



State of  
DEPARTMENT OF COMMERCE  
DIVISION OF SECURITIES

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September 26, 1994

Alan M. Gnessin  
Gnessin & Waldman  
360 Lexington Avenue, 24th Floor  
New York, NY 10017-3122

Re: American Family Care of Utah, Inc. File #003-6507-35/A31038-35

Dear Mr. Gnessin:

This letter is in response to your letter dated September 7, 1994 regarding the proposed offer and sale of stock to no more than thirty (30) health care providers who are residents of the State of Utah. In your letter, you request an interpretive opinion and/or no-action letter indicating that the proposed transaction is exempt from registration pursuant to §61-1-14(2)(n) of the Utah Uniform Securities Act ("Act"). Such offering is more fully described in your letter.


Pursuant to the information filed with this office, it is the position of the Division of Securities that the transaction described therein is exempt from registration pursuant to § 61-1-14(2)(n) of the Act.

Please be informed that the exemption does not absolve the company from complying with the anti-fraud provisions contained in § 61-1-1 of the Act. Therefore, all material information relating to the offering and company involved must be disclosed.

Also, please note that this confirmation of exemption relates only to the referenced offering and shall have no value for future similar offerings. It should be further noted that any different facts or conditions of a material nature might require a different conclusion.

Very truly yours,

UTAH DIVISION OF SECURITIES

  
S. Anthony Taggart  
Director of Corporate Finance

**GNESSIN & WALDMAN**

A PROFESSIONAL CORPORATION

ALAN M. GNESSIN, ESQ. • DC, NY

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OF COUNSEL

September 7, 1994

BY FEDERAL EXPRESS

S. Anthony Taggart, Securities Examiner  
State of Utah Securities Division  
Department of Commerce  
160 East 300 South  
Salt Lake City, Utah 84111

Re: Request for Interpretive Response on Organi-  
zation of American Family Care of Utah, Inc.,  
a Utah Corporation

Dear Mr. Taggart:

In May of this year, I spoke with Matt Jenkins on behalf of American Family Care of Utah, Inc. ("AFC") regarding the process by which AFC could request an interpretive opinion and no-action letter regarding the issuance of stock in connection with AFC's organization. As you and I discussed yesterday, this letter serves as a formal request pursuant to Rule R164-25-5 under the Utah Uniform Securities Act (the "Act") for an interpretive opinion and no-action letter regarding that issuance. As provided for in that Rule, please find enclosed a fee of \$ 120 as well as a second copy of this letter.

Specifically, for the reasons set forth below, AFC believes that its proposed sale of stock to no more than thirty (30) health care providers ("Providers") who are residents of the State of Utah does not constitute a public offering pursuant to Section 61-1-14(n) of the Act and is exempt from the registration requirements of Sections 6-1-7 and 61-1-16 of the Act. Therefore, we are requesting on behalf of AFC that the Division issue an interpretive opinion to the effect that the sale as described below would not constitute a public offering under the Act.

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#### FACTS

On May 27, 1994, the organizers of AFC filed Articles of Incorporation with the Utah Division of Corporations and Commercial Code of the Department of Commerce incorporating AFC. The initial articles of incorporation provided for authorized capitalization of one thousand (1000) common voting shares.

It is the intent of AFC to establish and operate a health maintenance organization ("HMO") in Utah pursuant to the Utah Health Maintenance Organizations Act, Utah Code Ann. §§ 31A-8-101 to 31A-8-408. HMO's receive periodic fixed, pre-paid premiums from members or third parties on behalf of members and is then responsible for providing all medical care for such members through contracted providers. The ability of AFC to operate profitably is heavily dependent on its ability to control utilization of health care services and the cost of those services. In the case of AFC, this means that it will enter into contracts with a wide range of health care providers through which it will emphasize their critical role in the control of utilization and directing members to the appropriate site of care in conjunction with the management of AFC.

Toward that end, AFC is in the process of identifying no more than thirty (30) Providers<sup>1</sup> with whom it wishes to not only contract as providers of health care services but to whom, owing to their positions of leadership in the health care community as well as their ability to contribute in a meaningful manner to the utilization review function, it also wishes to offer the opportunity to acquire stock in AFC.

Each of these thirty (30) specified Providers will be offered the opportunity to purchase no less than one (1) unit (ten (10) shares of AFC stock) at the price of \$10,000 per unit. If a Provider subscribes for at least one (1) unit, the Provider will be permitted, as part of that subscription, to also subscribe for additional units by increments of one-half (1/2) unit (five (5) shares of AFC stock). The units will be sold to the specified Providers on a first-come, first-served basis. Therefore, if one or more of the Providers subscribe for more than one (1) unit, not all of the other specified Providers will be able to subscribe for

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<sup>1</sup> Providers will include primary care and consulting physicians as well as ancillary health care providers.

units. Two or more Providers will not be permitted to split any of the units among themselves. The aggregate number of shares represented by these units to be offered to the Providers will not exceed 300 shares. The units, if fully subscribed for, will represent 30 percent of the authorized and issued stock of AFC. AFC currently has no plans now or in the near future, that is, the next 3 to 5 years, to permit conversion of the stock to smaller denominations nor to initiate a public offering of stock. In subscribing for the stock, each Provider shall be required to represent and warrant that he, she or it is not purchasing the shares for re-sale and that it is being purchased as an investment for the respective Provider's account. The stock will not be transferrable to any other party, other than AFC and the other Providers and, then, only upon the occurrence of certain events, for at least five (5) years from the purchase date. A transfer restriction will appear on each stock certificate.

The sale of AFC stock will not be advertised, publicly or privately. There will be no general solicitation with respect to the sale of the units. Nor will AFC utilize underwriters, brokers or agents in the sale of the units. Management of AFC will sell the units and will not receive any additional compensation regarding those sales. Stock will not be offered to, nor preliminary discussions held with, more than the indicated thirty (30) specified Providers. No documents relating to the purchase will be circulated to any parties other than the thirty (30) specified Providers. If all thirty (30) units are not subscribed for by the thirty (30) specified Providers the units will not be sold to any other health care providers. In the event that parties other than the thirty (30) specified Providers become aware of the sale of stock, the stock will not be sold to any health care provider or other party other than the thirty (30) specified Providers identified by AFC, even if AFC is approached by other health care providers or other parties to purchase the stock. All offers to purchase stock in AFC other than those received from the thirty (30) specified Providers identified by AFC shall be rejected.

AFC has not taken any steps to proceed with the above transaction other than to begin to identify the thirty (30) specified Providers to whom the units will be offered.

Finally, there is no legal action, judicial or administrative, which relates, directly or indirectly, to the above transaction or the facts set forth above.

#### ANALYSIS

AFC is not aware of any judicial or regulatory interpretation of "public offering" under the Act. However, the United States Securities and Exchange Commission has, by way of an interpretative ruling, Release No. 33-285, January 24, 1935 (11 FR 10952) (enclosed) (the "Release") has identified four (4) factors which bear upon a determination of whether a transaction is a public offering. These are:

1. The Number of Offerees and Their Relationship to Each Other and the Issuer;
2. The Number of Units Offered;
3. The Size of the Offering; and
4. The Manner of Offering.<sup>2</sup>

Each of these factors is discussed, in turn, below.

1.A. The Number of Offerees - In the Release, the General Counsel provides that it is not merely the number of persons formally offered the opportunity to acquire stock but the number of persons with whom the Issuer even discussed the possibility of a purchase regardless if a formal offer is ever made.

In the instant case, AFC has not and will not discuss the offer of stock with any individuals other than the thirty (30) specified Providers which it is in the process of identifying, even if less than all thirty (30) specified Providers do not purchase the stock.

As noted above, if all thirty (30) specified Providers do not subscribe for the units, it is not the current intention of AFC to sell the units for which a subscription has not been received to other Providers.

Also as noted above, if one or more Providers subscribe for more than one (1) unit each, there will not be a sufficient number

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<sup>2</sup> Release No. 33-4552, November 6, 1962, expanded upon the four factors in the Release 33-285 and added additional considerations not relevant here. We believe that the following discussion also complies with the standards of Release 33-4552.

of units remaining to permit subscription by all of the other specified Providers.

1.B. The Relationship of the Offerees to One Another - The Release states that a very limited offering to the general public may still be a public offering while an offering to a well-defined class, membership in which may be determined by the application of some pre-existing standard, may not be public offering notwithstanding its larger size.

In the instant case, AFC is not only limiting the absolute number of offers to acquire stock to a very small number, but the group from whom the offerees are drawn is not the general public but, rather, has been selected from a narrowly defined group through the use of pre-existing standards. That is, the offerees must be health care providers, in a position to contribute in a meaningful manner to the utilization review function, licensed in Utah, and be leaders in the health care community. The population of the Salt Lake City area is approximately 1,275,000. The number of health care providers is approximately 17,500.<sup>3</sup> Thus, the class to which the limited offer is being made is itself a tiny, discrete subset of the general population.

1.C. The Relationship of the Offerees to the Issuer. The Release provides that where a significant relationship exists between the Issuer and the offeree, that is, the offerees are members of a class that have special knowledge of the issuer, the offering is less likely to be found to be a public offering.

In this instance, while the offerees may not have special knowledge, the offeree class has had discussions with the Issuer regarding its business and health care philosophy as well as the manner in which the Issuer intends to operate. In addition, each offeree will have an ongoing business relationship with the Issuer as a contracting health care provider after the offering is complete. As a result, the offeree class does have a special knowledge and relationship with the Issuer as compared with members of the general public.

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<sup>3</sup> These two figures were obtained from the Utah State Department Community and Economic Development.

2. The Number of Units Offered - The Release suggests that where the denominations of the units are such that only an unsubstantial number are issued, presumptively no public offering would be involved. The Release goes on to note that the use of units issued in small denominations, or the use of convertible units, suggests a public offering.

In the instant case the denomination of the offering is relatively large, that is, \$10,000. Moreover the units are not convertible into smaller denominations and AFC does not currently anticipate such a conversion any time in the near future, that is, the next 3 to 5 years. Moreover, no other securities in AFC are being offered and none is contemplated, a factor that according to the Release, supports a finding that the offering is not public.

3. The Size of the Offering - The Release suggests that an anticipated later public offering relating to the so-called non-public offering supports a conclusion that the initial offering was also public.

In the instant case, AFC has no plans and does not currently contemplate that any time in the near future, that is, the next 3 to 5 years, that it will undertake a public offering. Finally, given the size of the units, this is not the type of offering typically available to the general public.

4. The Manner of the Offering - The Release provides that transactions which are effected by direct negotiations between the offerees and the Issuer are much more likely to be non-public than those effected through the use of the machinery of public distribution.

In the instant case, the offering will not use any underwriters, brokers or dealers. Each and every one of the Providers to whom the offer is made will have had the opportunity to meet with the senior management of AFC and negotiate his, her or its relationship with AFC, including the over all business relationship between the Provider and AFC.

Clearly, the elements noted by the SEC and the facts surrounding the AFC offer argue forcefully in favor of concluding that the proposed offer by AFC is not a public offering.

S. Anthony Taggart  
September 7, 1994  
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Finally, the word "public" is defined in Websters' Third New International Dictionary of the English Language, Unabridged, as

1(a): of, relating to, or affecting the people as an organized community: ... b: of or relating to the international community or to mankind in general ...  
3(a): of or relating to business or community interests as opposed to private affairs: ... 4(a): accessible to or shared by all members of the community ....

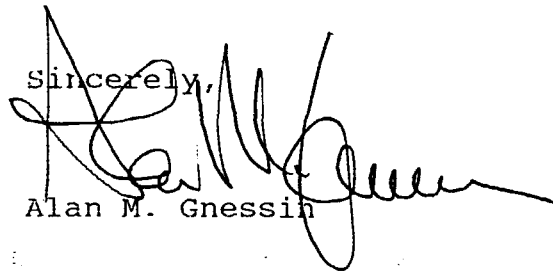
The offering of AFC stock to thirty (30) specified Providers would not, given the above definitions, appear to constitute a public event, offering or otherwise, of any sought. Indeed, the plain meaning of the term "public" cannot suggest that any activity involving as few as thirty (30) specified individuals or entities in the context of the AFC offering could constitute a public activity or event.

#### CONCLUSION

On the basis of the above-stated facts and analysis, we request an interpretive response from the Division to the effect that the stock of AFC to be offered for sale by AFC to thirty (30) specified Providers does not constitute a public offering under the Act.

I look forward to your response in the near future. If the Division requires any additional information or has any questions regarding the above, please do not hesitate to call.

Sincerely,



Alan M. Gnessin

cc: John Molina, J.D.  
Jose Fernandez