ARIZONA CORPORATION COMMISSION

SECURITIES DIVISION
1300 West Washington, Third Floor
Phoenix, AZ 85007-2996
TELEPHONE: (602) 542-4242
FAX: (602) 594-7470

December 5, 1996

Tiffany L. Seevers, Esq.
Baird, Holm, McEachen, Pedersen, Hamann & Strasheim
1500 Woodmen Tower
Omaha, Nebraska 68102-2068

RE: Professional Veterinary Products, Ltd.
A.R.S. § 44-1801(22)

Dear Ms. Seevers:

On the basis of the facts set forth in your letter of September 26, 1996, attaching your firm's letter to the Office of the Chief Counsel, Division of Corporation Finance, U.S. Securities and Exchange Commission dated June 27, 1996, and your supplemental letters dated November 21, 1996, November 26, 1996, and December 3, 1996, and in reliance upon your opinion as counsel, the Securities Division ("Division") will not recommend enforcement action for violation of the Securities Act of Arizona ("Act") should the transaction take place as set forth in your letters. In concurring with your opinion that the stock offered by Professional Veterinary Products, Ltd. ("PVP") does not constitute a "security" for purposes of the Act, the Division has noted particularly your representations that PVP is a purchasing cooperative and that its stock merely evidences membership in the cooperative and does not possess most of the characteristics of a security, such as transferability, ordinary dividend rights, and the potential for appreciation in value.

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

To the extent that the transaction does not take place as set forth in your above-referenced letters, or a material change in circumstances causes the stock issued by PVP to be deemed "securities" for purposes of the Act, then the anti-fraud provisions of the Act will be applicable ab initio.

We have attached a photocopy of your letters. By doing this we are able to avoid having to recite or summarize the facts set forth therein.

Very truly yours,

VICTOR RODARTE
Chief Deputy Director of Securities

VR:ptj
Attachment

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*ALSO ADMITTED IN IOWA

September 26, 1996

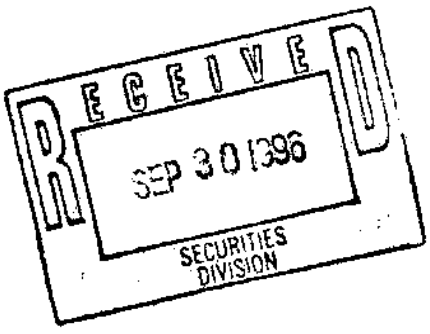
No Action Letter Committee
1300 West Washington
3rd Floor
Phoenix, Arizona 85007-2996

Re: No Action Request/Professional Veterinary Products, Ltd.

Dear Ladies and Gentlemen:

Pursuant to my conversation with the Securities Division yesterday morning, this letter is to request a No Action Letter from the Arizona Securities Division with respect to the issuance of shares of "stock" of Professional Veterinary Products, Ltd. ("PVP") in the State of Arizona. It is our opinion that the "stock" of PVP does not constitute a "security" under Section 44-1801(22) of Title 44 of the Arizona Revised Statutes (the "Law"), which defines "security," and thus PVP need not comply with registration requirements and/or exemption filings under the Law. The facts and legal argument supporting our opinion are addressed fully in our letter to the U.S. Securities and Exchange Commission ("SEC") dated June 27, 1996, which letter is attached hereto as part of Exhibit A and incorporated herein by reference. In response to that letter, the SEC issued PVP a No Action letter dated July 12, 1996, which also is attached as Exhibit A.

Enclosed is a check in the amount of $200.00 made payable to the Arizona Corporation Commission to cover the costs associated with this request. Please call me if you have any questions or need additional information. We look forward to hearing from you in the near future.



Kindest regards,

Tiffany L. Seevers
FOR THE FIRM

TLS/kkd
Enclosure
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Rec# 158987
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
ORPORATION FINANCE

July 12, 1996

Dennis J. Fogland, Esq.
Baird, Holm, McEachen, Pedersen
Hamann & Strasheim
1500 Woodmen Tower
Omaha, Nebraska 68102-2068

Re: Professional Veteriary Products, Ltd.

Dear Mr. Fogland:

In regard to your letter of June 27, 1996 our response thereto is attached to the enclosed photocopy of your correspondence. By doing this, we avoid having to recite or summarize the facts set forth in your letter.

Sincerely,

Martin P. Dunn

Martin P. Dunn
Chief Counsel

'DERYL F. HAMANN
JERROLD L. STRASHEIM
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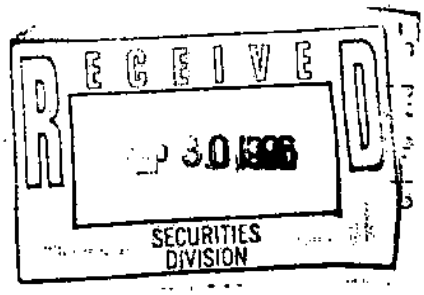
June 27, 1996

VIA FEDERAL EXPRESS

Office of the Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
450 Fifth Street, N. W.
Washington, D. C. 20549



Attention: Anita Klein, Esq.

Re: *Professional Veterinary Products, Ltd.*

Dear Ms. Klein:

The purpose of this letter is to request on behalf of Professional Veterinary Products, Ltd. ("Company") that the staff of the Division of Corporation Finance and the Division of Market Regulation (the "Staff") of the Securities and Exchange Commission (the "Commission") not recommend any action to the Commission with respect to: (1) the issuance of "stock" by the Company without registration under Section 5 of the Securities Act of 1933 (the "Securities Act"); and (2) the deregistration by the Company of its "stock" under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act"). It is our opinion that the "stock" of the Company, in the context and under the facts and circumstances as set forth herein, including the proposed amendments to the Articles of Incorporation of the Company described herein, will not constitute a "security" within the meaning of that term as defined in Section 2(1) of the Securities Act and Section 3(a)(10) of the Exchange Act. Therefore, registration is not required of the Company's stock under Section 5 of the Securities Act and Section 12(g) of the Exchange Act (the Securities Act and Exchange Act are collectively referred to herein as the "Acts").

I. Background and Facts.

Professional Veterinary Products, Ltd. ("Company") was organized as a Missouri corporation on August 2, 1982 with the express purpose of acting as a wholesale buyer of pharmaceuticals, vaccines, supplies, equipment and other items related to the practice of veterinary medicine so that the Company might sell such items at a reduced cost to its members (Article VIII, Company's Articles of Incorporation). (A copy of the Company's current Articles of Incorporation is enclosed as Attachment I; a copy of proposed amendments to the Articles of Incorporation as discussed below is enclosed as Attachment II.) According to Article III of the Company's Articles of Incorporation: "No one may own stock in the Corporation other than a licensed, practicing veterinarian (or business entity comprised of veterinarians such as a partnership or a corporation)," and each such stockholder may own only one share of stock.

Under Article VIII of the Company's Articles of Incorporation, sales to shareholder-members can be at no more than 5% over the Company's cost as determined by the Company's certified public accountant. In furtherance of its cooperative purpose, the Company annually issues rebates to its members, which are strictly based on a percentage of purchases made by the respective member. No dividends have ever been paid on the stock of the Company, and none are anticipated. In addition, the Company's Board of Directors has approved a proposed amendment to the Article of Incorporation (Amendment to Article III, as shown on Attachment II), which prohibits the Company from paying any dividends on its stock.

Under its Articles of Incorporation (Article VIII), the Company sells items only to its shareholder-members, except with the explicit approval of the Board of Directors. As of the fiscal year ended July 31, 1995, 96.7% of the Company's sales of product were made to members. Sales made to other distributors, such as the Company, accounted for 2.8% of the Company's sales, while sales to non-members were 0.5% of total sales. Sales by the Company to other distributors generally are made to reduce inventory of seasonal items, while sales to non-members include sales to prospective veterinarian shareholder-members who chose not to become a member. These percentages for fiscal year 1995 are consistent with the Company's experiences in prior fiscal years, and its expectations for the future. The Company does not solicit sales of its products to parties other than its own members (or prospective members) and does not market its products to anyone other than this same group.

The Company may issue a share of stock only to a qualified veterinarian or practice after the approval of the Board of Directors (Article III). Initially, shares were issued for $2,000 per share; since 1982 shares have been issued for $3,000 per share, which is essentially an "initiation fee" for the member to have access to purchase products from the Company. A single share of stock is sold to a veterinarian when that veterinarian requests to become a member of the cooperative. (Potential members are generally given the opportunity to buy products on a "trial basis" for a short period prior to becoming a member-shareholder.)

Proceeds from the sale of shares are used in the administration of the Company and to help fund the activities of the Company in purchasing veterinary products needed to supply its membership.

New shareholder members are obtained primarily through referrals from existing veterinarian shareholders. Prospective members expressing an interest in the Company may be contacted by a field service representative of the Company to answer questions concerning the Company and its program. A prospective member is not induced to purchase his or her membership share through any representation or promise of an expectation of profit or gain that might be realized by such member from the monetary or resale value of such share of stock. There are no commissions or discounts or other forms of remuneration paid to such representatives, or any other party, in connection with the sale of the membership shares. There is no general public advertising or marketing of the Company's membership shares. The Company does not advertise in any trade magazine or professional journals, or in any media which is generally disseminated to the public. As part of this request, the Company is proposing to amend its Articles of Incorporation to require that the price of a share of stock to be issued to future members may not exceed $3,000 per share, or such lesser amount as determined by the Board of Directors in its discretion. (Amendment to Article III, Articles of Incorporation).

There is no trading market for the Company's shares. Under current Article III of the Articles, the Company has a first right of refusal to purchase any proposed transfer of Company stock at the price paid for the stock. Historically, such transfers have been rare, primarily where a veterinary practice was sold, or upon death. Under the proposed Amendment to Article III, all transfers of Company stock to third parties will be prohibited (including any pledge or hypothecation of such stock), and any sale of a share must be sold back to the Company at the original price paid for the stock.

There are currently eight directors, each of whom is a veterinarian shareholder-member, representing eight geographic districts where shareholder-members are located (Article VI of the Articles of Incorporation). Directors are elected for 4-year terms by the shareholder-members. Each veterinarian shareholder-member has one vote (as the holder of one share) on matters to be voted on by the shareholder-members. No shareholder-member (and therefore no director) receives any salary or other type of remuneration from the Company, other than meeting fees paid to directors. Members of the Board of Directors receive rebates on purchases from the Company on the same basis as all other shareholder-members (i.e., based on the volume of purchases, not on share ownership).

There are currently approximately 80 employees of the Company, none of whom are shareholder-members of the Company. The President and Chief Executive Officer of the Company is Dr. Lionel L. Reilly, who is a salaried employee, and is not a shareholder-member. There are currently 871 shares of the Company outstanding, held by 871 veterinarian

shareholders. The Company's facilities are located at 10100 J Street, Omaha, Nebraska 68127. The Company business consists of purchasing veterinary pharmaceutical and related veterinary products and equipment from manufacturers at volume prices, which savings (due to volume purchase discounts) are then passed on to members. These products are stored in the Company's warehouse facility and sold and shipped to veterinarian shareholder-members in response to telephonic orders to the Company's telemarketing staff. The Company keeps records of all purchases made by each member-shareholder, and at the end of the fiscal year issues a credit voucher to each member based on that member's purchases during the preceding year. This credit voucher is then used by the member towards future purchases from the Company. The amount of the credit voucher is in direct proportion to the dollar volume of eligible purchases made by the member-shareholder.

None of the directors, officers or employees of the Company directly or indirectly (through businesses they own) provide goods or services to the Company (except in their status as directors, officers and employees). To the best of the knowledge of the Company, none of the shareholder-members of the Company directly or indirectly (through businesses they own) provide goods or services to the Company, except for one shareholder-member who sells approximately $7,000 of product to the Company annually (compared to the Company's net sales in excess of $62 million for fiscal year ended July 31, 1995).

The Company filed a Form 10 with the Commission in August 1995, registering the Company's stock under Section 12(g). Since such time the Company has filed its Form 10-K Annual Report and Form 10-Q Quarterly Reports in accordance with the Exchange Act requirements. After further review this year, the Company Board of Directors has approved the following Amendments to the Articles of Incorporation of the Company:

(1) An amendment to Article III expressly prohibiting the payment of any dividends on any shares of stock of the Company. As noted above, the Company has never paid any dividends on its stock, and has no intentions to do so.

(2) An amendment to Article III expressly setting the price of one share at $3,000, or such lesser amount as determined by the Board of Directors in its discretion.

(3) An amendment to Article III expressly prohibiting the sale or transfer (including by pledge or hypothecation) to any third party of any share of stock of the Company by the shareholder-member. Under the Article III amendment, the shareholder-member may sell the share of stock only back to the Company at the same price as the original sale price. The Company also has the right to repurchase the share of stock at the original sale price in the event the holder no longer qualifies under the Company's Articles of Incorporation as an eligible licensed veterinarian, or upon the death of a shareholder-member.

(4) An amendment to the Articles of Incorporation adding new Article X which provides that upon liquidation or dissolution of the Company the proceeds, if any, in excess of the return of the original purchase price of the shareholder's stock, shall be distributed as follows. Each shareholder would be entitled to designate to the Corporation that any excess funds, determined on a pro rata per shareholder basis, would be distributed by the Corporation to either (i) the American Veterinary Medical Association, (ii) the state Veterinary Medical Association selected by the shareholder, or (iii) the College of Veterinary Medicine selected by the shareholder.

Under the Company's Articles of Incorporation (Article IX) such amendment will require a 2/3 vote of the shares of the Company at a meeting in which a majority of the shares are represented. The Company intends to call a special shareholder-members' meeting for the sole purpose of voting on such amendments as soon as practicable. The Board of Directors of the Company approved the proposed amendments to the Articles of Incorporation on May 16, 1996, and voted to recommend such amendments to the shareholder-members for approval at a special meeting to be held in accordance with the Company's Articles and Bylaws. Similar conforming amendments to the Company Bylaws will be made as are proposed above for the Articles of Incorporation. Amendment to the Bylaws requires a majority vote of the shareholders-members at a meeting at which a quorum is present.

While the Company believes that its stock as currently issued, and under current Company policies and practices, is not a "security" for purposes of the Acts, the following analysis and legal opinion is based on the Company's completion of the proposed amendments to the Company's Articles of Incorporation (which requires the requisite vote of shareholder-members and filing of the Articles of Amendment with the Missouri Secretary of State).

II. Statement of Issue.

Whether the "stock" of the Company constitutes a "security" within the scope of the definition of that term in Section 2(1) of the Securities Act and Section 3(a)(10) of the Exchange Act in the context where: (1) the "stock" can only be issued to licensed veterinarians, who purchase it for the purpose of gaining membership in a veterinary buying cooperative organization; (2) the issuance and repurchase price of such "stock" is set at the same fixed price, so that the shareholder-member may never receive more for such "stock" than the initial price paid for it; (3) no dividends are ever paid on the "stock" and are in fact prohibited to be paid under the Company's Articles of Incorporation; (4) the Articles of Incorporation prohibit the sale or transfer (including pledge or hypothecation) of the "stock," except back to the Company at the initial purchase price; (5) there is no trading market in the "stock" of the Company and never has been any market; (6) any rebates received by shareholder-members from the Company are based solely on the volume of purchases by the

member from the Company, and not on the share of "stock" held by the member; (7) upon liquidation or dissolution of the Company the shareholder member is entitled to receive back only the initial purchase price; and (8) the Company has the right to repurchase the "stock" (at the initial sale price) if the holder should no longer be a licensed veterinarian.

III. Legal Opinion.

It is our opinion that the "stock" of the Company, in the context and under the facts and circumstances set forth under Sections I and II above, does not constitute a "security" within the meaning of that term as defined in Section 2(1) of the Securities Act and Section 3(a)(10) of the Exchange Act. Accordingly, in our opinion, registration of the Company's "stock" is not required under Section 5 of the Securities Act and Section 12(g) of the Exchange Act.

IV. Legal Discussion and Bases for Opinion.

A. The Mere Designation of the Membership Interests as "Stock" is not Sufficient to Create a "Security" within the Coverage of the Federal Securities Laws.

While the definition of the term "security" under the Securities Act and the Exchange Act does include the words "any . . . stock," the Supreme Court in *United Housing Foundation, Inc. v. Forman*, 421 U. S. 837, 848 (1975), rejected the contention that the purchase of an apartment in a housing project evidenced by the sale of stock must be considered a securities transaction simply because of the statutory definition. In reversing a prior decision by the Second Circuit Court of Appeals, which held that because the instruments were labeled "stock," the Securities Act applied, the Supreme Court said:

"We reject at the outset any suggestion that the present transaction evidenced by the sale of shares called "stock," must be considered a security transaction simply because the statutory definition of a security includes the words 'any ...stock'. Common sense suggests that people who intend to acquire only a residential apartment in a state-subsidized cooperative, for their personal use, are not likely to believe that in reality they are purchasing investment securities simply because the transaction is evidenced by something called a share of stock." 421 U.S. at 848.

Similarly, in the current circumstances the Company believes that a shareholder-member of the Company views the mandatory purchase of a "share of stock" as necessary incident to doing business with the cooperative and not as the purchase of an investment security. Rather, members expect a return from their own efforts, i.e., their purchases of merchandise from the Company, not from their investment of capital.

Further, in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), the Supreme Court emphasized: (i) that the purpose of the Acts is to regulate investments; (ii) legal formalisms

are not binding, but the court should consider the economics of the transaction; (iii) form should be disregarded for substance; and (iv) the proper focus is on economic reality. Accordingly, "the task has fallen to the Securities and Exchange Commission, the body charged with administering the Securities Acts, and ultimately to the federal courts to decide which of the myriad financial transactions in our society come within the coverage of these statutes." *Forman*, supra, at 848. In interpreting the term "security," form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

B. The Company's "Stock" Does Not Have the Significant Characteristics Generally Associated with Securities Covered by the Acts.

In determining whether a particular instrument is a "security," as the Supreme Court noted in *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), "we must ... determine whether these instruments possess 'some of the significant characteristics typically associated with' stock." 471 U.S. at 486 (quoting *Forman*, 421 U.S. at 851). In *Forman*, the Court identified these characteristics as: (1) the right to receive dividends contingent upon an apportionment of profits; (2) negotiability; (3) the ability to be pledged or hypothecated; (4) the conferring of voting rights in proportion to the number of shares owned; and (5) the capacity to appreciate in value.

Applying these characteristics to the Company's "stock" leads to the conclusion that the Company's stock does not have the significant characteristics of a security as defined in the Acts. As noted under Section I above, the Company's stock: (1) has never paid dividends and cannot pay dividends under its Articles of Incorporation, as amended; (2) is not negotiable or transferable (except back to the Company at the original purchase price); (3) cannot be pledged or hypothecated (under amended Article III to the Articles of Incorporation); and (4) cannot appreciate in value (either through resale or transfer, or through liquidation or dissolution of the Company). While the Company's stock does give each holder one vote on Company matters, there is no correlation between the number of votes a member has (always one vote) and the true measure of economic benefit to the member, which is the amount of rebate to which the member is entitled (which is based solely on the volume of business done with the Company, not share ownership).

The relationship between the Company and its shareholder-members is in a number of respects similar to the relationship in *Forman* between the housing cooperative and its shareholder-tenants. First, in *Forman*, the tenants could not transfer, assign or pledge their common stock, which is also true for the Company's shares. Second, in Forman, the tenants who desired to sell their shares were required to offer the stock back to the housing cooperative at its initial price. Under amended Article III, each member-shareholder will be able to sell such share only back to the Company at the same price such member paid for it. There is no

opportunity for the shareholder-member to realize any gain from the sale of the share due to appreciation in value.

Third, in *Forman*, the tenant members purchased stock for the economic benefit of subsidized low-cost housing and not with the expectation of making a profit on the stock. Similarly, professional veterinarians seek membership in the Company in order to realize reduced merchandise costs by purchasing inventory collectively in large volume as the economic benefit, not appreciation in their "investment" in the stock. This is a critical difference between the Company and ordinary business corporations: the economic benefits which accrue to the Company member-shareholder are directly related to their patronage activity (i.e., the amount of their purchases from the Company), while the economic benefits in a regular business corporation are returned to the shareholders in direct proportion to their investment in the corporation (i.e., the number of shares held). The veterinarian's decision to associate with the Company is not predicated on the opportunity to realize investment profits, but rather the evaluation of the economic benefits of lower cost for merchandise through large volume buying power.

The existence of a small percentage of revenue from non-member business does not change the conclusion that the Company's stock is not a security. In the *Forman* decision, the Supreme Court held that the stock of the residential housing cooperative did not involve the kind of profits which would transform such stock into a security even though the members of the cooperative benefited from non-cooperative income derived from leasing professional offices and parking spaces and from operating community washing machines. The Court relied on the economic reality that the members purchased the cooperative's stock in order to procure housing at a beneficial price, and not because they expected to realize a profit from such incidental activities. The Court concluded that the focus of the arrangement was on obtaining cooperative housing; the existence of incidental profit did not constitute an "expectation of profit" for purposes of determining a "security."

As indicated above, in its most recent fiscal year, 96.7% of the Company's sales of product were to member-shareholders. Sales to other distributors constituted 2.8% and were generally made to reduce inventory of seasonal items. Sales to non-members, which included sales made to prospective members who decided not to become a member, constituted only 0.5% of the Company's total sales. These non-member sales revenues, when evaluated in the context of their significance to total business operations, are not significant and are merely incidental to the Company's cooperative activities. Significantly, the Company does not solicit sales of its products to parties other than its own members (or prospective members) and does not market to anyone other than this same group. Further, the Company does not in any manner sell its membership shares on the basis of the economic gain to be derived from such non-member business.

This position is consistent with a number of prior SEC Staff No-Action Letters, including Affiliated of Florida, Inc., September 25, 1987, available in LEXIS 1987 SEC No-Act. LEXIS 2464 (non-member sales constituted approximately 12.3% of company's total sales); Associated Grocers of New England, Inc., October 5, 1989, available in LEXIS 1989 SEC No-Act. LEXIS 993 (non-member sales constituted approximately 5.6% of total sales); and Associated Grocers, Incorporated, February 12, 1988, available in LEXIS 1988 SEC No-Act. LEXIS 174 (grocer members required to purchase at least $10,000 of stock and sales to non-members constituted approximately 1% of overall sales).

C. The Company's "Stock" Does Not Constitute an Investment Contract.

In addition to the analysis described above under the *Forman* decision, in determining whether or not a "security" exists courts have analyzed whether or not the instrument constitutes an "investment contract." In *Reves v. Ernst & Young*, 494 U.S. 56 (1990), the Supreme Court held that the following factors should be examined in determining whether a transaction involves an "investment contract" and thus constitutes a "security": (1) the motivations that would prompt a reasonable seller and buyer to enter into the transaction; (2) the "plan of distribution"; (3) the reasonable expectations of the investors; and (4) additional factors, such as the existence of another regulatory scheme which would reduce the risk of the investment.

In the present case, as noted above, the purchaser of the share of stock is motivated by the desire to be able to purchase veterinary supplies and equipment at a lower price through the Company's large volume cooperative buying power. The member does not purchase the share of stock to realize any profit or gain on the share of stock, and indeed the Company's Articles do not permit the realization of any such gain. There is no inducement made to the prospective member to become a shareholder based on the potential gain or "profit" from the value of the one share of stock purchased. Indeed, the Company's Articles of Incorporation prohibit any such gain or profit from the sale or other transfer of the share of stock.

There is no "plan of distribution" for the Company's stock. As previously noted, initial purchase of the stock is limited to qualified veterinarians. In addition, the stock is not transferable, and can be sold only to the Company at the initial purchase price. There is no trading market for the stock, and it cannot be pledged by the holder. Therefore, there is no "trading for speculation or investment" in the Company's stock.

The Supreme Court in *Reves* noted that certain instruments can be "securities" on the basis of public expectation, even where an economic analysis might suggest the instruments are not securities. In the present case, there does not appear to be any public expectation with respect to the Company's stock. First, membership in the Company (and thus the purchase of a share of stock) is limited only to veterinarians. Second, as has been noted above, such persons or entities themselves purchase for the benefit of the cooperative buying power, not

the expectation of profit from the purchase of their one share of stock, which cannot appreciate in value, and has no negotiability, except back to the Company.

D. Previous Staff No-Action Letters Supporting the Company's Position that its "Stock" is not a Security.

Numerous previous SEC Staff No-Action Letters support the opinion that the Company stock is not a "security" within the meaning of the definitional sections of the Act. See Cap Rock Telephone Company, Inc., November 4, 1994, available in LEXIS 1994 SEC No-Act. LEXIS 763; Service Centers Corporation, May 21, 1993, available in LEXIS, 1993 SEC No-Act. LEXIS 721; Peer Marketing Associates, Inc., Feb. 3, 1993, available in LEXIS, 1993 SEC No-Act. LEXIS 146; Marine Preservation Association, Sept. 16, 1991, available in LEXIS, 1991 SEC No-Act. LEXIS 1085; Producers Feed Company, July 30, 1990, available in LEXIS, 1990 SEC No-Act. Lexis 999; Certified Physicians of Indiana, P.C., June 4, 1990, available in LEXIS, 1990 SEC No-Act. LEXIS 856; Associated Grocers of New England, Inc., SEC No-Action Letter [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) P79, 415 at 77,171 (Oct. 5, 1989); Hardware Wholesalers, Inc., Nov. 4, 1985, available in LEXIS, 1985 SEC No-Act, LEXIS 2660; End-Users, Inc., Nov. 12, 1984, available in LEXIS, 1984 SEC No-Act, LEXIS 2714; American Hardware Supply Co., Jan. 9, 1984, available in LEXIS, 1984 SEC No-Act. LEXIS 1521.

In addition, in other similar recent No-Action letters, the Staff has specifically noted whether the "stock" in question possessed most of the characteristics of a security, looking at factors such as:

(1) Whether there is restricted or unrestricted transferability;

(2) Whether the stock merely evidences membership in a corporation operating on a cooperative basis;

(3) Whether there is potential for appreciation in value for the common stock; and

(4) Whether there is any payment of dividends on the stock.

See Independent Stationers, Inc., April 15, 1994, available in LEXIS, 1994 SEC No-Act. LEXIS 444; American Truckload Cooperative, Inc., July 1, 1993, available in LEXIS, 1993 SEC No-Act. LEXIS 850; Kentucky Pharmacy Services Corporation, June 6, 1991, available in LEXIS, 1991 SEC No-Act. LEXIS 768; and Sports Specialists, Ltd., September 30, 1991, available in LEXIS, 1991, SEC No-Act. LEXIS 119.

As is discussed above, with respect to each of these factors the Company's "stock" does not have the characteristics of a security.

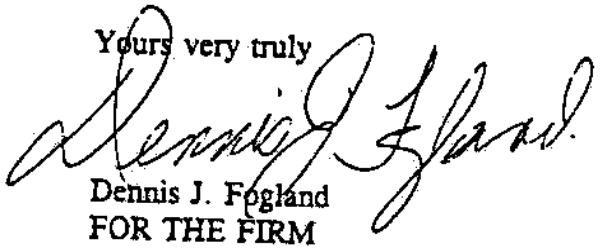
With respect to deregistration of the stock of a company which has already registered its stock under the Securities Exchange Act of 1934, see Affiliated of Florida, Inc., September 25, 1987, available in LEXIS, 1987 SEC No-Act. LEXIS 2464, and Associated Grocers, Incorporated, February 12, 1988, available in LEXIS, 1988 SEC No-Act. LEXIS 174, in which the Staff granted no-action positions to Exchange Act registered companies.

V. Conclusion.

In view of the foregoing, it is our opinion that the "stock" of the Company is not a "security" within the meaning of that term as defined in Section 2(1) of the Securities Act and Section 3(a)(10) of the Exchange Act. Accordingly, we respectfully request the Staff not to recommend any enforcement action to the Commission with respect to: (1) the issuance by the Company of its stock without registration under Section 5 of the Securities Act; and (2) the deregistration by the Company of its stock under Section 12(g) of the Exchange Act.

Pursuant to the procedures set forth in Securities Act Release Nos. 33-6269 (December 5, 1980) and 33-5127 (January 25, 1971), we enclose seven copies of this letter. Should the Staff not be inclined to act favorably on our request, we respectfully request a conference with the Staff before the issuance of any adverse written response. In the event you have any questions or need additional information, please contact me (402-344-0500) or my partner, Richard E. Putnam. Thank you in advance for your attention to this matter.

Yours very truly



Dennis J. Fogland
FOR THE FIRM

174921

July 12, 1996

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF CORPORATION FINANCE

Re: Professional Veterinary Products, Ltd. (the "Company")
Incoming letter dated June 27, 1996

Based on the facts presented, the Division will not recommend enforcement action to the Commission if the Company, in reliance on your opinion that registration under the Securities Act of 1933 and the Securities Exchange Act of 1934 (the "Exchange Act") is not required, offers and sells shares of its stock without compliance with such registration requirements and discontinues filing periodic and other reports under the Exchange Act. This position is conditioned on the prior adoption of the amendments to the Company's articles of incorporation described in your letter.

In reaching this position, we note in particular that, following the adoption of the described amendments to the Company's articles of incorporation: (1) the stock will not possess most characteristics of a security, such as ordinary dividend rights and unrestricted transferability; (2) there will be no potential for appreciation in the stock's value; and (3) the stock will represent only membership interests in a corporation operated on a cooperative basis.

The Division of Market Regulation has asked us to inform you that it concurs in this position.

Because this position is based on the representations made in your letter, it should be noted that different facts or conditions might require a different conclusion. Further, this response expresses the Division's position only on enforcement action and does not purport to express any legal conclusions on the questions presented.

Sincerely,

Anita Klein

Anita Klein
Special Counsel

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*ALSO ADMITTED IN IOWA

November 21, 1996

No Action Letter Committee
1300 West Washington
3rd Floor
Phoenix, Arizona 85007-2996
Attn: Pam Johnson

Re: Supplement to No Action Request/Professional Veterinary Products, Ltd.

Dear Ms. Johnson:

The purpose of this letter is to supplement our firm's prior request for a No-Action letter with respect to the issuance of shares of "stock" of Professional Veterinary Products. Ltd. ("PVP") in the State of Arizona, and to reiterate that request. It is our opinion that the "stock" of PVP does not constitute a "security" under Section 44-1801(22) of Title 44 of the Arizona Revised Statutes (the "Law"), which defines "security," and thus PVP need not comply with registration requirements and/or exemption filings under the Law. You have asked our firm to provide you with a legal analysis of our position under Arizona law.

BACKGROUND

PVP was organized as a Missouri corporation on August 2, 1982, with the express purpose of acting as a wholesale buyer of pharmaceuticals, vaccines, supplies, equipment and other items related to the practice of veterinary medicine so that PVP might sell such items at a reduced cost to its members. According to PVP's Articles of Incorporation, as amended, a copy of which Articles of Incorporation, and a recently adopted Certificate of Amendment thereto, are attached as Exhibit "A" (collectively, the "Articles"): "No one may own stock in the Corporation other than a licensed, practicing veterinarian (or business entity comprised of veterinarians such as a partnership or a corporation)," and each such stockholder may own only one share of stock. PVP's business consists of purchasing veterinary pharmaceutical and related veterinary products and equipment from manufacturers at volume prices, which savings (due to volume purchase discounts) are then passed on to members. These products are stored in PVP's warehouse facility and sold and shipped to veterinarian shareholder-members in

response to telephonic orders to PVP's telemarketing staff. PVP keeps records of all purchases made by each shareholder-member, and at the end of the fiscal year issues a credit voucher to each member based on that member's purchases during the preceding year. This credit voucher is then used by the member towards future purchases from PVP. The amount of the credit voucher is in direct proportion to the dollar volume of eligible purchases made by the shareholder-member.

Under the Articles, sales to shareholder-members can be at no more than 5% over PVP's cost as determined by PVP's certified public accountant. In furtherance of its cooperative purpose, PVP annually issues rebates to its members, which are strictly based on a percentage of purchases made by the respective member. No dividends have ever been paid on the stock of PVP, and none are anticipated. In fact, the Articles prohibit PVP from paying any dividends on its stock.

Under its Articles, PVP sells items only to its shareholder-members, except with the explicit approval of the Board of Directors. As of the fiscal year ended July 31, 1995, 96.7% of PVP's sales of product were made to members. Sales made to other distributors accounted for 2.8% of PVP's sales, while sales to non-members were 0.5% of total sales. Sales by PVP to other distributors generally are made to reduce inventory of seasonal items, while sales to non-members include sales to prospective veterinarian shareholder-members who chose not to become a member. These percentages for fiscal year 1995 are consistent with PVP's experiences in prior fiscal years, and its expectations for the future. PVP does not solicit sales of its products to parties other than its own members (or prospective members) and does not market its products to anyone other than this same group.

PVP may issue a share of stock only to a qualified veterinarian or practice after the approval of the Board of Directors. Initially, shares were issued for $2,000 per share; since 1982 shares have been issued for $3,000 per share, which is essentially an initiation fee for the member to have access to purchase products from PVP. The Articles provide that the price of a share of stock to be issued to future members may not exceed $3,000 per share, or such lesser amount as determined by the Board of Directors in its discretion. A single share of stock is sold to a veterinarian when that veterinarian requests to become a member of the cooperative. (Potential members are generally given the opportunity to buy products on a trial basis for a short period prior to becoming a shareholder-member.) Proceeds from the sale of shares are used in the administration of PVP and to help fund the activities of PVP in purchasing veterinary products needed to supply its membership. There is no trading market for PVP's shares. Under the Articles, all transfers of PVP stock to third parties are prohibited (including any pledge or hypothecation of such stock), and any sale of a share must be sold back to PVP at the original price paid for the stock. PVP has the right to repurchase the "stock" (at the initial sale price) if the holder should no longer be a licensed veterinarian.

New shareholder-members are obtained primarily through referrals from existing veterinarian shareholders. Prospective members expressing an interest in PVP may be contacted by a field service representative of PVP to answer questions concerning PVP and its program. A prospective member is not induced to purchase his or her membership share through any representation or promise of an expectation of profit or gain that might be realized by such member from the monetary or resale value of such share of stock. There are no commissions or discounts or other forms of remuneration paid to such representatives, or any other party, in connection with the sale of the membership shares. There is no general public advertising or marketing of PVP's membership shares. PVP does not advertise in any trade magazine or professional journals, or in any media which is generally disseminated to the public.

There are currently eight directors, each of whom is a veterinarian shareholder-member, representing eight geographic districts where shareholder-members are located. Directors are elected for 4-year terms by the shareholder-members. Each veterinarian shareholder-member has one vote (as the holder of one share) on matters to be voted on by the shareholder-members. No shareholder-member (and therefore no director) receives any salary or other type of remuneration from PVP, other than meeting fees paid to directors. Members of the Board of Directors receive rebates on purchases from PVP on the same basis as all other shareholder-members (i.e., based on the volume of purchases, not on share ownership).

ISSUE

Whether the "stock" of PVP constitutes a "security" under Section 44-1801(22) of Title 44 of the Arizona Revised Statutes (the "Law"), which defines "security," and thus PVP need not comply with registration requirements and/or exemption filings under the Law in the context where: (1) the "stock" can only be issued to licensed veterinarians, who purchase it for the purpose of gaining membership in a veterinary buying cooperative organization; (2) the issuance and repurchase price of such "stock" is set at the same fixed price, so that the shareholder-member may never receive more for such "stock" than the initial price paid for it; (3) no dividends are ever paid on the "stock" and are in fact prohibited to be paid under PVP's Articles; (4) the Articles prohibit the sale or transfer (including pledge or hypothecation) of the "stock," except back to PVP at the initial purchase price; (5) there is no trading market in the "stock" of PVP and there never has been any market; (6) any rebates received by shareholder-members from PVP are based solely on the volume of purchases by the member from PVP, and not on the share of "stock" held by the member; (7) upon liquidation or dissolution of PVP the shareholder-member is entitled to receive back only the initial purchase price; and (8) PVP has the right to repurchase the "stock" (at the initial sale price) if the holder should no longer be a licensed veterinarian.

LEGAL ARGUMENT

The definition of "security" contained in Section 44-1801(22) of the Law is identical in all material respects to the definition contained in Section 2(1) of the Securities Act of 1933 (the "Act"). Arizona courts and the Arizona Corporation Commission have looked to federal precedent in defining "security" under Arizona law. *Rose v. Dobras*, 624 P.2d 887 (Ariz.App.), *review denied*, 624 P.2d 887 (Ariz. 1981). *See also Maccollum v. Perkinson*, 913 P.2d 1097, 1104 (Ariz. 1996); *State v. Tober*, 826 P.2d 1199, 1200 (Ariz. 1991); *Vairo v. Clayden*, 734 P.2d 110, 113 (Ariz. 1987).

While the definition of the term "security" under the Act and the Securities Exchange Act of 1934 (collectively, the "Acts") does include the words "any . . . stock," the Supreme Court in *United Housing Foundation, Inc. v. Forman*, 421 U. S. 837, 848 (1975), rejected the contention that the purchase of an apartment in a housing project evidenced by the sale of stock must be considered a securities transaction simply because of the statutory definition. In reversing a prior decision by the Second Circuit Court of Appeals, which held that because the instruments were labeled "stock," the Act applied, the Supreme Court said:

> We reject at the outset any suggestion that the present transaction evidenced by the sale of shares called "stock," must be considered a security transaction simply because the statutory definition of a security includes the words "any ...stock". Common sense suggests that people who intend to acquire only a residential apartment in a state-subsidized cooperative, for their personal use, are not likely to believe that in reality they are purchasing investment securities simply because the transaction is evidenced by something called a share of stock.

421 U.S. at 848.

Similarly, in the current circumstances PVP believes that a shareholder-member of PVP views the mandatory purchase of a "share of stock" as necessary incident to doing business with the cooperative and not as the purchase of an investment security. Rather, members expect a return from their own efforts, i.e., their purchases of merchandise from PVP, not from their investment of capital.

Further, in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), the Supreme Court emphasized: (i) that the purpose of the Acts is to regulate investments; (ii) legal formalisms are not binding, but the court should consider the economics of the transaction; (iii) form should be disregarded for substance; and (iv) the proper focus is on economic reality. In interpreting the term "security," form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

In determining whether a particular instrument is a "security," as the Supreme Court noted in *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), "we must ... determine whether these instruments possess 'some of the significant characteristics typically associated with' stock." 471 U.S. at 486 (quoting *Forman*, 421 U.S. at 851). In *Forman*, the Court identified these characteristics as: (1) the right to receive dividends contingent upon an apportionment of profits; (2) negotiability; (3) the ability to be pledged or hypothecated; (4) the conferring of voting rights in proportion to the number of shares owned; and (5) the capacity to appreciate in value.

Applying these characteristics to PVP's "stock" leads to the conclusion that PVP's stock does not have the significant characteristics of a security as defined in the Acts. As noted above, PVP's "stock": (1) has never paid dividends and cannot pay dividends under its Articles; (2) is not negotiable or transferable (except back to PVP at the original purchase price); (3) cannot be pledged or hypothecated; and (4) cannot appreciate in value (either through resale or transfer, or through liquidation or dissolution of PVP). While PVP's stock does give each holder one vote on PVP matters, there is no correlation between the number of votes a member has (always one vote) and the true measure of economic benefit to the member, which is the amount of rebate to which the member is entitled (which is based solely on the volume of business done with PVP, not share ownership).

The relationship between PVP and its shareholder-members is in a number of respects similar to the relationship in *Forman* between the housing cooperative and its shareholder-tenants. First, in *Forman*, the tenants could not transfer, assign or pledge their common stock, which is also true for PVP's shares. Second, in Forman, the tenants who desired to sell their shares were required to offer the stock back to the housing cooperative at its initial price. Under the Articles, each shareholder-member may only sell its share back to PVP at the same price such member paid for it. There is no opportunity for the shareholder-member to realize any gain from the sale of the share due to appreciation in value.

Third, in *Forman*, the tenant members purchased stock for the economic benefit of subsidized low-cost housing and not with the expectation of making a profit on the stock. Similarly, professional veterinarians seek membership in PVP in order to realize reduced merchandise costs by purchasing inventory collectively in large volume as the economic benefit, not appreciation in their "investment" in the stock. This is a critical difference between PVP and ordinary business corporations: the economic benefits which accrue to PVP shareholder-members are directly related to their patronage activity (i.e., the amount of their purchases from PVP), while the economic benefits in a regular business corporation are returned to the shareholders in direct proportion to their investment in the corporation (i.e., the number of shares held). The veterinarian's decision to associate with PVP is not predicated on the opportunity to realize investment profits, but rather the evaluation of the economic benefits of lower cost for merchandise through large volume buying power.

The existence of a small percentage of revenue from non-member business does not change the conclusion that PVP's stock is not a security. In the *Forman* decision, the Supreme Court held that the stock of the residential housing cooperative did not involve the kind of profits which would transform such stock into a security even though the members of the cooperative benefited from non-cooperative income derived from leasing professional offices and parking spaces and from operating community washing machines. The Court relied on the economic reality that the members purchased the cooperative's stock in order to procure housing at a beneficial price, and not because they expected to realize a profit from such incidental activities. The Court concluded that the focus of the arrangement was on obtaining cooperative housing; the existence of incidental profit did not constitute an "expectation of profit" for purposes of determining a "security."

As indicated above, in its most recent fiscal year, 96.7% of PVP's sales of product were to shareholder-members. Sales to other distributors constituted 2.8% and were generally made to reduce inventory of seasonal items. Sales to non-members, which included sales made to prospective members who decided not to become a member, constituted only 0.5% of PVP's total sales. These non-member sales revenues, when evaluated in the context of their significance to total business operations, are not significant and are merely incidental to PVP's cooperative activities. Significantly, PVP does not solicit sales of its products to parties other than its own members (or prospective members) and does not market to anyone other than this same group. Further, PVP does not in any manner sell its membership shares on the basis of the economic gain to be derived from such non-member business.

In addition to the analysis described above under the *Forman* decision, in determining whether or not a "security" exists courts have analyzed whether or not the instrument constitutes an "investment contract." In *Rose v. Dobras*, the Arizona court adopted the test the Supreme Court announced in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946), for determining whether an instrument is an "investment contract." *Rose*, 624 P.2d at 889. The *Howey* test considers whether the "share" is a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise." *Howey*, 328 U.S. at 298.

In the present case, as noted above, the purchaser of the share of stock is motivated by the desire to be able to purchase veterinary supplies and equipment at a lower price through PVP's large volume cooperative buying power. The member does not purchase the share of stock to realize any profit or gain on the share of stock, and indeed PVP's Articles do not permit the realization of any such gain. There is no inducement made to the prospective member to become a shareholder based on the potential gain or "profit" from the value of the

one share of stock purchased. Indeed, PVP's Articles prohibit any such gain or profit from the sale or other transfer of the share of stock.

Of utmost significance in this matter is that after considering the same issue and facts as presented above, the U.S. Securities and Exchange Commission (the "SEC") granted PVP a no-action letter. A copy of the no-action letter is attached hereto as Exhibit "B."

Importantly, the Arizona Corporation Commission has issued a no-action letter to a company which issues shares under a plan with a striking resemblance to PVP's plan. In *Re: Hardware Wholesalers, Inc.*, Arizona Corporation Commission, 1992 Ariz. Sec. LEXIS 29 (August 18, 1992), the Arizona Corporation Commission agreed that the shares of the company which conducted business as a cooperative buying association for the benefit of its members were not "securities" under Arizona law. The attributes of the company's shares are as follows:

1. Ownership of shares of the company is limited to retailers of hardware, lumber and builders' supplies.

2. Each holder of shares held 20 or more common shares, and the sale of such shares is a necessary incident to membership in the company.

3. The company does not pay dividends in the usual sense. Rather, members order supplies from the company, and the company keeps a record of the purchase made by each member. During each fiscal year the company notes the gross profit on the merchandise sold, and during the following year refunds to members the gross profit earned less operating expenses. Refunds are made to each member in the proportion to which the gross profit on purchases made by that member bear to the total gross profit on all purchases by members.

4. Shares of the company are only transferable to the company or an eligible successor retailer. There is no market for the shares.

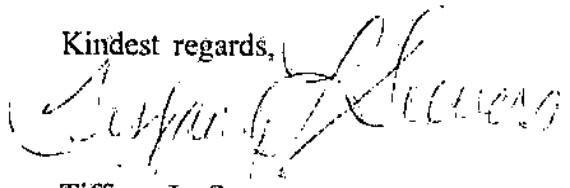
5. The company repurchases shares of those who desire to terminate the relationship with the company, or any holder on demand.

Based on the foregoing facts, the Arizona Corporation Commission granted a no-action letter. The facts of the present case weigh even more heavily in favor of the conclusion that PVP's shares are not securities in that PVP's shares are only transferrable back to PVP at the initial sale price (unlike the above-described "shares"). This Arizona opinion, along with the overwhelming conclusion of federal law (to which Arizona courts give great deference)

establish that PVP's shares are not "securities" for the purposes of Section 44-801(22) of Arizona law.

Please call me if you have any questions or need additional information. We look forward to hearing from you in the near future.

Kindest regards,



Tiffany L. Seevers
FOR THE FIRM

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*ALSO ADMITTED IN IOWA

November 26, 1996

VIA FACSIMILE (602) 594-7403

No Action Letter Committee
1300 West Washington
3rd Floor
Phoenix, Arizona 85007-2996
Attn: Pam Johnson

Re: SEC D Registration for Professional Veterinary Products, Ltd.

Dear Ms. Johnson:

Enclosed is a copy of the Form 15 (Edgar Format), as filed with the Securities and Exchange Commission on Monday, September 23, 1996. Filing of the Form 15 terminates the company's duty to file any further reports under the Securities Exchange Act of 1934. Please call me if you have any further questions.

Kindest regards,

Tiffany L. Seevers

Tiffany L. Seevers
FOR THE FIRM

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December 3, 1996

VIA FACSIMILE (602) 594-7403

No Action Letter Committee
1300 West Washington
3rd Floor
Phoenix, Arizona 85007-2996
Attn: Pam Johnson

Re: Professional Veterinary Products, Ltd.

Dear Ms. Johnson:

As we discussed in our telephone conversation of Monday, December 2, 1996, this letter is to confirm that Professional Veterinary Products, Ltd. ("PVP"), in conformance with the common corporate practice, did not issue new certificates to its shareholders in light of the recent amendments to its Articles (as defined in our prior correspondence to you). We do not believe that PVP shareholders existing at the time the amendments were adopted have ownership rights different from the rights of those who became shareholders after the amendments were adopted. The amendments to the Articles, which basically put into writing what was already the practice with respect to PVP shares, were approved by the shareholders. Thus, each PVP shareholder is aware of his, her or its ownership rights at this time. Issuing new certificates would serve no purpose. Please call me if you have any further questions.

Kindest regards,

Tiffany L. Seevers

Tiffany L. Seevers
FOR THE FIRM

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