not complying with the rules or standards of the Cooperative in accordance with procedures set forth in its Bylaws. Each stock certificate bears the appropriate legend reflecting these restrictions on transfer of the Shares. Shares of the Cooperative’s stock are not traded on any stock exchange or automatic quotation system.

Cooperative Members are not entitled to receive ordinary dividends on their Shares. Under the Cooperative Articles of Incorporation and Bylaws, however, the Cooperative pays “patronage” dividends to Members. Patronage dividends are paid monthly. The amount of patronage dividends is determined for each Member based on that Member’s total dollar volume of business done in connection with the Cooperative in relation to the total dollar volume of all Members. Patronage dividends are not based on the number of Shares owned by a Member, since all Members own the same number of Shares. The Cooperative considers the receipt of patronage dividends to be an incidental benefit to Members, more in the nature of a volume discount, the primary benefit being lower prices on pharmaceutical products that are available to Members participating in the Cooperative.

In the event of a hypothetical liquidation of the assets of the Cooperative, the excess proceeds would be distributed pro rata among its Members in accordance with Alabama law. Such distribution could result in a Member receiving an amount in excess of the purchase price paid for the Shares. The Cooperative believes this result is remote, however, and is not the incentive or objective of Cooperative membership.

Ms. Cheryl T. Farson  
General Counsel  
Securities Division  
Arizona Corporation Commission  
January 17, 2012  
Page 3

**RYLEY CARLOCK**  
& APPLEWHITE  
*Attorneys*

The Cooperative negotiates prices of pharmaceutical products with wholesale pharmaceutical distributors (currently McKesson, or such other vendors with whom the Cooperative may contract in the future, collectively referred to herein as the "Vendors"). Members order such products directly from the Vendors at prices negotiated by the Cooperative, plus a mark-up based on a percentage of the negotiated price. In addition, the Vendors charge an additional one percent (1%) mark-up on generic products sold to the Members, which is remitted to the Cooperative for use in paying the Cooperative's operational expenses.

The requirements described above and the other terms and conditions of the Articles and Bylaws are acknowledged and agreed to by Members when they sign a Subscription Agreement at the time they purchase their Shares. The form of required Subscription Agreement is attached hereto at Exhibit D.

The Cooperative now desires to offer the Shares to retail pharmacists residing in Arizona to allow them to participate as Members in the Cooperative and benefit from discounts on the pharmaceutical products they order through the Cooperative. Each subscriber would be required to warrant that it is engaged in the operation of retail pharmacy in the State of Arizona. The Cooperative certifies that the offering of the Shares is not the subject of any pending or final judicial, SRO or administrative proceeding. The Cooperative certifies that it has not commenced offering membership to Arizona retail pharmacies.

#### Discussion

The Cooperative requests a "no action" letter from the Securities Division confirming that it will not take enforcement action under the Act against the Cooperative if the Cooperative offers its common stock to retail pharmacies located in the State of Arizona without registration or exemption under the Act. This request is based on the Cooperative's position that the shares of common stock of the Cooperative will not constitute "securities" within the meaning of the Act. A.R.S. § 44-1801 sets forth the definitions applicable to Arizona's securities laws. The statute states that the definitions apply to the Act, "unless context otherwise requires." The term "security" is defined in A.R.S. § 44-1801(26) as:

any note, stock, treasury stock, bond, commodity investment contract, commodity option, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, viatical or life settlement investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, real property investment contract or, in general, any interest or instrument

commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The foregoing definition of a “security” under the Act, on its face, includes “stock,” “unless context otherwise requires.” The name or label of an instrument is not necessarily controlling. Courts and agencies will look beyond the form of a transaction to its substance, placing emphasis on the economic realities of the situation. See *United Housing Foundation Inc. v. Forman*, 421 U.S. 837 (1975). The Securities Division has also done so in the past. See National Turf Cooperative, Inc., No-Action Letter, Arizona Corporation Commission, Securities Division (June 6, 1996))(issuing no-action letter with respect to issuance of stock in cooperative wholesale buyer of golf course supplies).

In *United Housing Foundation Inc. v. Forman*, the Court concluded that the stock of a housing cooperative did not constitute a security within the meaning of the Securities Act of 1933 or the Securities Exchange Act of 1934. In reaching that conclusion, the Court used two tests to determine whether stock in the housing cooperative was a security. First, the Court examined whether the stock possessed five characteristics that are usually present in a security, including (i) the right to receive dividends contingent upon an apportionment of profits; (ii) negotiability; (iii) the ability of the stockholder to hypothecate or otherwise pledge the stock; (iv) the conferring of voting rights proportionate to the number of shares held; and (v) the capacity of the shares to appreciate in value. Second, the Court looked to *SEC v. W.J. Howey Company*, 328 U.S. 293 (1946), in determining whether the housing cooperative stock constituted an investment contract within the meaning of the federal securities statutes, and therefore a security. The *Howey* decision focused on whether the scheme involved an investment of money in a common enterprise with profits to come solely from the efforts of others.

When applying the tests articulated in *Forman* and *Howey*, the Cooperative believes that its Shares, although called “common stock,” are not “securities” within the meaning of the Act.

First, Members will not receive ordinary dividends that are contingent upon an apportionment of profits with respect to their Shares. Members of the Cooperative will instead receive only patronage dividends, determined by and directly proportional to the total amount of purchases through the Cooperative’s Vendors in relation to the purchases of all Members thereof and not by the number of Shares owned. Consequently, there will be no relationship between the amount of a Member’s dividends and the amount of its initial investment in buying the stock, presently fixed at \$1,000.00 for all Members.

Similarly, the second and third indicia of “stock” considered in *Forman*, the negotiability of the shares and the ability of the owner to pledge or hypothecate the shares, are also not present in the stock of the Cooperative. The transfer of the Shares is restricted under the Articles, the Bylaws, the Subscription Agreement, and the stock certificate issued to Members, all of which bar the sale, assignment, pledge, disposal, hypothecation or other transfer of the Shares by any stockholder except to or in favor of the Cooperative.

The fourth traditional characteristic of a “stock” identified by the Court is also inapplicable. The voting rights of Members is expressly unrelated to the number of Shares held under Section 4C(i) of the Articles, which states that each shareholder is entitled to one vote.

Finally, the incentive of Members to purchase the Cooperative’s Shares is not the promise of appreciation of the Shares or the income therefrom. Because of the restrictions on transfer of the Shares, Members could not receive an amount for the Shares in excess of their investment barring the liquidation or sale of the business (not in the ordinary course), which would not reasonably be their expectation in purchasing the Shares. The Shares do not pay dividends based on the profits of the Cooperative; rather, the Cooperative pays patronage dividends to Members, which it believes to be an incidental benefit to Members, the primary benefit being lower prices on pharmaceutical products that are available to Members participating in the Cooperative.

The Shares also fail to meet the test of an “investment contract” as articulated by the *Forman* and *Howey* Courts. The Members make their “profits” by their own efforts, not the efforts of others, by growing their business and placing orders for products from Vendors. Local retail pharmacies will control the amount of patronage dividends they receive by the degree of their participation in the Cooperative, not through the efforts of others. Patronage dividends, in effect, reduce the cost of goods sold.

The State of Arizona has issued no-action letters to entities whose business model is similar to that of the Cooperative. In 1996, the Securities Division of the Arizona Corporation Commission issued a no action letter to National Turf Cooperative, Inc. (“NTC”), a wholesale buyer of golf course turf products. In NTC, golf course owners were eligible to purchase shares of stock in the company. NTC paid patronage dividends to members annually based upon a percentage of purchases made by the respective members. The Securities Division looked to the characteristics of “stock” as articulated in *Forman* to conclude that the stock offered by NTC was not a “security” within the meaning of the Act.

Based on the foregoing analysis, a no-action letter is appropriate for the Cooperative. Because Cooperative membership is limited to retail pharmacies, no adverse effect on the public interest would result from granting this request.

Ms. Cheryl T. Farson  
General Counsel  
Securities Division  
Arizona Corporation Commission  
January 17, 2012  
Page 6

**RYLEY CARLOCK**  
& APPLEWHITE  
*Attorneys*

Request for No Action Letter

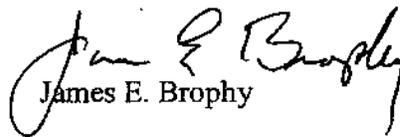
Based on the facts and discussion presented in this letter, we respectfully request a "no- action" letter from the Securities Division confirming that it will not take enforcement action against the Cooperative if it offers and sells the Shares to retail pharmacists in the State of Arizona without registration or reliance upon an exemption from registration because such Shares do not constitute a "security" within the meaning of A.R.S. § 44-1801(26).

As noted above, the Cooperative already does business in twenty-four states and the U.S. Virgin Islands. In most of those states, it has requested and received a no-action or other interpretive letter from the applicable state agency in charge of securities, based on the finding that the stock of the Cooperative is not a "security" under the applicable state law. In a few states, there exists a specific exemption from registration of shares for businesses such as the Cooperative. Examples of no-action letters have been provided at Exhibit B, and additional copies of other states' no-action letters with respect to the Cooperative's request hereunder are available upon request.

Please contact me at (602) 440-4807 or by email at [jbrophy@rcalaw.com](mailto:jbrophy@rcalaw.com) if you need additional information to make your decision. If you find that our analysis of the facts with respect to the Cooperative and its Shares or of the Act is incorrect or unsupported by the information we have provided to you, we would appreciate an opportunity to respond or to provide additional information before you issue any unfavorable written response. The undersigned acknowledges that this request may be released for publication. Thank you for your attention to this matter.

Pursuant to A.R.S. § 44-1861, subsection M, enclosed is a check in the amount of \$200.00 payable to the Arizona Corporation Commission to cover the required fee.

Very truly yours,

  
James E. Brophy

cc: Matthew J. Neubert, Director  
Bruce F. Rogers, Esq.  
Rebecca Eubanks, Esq.