Fed. Sec. L. Rep. P 76,367, 1979 WL 13087 (S.E.C. No - Action Letter)

(SEC No-Action Letter)

***1 Global**
Van
Lines
, Incorporated

Publicly Available November 2, 1979

SEC LETTER

1933 Act / s 2(1)

October 2, 1979
Publicly Available November 2, 1979

John F. Olson, Esq.
Gibson, Dunn & Crutcher
818 Connecticut Avenue, N.W.
Washington, D. C. 20006Re: **Global Van Lines**, Inc.

Dear Mr. Olson:

This is in response to your letter of August 20, 1979 concerning the proposed offer and sale of membership interests in a not-for-profit corporation (the ‘Association’) to be organized under California law without compliance with the registration requirements of the Securities Act of 1933 (the ‘1933 Act’).

We understand the material facts, as more fully set forth in your letter, to be as follows. **Global Van Lines**, Inc. (‘Global’) is a corporation engaged in the business of providing nationwide moving and storage services. Global contracts with independent contractors who own and operate their own vehicles (‘Owner/Operators') to perform trucking services for Global's customers and desires to assist the Owner/Operators in forming an association, the members of which would be the Owner/Operators, for the purpose of obtaining more favorable insurance lates for the members. The Owner/Operators have been unable to purchase insurance at favorable group rates because they are independent contractors and not employees of Global or otherwise related through a single entity. If a separate entity such as the Association is established to purchase insurance on behalf of its members, favorable group insurance rates would be available.

The Association will be organized as a not-for-profit corporation under California law. Initially, membership in the Association will be offered to all Owner/Operators under contract to Global. There are currently approximately 380 such Owner/Operators. The Association will attempt to procure insurance coverage for the benefit of its members at favorable group insurance rates.

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There will be no obligation on the part of any Owner/Operator under contract to Global to become a member in the Association, nor will membership in the Association be denied to any Owner/Operator not under contract to global who would otherwise qualify for group insurance coverage under the insurance plan of the Association (although it is not contemplated that persons not under contract to Global will be solicited to become members).

Members will be required to pay an initial refundable membership fee of approximately $600 and insurance premiums. Part of the funds raised by the membership fees will be used to pay administrative expenses of the Association and the remainder will be held by the Association in an interest-bearing bank account. In order to obtain the insurance coverage contemplated, it will be necessary to have a minimum number of members. If an insufficient number of memberships have been issued, any premiums and any portion of the membership fee already paid will be refunded to the members who have made such payments.

***2** Memberships will not be transferable and will be redeemed approximately six months following the end of the first coverage year occurring after termination of membership. The redemption price will be the full membership fee paid to the date of termination, after deducting any outstanding premium obligations (including retrospective premiums) of the terminating member.

The Association will be managed by a board of directors elected by the members annually, with each member entitled to one vote regardless of the amount of premiums paid.

Any Owner/Operator's membership will not be dependent on remaining under contract to Global; rather, once a member has been admitted and qualified for insurance under the Association's group plan, such membership and coverage will continue for so long as his premium contribution remains current.

The Association will enter into a contractual relationship with a major United States insurance carrier (the ‘Insurance Carrier’) whereby the Insurance Carrier will undertake to issue insurance policies to the members of the Association. The Association will indemnify the Insurance Carrier up to a pre-determined dollar limit per occurrence in the policies issued to the members, which is presently anticipated to be the first $100,000 per occurrence. Thus, the Insurance Carrier will be the primary and only obligor on each such policy for any losses incurred, but will look to the Association for reimbursement up to its indemnity limit of the first $100,000 of loss per occurrence.

In order to provide the Insurance Carrier with the funds it deems necessary to implement this insurance program, the following premium obligations and financial assurances will be established.

(1) Policy premiums determined on the basis of historical loss experience will be fixed by the Insurance Carrier at the inception of the policy in each year and charged directly to the members. Global will collect the premiums (on the instructions and authority of the members) by making deductions from payments owing to the Owner/Operators under their Contracts with Global, and forward the premiums to the insurance brokerage firm which has placed the insurance. After deducting its fee, the brokerage frim will forward the difference to the Insurance Carrier.

(2) After deducting a certain portion of such funds for administrative fees, ‘excess coverage’ premiums, and profits, the Insurance Carrier will place the remainder of the funds in a separate interest-bearing account to offset the Association's contractual obligation to indemnify the Insurance Carrier (the ‘Association Fund’). The Association Fund will be used by the Insurance Carrier to satisfy the Association's obligations under the indemnity contract.

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(3) To the extent that the Association Fund is insufficient to cover the reimburseable losses sustained in any coverage year by the Insurance Carrier, the Insurance Carrier will have available the following alternative methods of seeking reimbursement from the Association and its members:

***3** (a) The Insurance Carrier may seek reimbursement from the Association out of the membership fee funds held by the Association;

(b) The Insurance Carrier may assess retrospective premiums on the members of the Association in an amount not to exceed a maximum percentage (as yet undetermined) of the annual premium for the coverage year in question. If a member chooses not to pay such retrospective premium, his membership in the Association will be terminated; or

(c) The Insurance Carrier may require the Association to draw against a standby line of credit with a blank obtained by the Association with the credit assistance of Global.

(4) To the extent that the Association Fund exceeds the amount of reimburseable losses incurred by the Insurance Carrier in any coverage year, such excess will either (a) be returned to the members as good experience returns based upon their relative premium contribution for that year, or (b) be credited to the members on the same basis by reducing the annual premium for the succeeding year.

(5) Any losses incurred by the Insurance Carrier in excess of the indemnity amount will be borne by the Insurance Carrier.

Based on the facts presented, this Division will not recommend any enforcement action to the Commission if the transactions are implemented as proposed without compliance with the registration requirements of the 1933 Act, in reliance upon your opinion as counsel that registration is not required.

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

Sincerely,

William E. Toomey
Assistant Chief Counsel

LETTER TO SEC

August 20, 1979

William Toomey, Esq.
Special Counsel
Office of General Counsel
Division of Corporation Finance
Securities and Exchange Commission
500 N. Capitol Street
Washington, D.C. 20549Dear Bill:

I am enclosing for your information a copy of the no action letter request that we are filing today on behalf of

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Global Van Lines which I understand that my associate Michael Greaney discussed with you on the telephone Friday.

In view of the extremely tight time constraints in obtaining favorable rates for the proposed insurance association, we would very much appreciate your response, if at all possible, by the end of next week.

Thank you for your assistance.

Sincerely,

John F. Olson

LETTER TO SEC

August 20, 1979

John J. Heneghan, Esq.
Chief Counsel
Division of Corporate Finance
SECURITIES AND EXCHANGE COMMISSION
500 North Capitol Street, N.W.
Washington, D.C. 20549Re: **Global Van Lines**, Inc.:

Request for 'No-Action' Letter

***4** Gentlemen:

This firm represents **Global Van Lines**, Inc. ('Global') a corporation engaged in the business of providing nationwide moving and storage services. As set forth more fully below, Global contracts with independent contractors who own and operate their own vehicles ('Owner/Operators') to perform trucking services for Global's customers and is desirous of assisting the Owner/Operators in forming an entity (the 'Association'), the members of which would be the Owner/Operators, for the purpose of obtaining more favorable insurance rates for the members. In our opinion, based upon the facts set forth below, memberships in the Association would not constitute 'securities' within the meaning of that term as defined in Section 2(1) of the Securities Act of 1933 (the 'Act'). We request your concurrence with our opinion and that we be advised that no action will be recommended by the Division of Corporate Finance to the Securities and Exchange Commission if the formation of the Association, the solicitation and issuance of memberships therein and the operation thereof proceed without compliance with the registration requirements of the Act.

INTRODUCTION

Global desires that Owner/Operators with whom it contracts for trucking services provide workers' compensation and accident and health insurance for themselves and their employees. Although they are free to obtain such insurance from the carrier of their choice, most Owner/Operators have in the past obtained coverage from a carrier with an existing or previous relationship with Global due to economic reasons which no longer exist.

Because the Owner/Operators are independent contractors and not employees of Global or otherwise related

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through a single entity, they have been unable to purchase workers' compensation and health and accident insurance at favorable group rates and are forced to pay excessive rates for such insurance. (Some Owner/Operators themselves have one or more employees; however, the number of employees of a single employer is not sufficient to obtain group insurance rates.) Certain representatives of the Owner/Operators, concerned about the rising cost of obtaining such insurance, have sought the assistance and advice of Global. Upon investigation into the problem with representatives of the insurance industry, Global has learned that if a separate entity such as the Association can be established to purchase insurance on behalf of its members, favorable group insurance rates would be available. A proposal to form the Association for this purpose has been made.

STRUCTURE AND OPERATION

OF THE ASSOCIATION

The Association will be organized as a not-for-profit corporation under California law. Initially, memberships in the Association will be offered to all Owner/Operators under contract to Global. There are currently approximately 380 such Owner/Operators. The Association will attempt to procure workers' compensation and health and accident insurance coverage for the benefit of its members at competitive group insurance rates. In addition to the premium obligations discussed below, members will be required to pay an initial refundable membership fee of approximately $600, payable in monthly installments over the first twelve months of membership. A small part of the funds raised by the membership fees will be used to pay administrative expenses of the Association. The remainder will be held by the Association in an interest-bearing bank account to meet contingent liabilities of the Association on its contractual indemnity to the Insurance Carrier (see discussion under ‘Insurance Offered’ section below). In order to obtain the insurance coverage contemplated, it will be necessary to have a minimum number of members and, in the event that an insufficient number of memberships have been issued, any premiums and any portion of the membership fee already paid will be refunded to the members who have made such payments.

***5** Memberships will not be transferable and will be redeemed approximately six months following the end of the first coverage year occurring after termination of membership. The redemption price will be the full membership fee paid to the date of termination after deducting any outstanding premium obligations (including retrospective premiums) of the terminating member.

The Association will be managed by a board of directors elected by the members annually, with each member entitled to one vote regardless of the amount of premiums paid.

An Owner/Operator's membership will not be dependent on remaining under contract to Global; rather, once a member has been admitted and qualified for insurance under the Association's group plan, such membership and coverage will continue for so long as his premium contribution remains current.

There will be no obligation on the part of any Owner/Operator under contract to Global to become a member in the Association nor will membership in the Association be denied to any Owner/Operator not under contract to Global who would otherwise qualify for group insurance coverage under the insurance plan of the Association (although it is not contemplated that persons not under contract to Global will be solicited to become members).

Solicitation of memberships will not involve the offering or holding out of any hope of appreciation or any other financial return in the value of a membership. Further, there will be no prospect of any financial ‘profit’ to the members as a result of purchasing insurance through the Association. The only incentive offered for becoming a

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member would be the availability of needed insurance coverage at competitive group insurance rates not otherwise available to independent contractors such as those providing services to Global.

INSURANCE OFFERED

After consultation with representatives of the insurance industry, it has been determined that the following type of insurance program will be available to members of the Association.

The Association will enter into a contractual relationship with a major United States insurance carrier (the ‘Insurance Carrier’) whereby the Insurance Carrier will undertake to issue workers' compensation and accident and health insurance policies to the members of the Association. Pursuant to its agreement with the Insurance Carrier, the Association will indemnify the Insurance Carrier up to a predetermined dollar limit per occurrence in the policies issued to the members. It is presently anticipated that this indemnity limit will be the first $100,000 per occurrence. Thus, the Insurance Carrier will be the primary and only obligor on each such policy for any losses incurred but will look to the Association for reimbursement up to its indemnity limit of the first $100,000 of loss per occurrence.

In order to provide the Insurance Carrier with the funds it deems necessary in order to implement this insurance program, the following premium obligations and financial assurances will be established.

***6** (1) Policy premiums determined on the basis of historical loss experience will be fixed by the Insurance Carrier at the inception of the policy in each year and charged directly to the members. Such premiums will be collected periodically throughout the year by Global (on the instructions and authority of the members) by making deductions from payments owing to the Owner/Operators under their contracts with Global. Global will forward the aggregate amount of such premiums to the insurance brokerage firm which has placed the insurance. After deducting its fee, the brokerage firm will forward the difference to the Insurance Carrier.

(2) After deducting a certain portion of such funds for administrative fees, ‘excess coverage’ premiums, and profits, the Insurance Carrier will place the remainder of the funds in a separate interest-bearing account to offset the Association's contractual obligation to indemnify the Insurance Carrier (the ‘Association Fund’). The Association Fund will be held in a bank account in the name of the Insurance Carrier. The Association Fund will be used by the Insurance Carrier to satisfy the Association's obligations under the indemnity contract.

(3) To the extent that the Association Fund is insufficient to cover the reimburseable losses sustained in any coverage year by the Insurance Carrier, the Insurance Carrier will have available the following alternative methods of seeking reimbursement from the Association and its members:

(a) The Insurance Carrier may seek reimbursement from the Association out of the membership fee funds held by the Association;

(b) The Insurance Carrier may assess retrospective premiums on the members of the Association in an amount not to exceed a maximum percentage (as yet undetermined) of the annual premium for the coverage year in question. In the event that a member chooses not to pay such retrospective premium, thereby terminating his membership in the Association, the Association may deduct from the refundable membership fee due to such terminating member the full amount of any outstanding premium obligations, including retrospective premiums, of such member; or

(c) The Insurance Carrier may require the Association to draw against a standby line of credit with a bank obtained by the Association with the credit assistance of Global.

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(4) To the extent that the Association Fund exceeds the amount of reimburseable losses incurred by the Insurance Carrier in any coverage year, such excess will either (a) be returned to the members as good experience returns based upon their relative premium contribution for that year, or (b) be credited to the members on the same basis by reducing the annual premium for the succeeding year.

(5) Any losses incurred by the Insurance Carrier in excess of the indemnity amount will be borne by the Insurance Carrier.

DISCUSSION

Based upon the foregoing facts, it is our opinion that the solicitation and issuance of memberships in the Association would not involve the offer or sale of a ‘security’ within the meaning of Section 2(1) of the Act.

***7** The Association will be organized solely to enable Owner/Operators who, because of their status as independent contractors, are unable to purchase needed workers' compensation and health and accident insurance at competitive group insurance rates. Prospective members will be evaluating a method of obtaining such insurance rather than making an investment with the expectation of profit. Prospective members will have no expectation of any capital appreciation nor will they anticipate or receive any distribution of earnings on their premiums paid for the insurance obtained by the Association.

We believe that our view that memberships in the Association are not securities within the meaning of Section 2(1) of the Act is supported by the United States Supreme Court decisions which have followed SEC v. W. J. Howey Co., 328 U.S. 293 (1946), in particular United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975) . In Forman, the Court noted that ‘when a purchaser is motivated by a desire to use or consume the item,’ and not by ‘a reasonable expectation of profits to be derived from the entrepencurial or managerial efforts of others,’ the sale of a security is not involved.421 U.S. at 852–3. Membership in the Association will entitle the member to purchase insurance at more favorable group rates; no other benefits or expectation of benefits will inure to the prospective members.

In addition to the judicial authorities noted above, we believe that our conclusion is consistent with the position taken by your Division in several no-action letters on similar factual situations, including National Association of Security Services (available May 15, 1972); Wine and Spirits Shippers Cooperative, Inc. (available March 8, 1977); Rural Television Cooperative Association (available September 22, 1977); Attorneys Liability Assurance Society Ltd. (available February 12, 1979); and Medical Device Mutual Assurance and Reinsurance Company, Ltd. (available January 29, 1979).

In the latter two letters the staff took a favorable no-action position with respect to the implementation of insurance programs which were very similar to the Association's proposed program, and included such factors as retrospective premiums, good experience returns, indemnity by the new entity and excess coverage by a primary insurance carrier.

Based upon the foregoing facts and our conclusion with respect to the definition of a ‘security’ under Section 2(1) of the Act, we request that you advise us as to whether you concur in our opinion and as to whether your Division would recommend to the Commission that no action be taken if the formation of the Association, the solicitation and issuance of memberships therein and the operation thereof are effected, as set forth above, without compliance with the registration requirements of the Act.

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NEED FOR EXPEDITED

TREATMENT OF THIS REQUEST

***8** The Owner/Operators have been advised that premiums on their existing insurance coverage have been sharply increased effective immediately. Substantial savings to the Owner/Operators will result if the insurance program described herein can be initiated by September 1, 1979. Therefore, we respectfully ask that this no-action request be given expedited treatment.

We trust this letter contains all the information which you need to process this request. However, if you have any questions or need additional information, please do not hesitate to call me or either Bruce Tester or E. Michael Greaney of our California offices at (714) 759–3800.

Yours very truly,

John F. Olson
of Gibson, Dunn & Crutcher

Fed. Sec. L. Rep. P 76,367, 1979 WL 13087 (S.E.C. No - Action Letter)

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