2000 WL 1829398 (S.E.C. No - Action Letter)

(SEC No-Action Letter)

***1** The
Baltimore
Life
Insurance
Company

Publicly Available December 11, 2000

SEC LETTER

1933 Act / s 2(a)(1)
1934 Act / s 12(g)

December 11, 2000
Publicly Available December 11, 2000

Re: The **Baltimore Life Insurance Company**

Incoming Letter dated December 8, 2000

Based on the facts presented, but without necessarily agreeing with your analysis, the Division will not recommend enforcement action to the Commission if, in reliance on your opinion of counsel that membership interests in the Mutual Insurance Holding Company, as defined in your letter, are not securities within the meaning of the Securities Act of 1933 or the Securities Exchange Act of 1934, Baltimore Life causes its current and future policy holders to become members of the Mutual Insurance Holding Company after the Reorganization without registration under either statute.

In reaching this position, we particularly note that:

- the Reorganization will be effected under Maryland law permitting the formation of mutual insurance holding companies by mutual insurance companies;
- membership rights in the Mutual Insurance Holding Company will be substantially the same as membership rights in Baltimore Life;
- with the Reorganization, Baltimore Life's policy holders will automatically become members of the Mutual Insurance Holding Company;
- the Reorganization is subject to approval by the Maryland Insurance Commissioner after notice to policy holders and a public hearing where policy holders are entitled to appear;
- the Maryland Insurance Administration has advised us that the Maryland Insurance Commissioner will approve the Reorganization only after finding that the Reorganization is equitable to existing policy holders,

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which will include a conclusion that the Reorganization is procedurally and substantively fair to existing policy holders;
• the Mutual Insurance Holding Company will be subject to insurance regulation at a level equivalent to that applicable to Baltimore Life before the Reorganization; and
• the Mutual Insurance Holding Company will not be permitted to pay dividends or to make other distributions or payments of income or profits to its members, except as directed or approved by the Maryland Insurance Commissioner.

This position is based on the representations made to the Division in your letter. Different facts or conditions might require a different result. This letter expresses the Division's position on enforcement action only and does not express a legal conclusion on the question presented.

Sincerely,

Amy M. Starr
Special Counsel

LETTER TO SEC

December 8, 2000

PAULA DUBBERLY, ESQ.
CHIEF COUNSEL
OFFICE OF THE CHIEF COUNSEL
DIVISION OF CORPORATION FINANCE
SECURITIES AND EXCHANGE COMMISSION
450 FIFTH STREET, N.W., ROOM 3027
WASHINGTON, D.C. 20549The **Baltimore Life Insurance Company**

Dear Ms. Dubberly:

We are special counsel to The **Baltimore Life Insurance Company**, a Maryland mutual life insurance company (“Baltimore Life”), in connection with Baltimore Life's proposed reorganization from a mutual life insurance company to a stock life insurance company ultimately controlled by a mutual insurance holding company. The process, described in detail below, will be effected under the newly enacted Mutual Insurance Holding Company Act, Section 3-121.1 of the Insurance Article, Annotated Code of Maryland (the “Insurance Article”), which permits the formation of mutual insurance holding companies. This letter replaces our letter dated July 17, 2000 to you.

***2** The reorganization would occur through a transaction in which Baltimore Life would reorganize from a mutual life insurance company to a stock life insurance company (referred to herein as the “Reorganized Stock Insurer”) owned indirectly by a newly-formed mutual insurance holding company (the “Mutual Insurance Holding Company”). On the Effective Date (as defined below) of the reorganization, all of the membership interests (as defined below) of Baltimore Life's policyholders in Baltimore Life will be extinguished and the policyholders will become members of the Mutual Insurance Holding Company. Also on the Effective Date, all of the shares of capital stock of the Reorganized Stock Insurer will be issued to a newly formed intermediate stock holding

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company (the “Intermediate Holding Company”), and all the Intermediate Holding Company's shares will be owned by the Mutual Insurance Holding Company. Owners of policies and contracts (each such policy and contract, a “Policy”) issued by the Reorganized Stock Insurer after the Effective Date will, pursuant to Baltimore Life's Plan of Reorganization, dated as of July 26, 2000 (the ““Plan”), and the by-laws of the Mutual Insurance Holding Company, immediately become members of the Mutual Insurance Holding Company. Under Section 3-121.1 of the Insurance Article, the fairness of the terms and conditions of the Plan must be approved in advance by the Maryland Insurance Commissioner (the ““Commissioner”), as well as by a policyholder vote.[FN1]

FN1. For your convenience, a copy of Section 3-121.1 of the Insurance Article, permitting the reorganization of Maryland mutual insurance companies into stock companies controlled by mutual insurance holding companies, along with the other sections of Maryland law cited in this letter, are attached hereto as Exhibit A. Unless otherwise indicated, references to title and section numbers are to sections of the Insurance Article.

We understand that the Maryland Insurance Administration has supplementally advised you as to the conditions the Commissioner must reach in order to issue his order approving the Plan.

End of Footnote(s).We are writing to request confirmation that, based upon the facts and representations set forth below, the staff will not recommend that the Securities and Exchange Commission (the “Commission”) take any enforcement action if, in connection with the reorganization of Baltimore Life and operation of the Mutual Insurance Holding Company, (i) the membership interests of Baltimore Life's policyholders are extinguished and such policyholders immediately become members of the Mutual Insurance Holding Company and (ii) after the Effective Date, owners of Policies issued by the Reorganized Stock Insurer automatically become members of the Mutual Insurance Holding Company, in each case without registration of the membership interests in the Mutual Insurance Holding Company under the Securities Act of 1933, as amended (the ““Securities Act”) or the Securities Exchange Act of 1934, as amended (the ““Securities Exchange Act”).

***3** Baltimore Life is a mutual life insurance company organized under the laws of Maryland and is licensed in 49 states and the District of Columbia. As of December 31, 1999, Baltimore Life's assets were in excess of $510 million and unassigned surplus was in excess of $59 million. Baltimore Life offers a range of financial products and services, including life insurance, health insurance and annuities.

As a mutual life insurance company, Baltimore Life has no authorized, issued or outstanding capital stock. The policyholders of Baltimore Life (other than holders of reinsurance contracts who do not acquire the right to vote), through the purchase of insurance policies and contracts, acquire both insurance coverage and, in accordance with the Insurance Article, certain membership interests in Baltimore Life, consisting generally of the right to vote on the election of directors of Baltimore Life and on other matters and the right to receive distributions of Baltimore Life's surplus in the event of the liquidation of Baltimore Life (such rights to vote and other rights collectively referred to herein as “membership interests”).See, e.g., Section 3-103.

THE PROPOSED REORGANIZATION

Baltimore Life proposes to reorganize from a mutual life insurance company into a stock life insurance company that is a majority-owned subsidiary of a mutual insurance holding company in accordance with the provisions of Section 3.121.1 the Insurance Article.

Sections 3-121.1(b) and (c) permit the reorganization of a Maryland mutual life insurance company to a stock life insurance company that is a majority-owned subsidiary of a mutual insurance holding company. Sections 3-121.1(g) and (h) permit such a reorganization only after the occurrence of certain events, including (i) approv-

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al of a formal plan of reorganization by the mutual insurance company's board of directors, (ii) approval of the plan of reorganization by a vote of the mutual insurance company's policyholders; and (iii) approval of the plan of reorganization by the Commissioner after holding a public hearing (if the Commissioner requires that a public hearing be held) regarding it.

Pursuant to Section 3-121.1(g)(1)(i), the Plan must be approved by the vote of a majority of the Board of Directors of Baltimore Life. The Plan was approved by Baltimore Life's Board of Directors on July 26, 2000.

Under Section 3-121.1(g)(1)(ii) and the Plan, policyholders of Baltimore Life are required to approve the Plan and the transactions required to implement the reorganization, at a special meeting of policyholders (the "Policyholder Meeting"). The Policyholder Meeting is scheduled for December 15, 2000. At such Policyholders' Meeting, any policyholder who is, based on Baltimore Life's records, a member of Baltimore Life under Section 3-103(c) and Article 1 of Baltimore Life's by-laws as of the date of the Policyholder Meeting, and is eligible to vote under Section 3-103(d) of the Insurance Article and Article 1, Sections 2 and 3 of Baltimore Life's by-laws (the "Voting Member") will be entitled to vote on the proposals presented at the Policyholder Meeting. Baltimore Life will provide notice of the Policyholder Meeting, in a manner approved by the Commissioner, setting forth the time, place and purpose of the Policyholder's Meeting. Baltimore Life will distribute the notice by first class mail to each Voting Member. As required by the Plan, Baltimore Life will also publish notice of the Policyholders' Meeting once each week for three successive weeks in a newspaper published in the Baltimore County in the State of Maryland and in a newspaper published in one of the two largest cities in each state in which Baltimore Life is licensed to conduct business. The Voting Members of Baltimore Life may vote in person, by proxy or by mail. The Plan will be approved upon receiving the affirmative vote of at least three-fourths of the votes cast by the Voting Members at the Policyholder Meeting.

***4** Also, pursuant to Section 3-121.1(h), the Plan, together with other materials required under that section and by the Commissioner, must be filed with the Commissioner for review and approval at least 60 days before the Effective Date of the reorganization. As permitted by Section 3-121.1(i)(4) and the Plan, the Commissioner will hold a public hearing on the Plan at which the policyholders of the mutual insurance company and other interested parties are permitted to appear and be heard. The public hearing is scheduled to be held on December 11, 2000. Baltimore Life will provide notice of the public hearing, in the form and in a manner approved by the Commissioner, setting forth the time, place and purpose of the public hearing, by publication once each week for three successive weeks in a newspaper published in the Baltimore County in the State of Maryland and in a newspaper published in one of the two largest cities in each state in which Baltimore Life is licensed to conduct business. Under Section 3-121.1(i)(2), the Commissioner may thereafter approve the Plan if (i) the Plan is equitable to Baltimore Life's policyholders, and (ii) the Plan is pursuant to the provisions of Section 3-121.1.

After obtaining the approval of the Plan by the Voting Members and the Commissioner, as provided under the Plan, Baltimore Life will file with the Department of Assessments and Taxation, (i) the amended and restated articles of incorporation of Baltimore Life and the articles of incorporation of the Mutual Insurance Holding Company and the Intermediate Holding Company; (ii) a statement, signed by the Chairman of the Board of Directors, the President or any Vice-President, and the Secretary or an Assistant Secretary of Baltimore Life, of the manner of the approval of the amended and restated articles of incorporation of Baltimore Life and the articles of incorporation of the Mutual Insurance Holding Company and the Intermediate Holding Company; and (iii) a copy of the approval obtained from the Commissioner to the Plan. Pursuant to the Plan, the Plan will become effective on the date of the filing of these documents with the Department of Assessments and Taxation (the "Effective Date").

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Pursuant to the Insurance Article and the Plan, the articles of incorporation of Baltimore Life will be amended and restated effective as of the Effective Date, primarily to give effect to the reorganization.

Under the Insurance Article and the Plan, the following actions will take place on the Effective Date: (i) the Mutual Insurance Holding Company and the Intermediate Holding Company will be formed, (ii) the membership interests of Baltimore Life's policyholders will be extinguished and the policyholders will immediately become members of the Mutual Insurance Holding Company, (iii) Baltimore Life will become a stock corporation and all of its shares of capital stock will be issued to the Intermediate Holding Company and (iv) all of the shares of the Intermediate Holding Company will be owned by the Mutual Insurance Holding Company. The Reorganized Stock Insurer will continue to perform all contractual obligations of Baltimore Life including those under existing insurance policies.

***5** While on the Effective Date, the Mutual Insurance Holding Company will own all of the outstanding shares of the Intermediate Holding Company, it is expected that, at some point after the reorganization, the Intermediate Holding Company may offer shares of their common stock to the public or to other investors. The timing and amount of any such offering would be subject to market conditions and the need for capital. Under Section 3-121.1(c)(2) and the Plan, after the Effective Date, the Mutual Insurance Holding Company must at all times own, directly or indirectly, a majority of the (i) outstanding voting securities of the Reorganized Stock Insurer and (ii) the total market value of all outstanding securities of the Reorganized Stock Insurer.

After the reorganization, each owner of a policy will have (i) a Reorganized Stock Insurer insurance policy or annuity contract and (ii) a membership interest in the Mutual Insurance Holding Company. Under the Insurance Article and the Mutual Insurance Holding Company's articles of incorporation and by-laws, the interests of members of the Mutual Insurance Holding Company will be substantially the same as those they had as members of Baltimore Life, consisting principally of the right to vote on the election of directors of the Mutual Insurance Holding Company and on other matters and the right to receive a distribution of surplus from the Mutual Insurance Holding Company in the event of the liquidation of the Mutual Insurance Holding Company as well as any other rights as are provided by statute, regulation and order of the Commissioner. Under the articles of incorporation of the Mutual Insurance Holding Company, the Mutual Insurance Holding Company will not be permitted to pay dividends or make other distributions or payments of income or profits to its members, except upon a voluntary dissolution or liquidation of the Mutual Insurance Holding Company or as otherwise directed or approved by the Commissioner. The Mutual Insurance Holding Company is subject to the laws relating to impaired entities, Title 9, and, additionally, its articles of incorporation will also provide that in the event of a voluntary dissolution or liquidation of the Mutual Insurance Holding Company, any surplus remaining after payment of all liabilities of the Mutual Insurance Holding Company will be distributed to its members as approved by the Commissioner.

The by-laws of the Mutual Insurance Holding Company will provide that owners of Policies issued by the Reorganized Stock Insurer after the Effective Date will immediately become members of the Mutual Insurance Holding Company. The members of the Mutual Insurance Holding Company will elect the Board of Directors of the Mutual Insurance Holding Company and vote on such other matters as may be brought to a vote of members under Maryland law.

Under the Plan and the by-laws of the Mutual Insurance Holding Company, a person who becomes an owner of a Policy will automatically become a member; membership ceases when a Policy is no longer owned. Membership interests in the Mutual Insurance Holding Company, however, will not be transferable or alienable in any

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manner whatsoever other than through a transfer of the ownership of the policy by virtue of which such membership interests are derived. This is the same way that a membership interest in Baltimore Life operates today and there will be no change. Because only the owner of a Policy can hold a membership interest, certificates evidencing membership interests will not be issued.

***6** Under the Insurance Article, the Mutual Insurance Holding Company will be subject to extensive regulatory oversight of the Commissioner. Following the reorganization, the Mutual Insurance Holding Company and the Reorganized Stock Insurer will be governed by the following statutory requirements:

(i) the Mutual Insurance Holding Company will be subject to Maryland Insurance Acquisition Disclosure and Control Act, Title 7 (except subtitle 3 for the purpose of this reorganization) as a domestic insurer. Accordingly,

- acquisitions and investments in subsidiaries will be subject to the same limitations as those for a domestic insurer;
- mergers of the Mutual Insurance Holding Company resulting in a change of control will be subject to the same limitations as those for a domestic insurer; and
- any transaction between the Mutual Insurance Holding Company and any affiliate within the insurance holding company system must, among other things, be on terms that are fair and reasonable, and certain transactions between the Mutual Insurance Holding Company and those affiliates cannot be entered into unless the Commissioner has been notified in writing at least 30 days prior to the transaction and the Commissioner does not disapprove the transaction within that period;

(ii) the Mutual Insurance Holding Company may be required to provide to the Commissioner an annual statement in the same manner as an insurer (see Section 3-121.1(j)(2));

(iii) if any liquidation proceeding is brought against the Reorganized Stock Insurer, the Mutual Insurance Holding Company must become party to the proceeding (see Section 3-121.1(1)(ii)); and

(iv) the Mutual Insurance Holding Company cannot voluntarily dissolve without the approval of the Commissioner under a proceeding similar to that involving domestic insurers (see Section 3-121.1(l)(1)(i) and Title 9) and, in any such proceeding, all of the assets of the Mutual Insurance Holding Company will be deemed assets of the estate of the Reorganized Stock Insurer to the extent necessary to satisfy claims against the Reorganized Stock Insurer (see Section 3-121.1(1)(2)).

Based on the foregoing, it is apparent that the Mutual Insurance Holding Company and the Intermediate Holding Company will be subject to regulatory oversight by the Commissioner at a level that is substantially equivalent to that imposed upon domestic insurers.[FN2]

FN2. Certain provisions of the Insurance Article which relate to the operating activity of an insurance company are not applicable to a mutual insurance holding company which does not issue policies, such as provisions relating to the filing of policy rates and forms. However, as discussed above, the Mutual Insurance Holding Company will be subject to extensive regulatory oversight by the Commissioner.

End of Footnote(s).DISCUSSION

1. Registration under the Securities Act

Applying the test developed in Securities and Exchange Commission v. Howey, 328 U.S. 293 (1946), and its progeny, it is our opinion that the membership interests in the Mutual Insurance Holding Company received by Baltimore Life's policyholders in connection with the reorganization and created from time to time in the Mutual

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Insurance Holding Company by virtue of the issuance of a Policy would not constitute the offer or sale of a "security" as that term is defined in Section 2(a)(1) of the Securities Act. We note that the staff has previously taken no-action positions involving this issue in the context of reorganization transactions similar to that contemplated by Baltimore Life. National Travelers Life Company (publicly available December 29, 1999); The Woodmen Accident and Life Company (publicly available December 28, 1999); American Republic Insurance Company (publicly available December 23, 1999); The Security Mutual Life Insurance Company of Lincoln, Nebraska, (publicly available November 30, 1999); Trustmark Insurance Company (publicly available August 25, 1999); Mutual Trust Life Insurance Company (publicly available August 4, 1999); Mutual of Omaha Insurance Company (publicly available November 27, 1998); National Life Insurance Company (publicly available September 23, 1998); National Capital Reciprocal Insurance Company (publicly available July 10, 1998); Principal Mutual Life Insurance Company (publicly available June 8, 1998); The Ohio National Life Insurance Company (publicly available June 5, 1998); Security Benefit Life Insurance Company (publicly available June 3, 1998); Minnesota Mutual Life Insurance Company (publicly available May 21, 1998); Provident Mutual Life Insurance Company (publicly available April 7, 1998); FCCI Mutual Life Insurance Company (publicly available March 30, 1998); Ameritas Life Insurance Corporation (publicly available December 8, 1997); Acacia Mutual Life Insurance Company (publicly available June 27, 1997); Pacific Mutual Life Insurance Company (publicly available April 17, 1997); General American Life Insurance Company (publicly available February 20, 1997); and American Mutual Life Insurance Company (publicly available June 13, 1996) (collectively, the "Mutual Insurance Holding Company Letters").

***7** Section 2(a)(1) of the Securities Act defines the term "security," in pertinent part, as follows:

> [A]ny note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights … or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

A "membership interest" is not included in this list of financial instruments. An unlisted instrument, however, may still be deemed to be a security if it falls within one of the definition's two general categories, "investment contract" or "interest or instrument commonly known as a 'security."D'[FN3]

FN3. Insurance policies, including their related membership interests in the insurer, are generally not considered securities. The 1933 House Committee Report on the Securities Act explained that the exemption for insurance policies, … makes clear what is already implied in the act, namely, that insurance policies are not to be regarded as securities subject to the provisions of the act. The insurance policy and like contracts are not regarded in the commercial world as securities offered to the public for investment purposes. The entire tenor of the act would lead, even without this specific exemption, to the exclusion of insurance policies from the provisions of the act, but the specific exemption is included to make misinterpretations impossible.

> H.R. Rep. No. 85, 73d Cong., 1st Sess. 15 (1933); see also SEC v. Variable Annuity Life Insurance Company of America, 359 U.S. 65, 74 n.4 (1959) (""VALIC") (Brennan, J., concurring) (stating insurance policy exemption "just confirmatory of the policy's noncoverage under the definition of security"). Some insurance products with investment components are regulated as investment contracts, but this is because such products have elements which qualify them as "securities," such as the holder bearing substantial investment risk and expecting a profit, and the product being marketed as an investment. See VALIC, 359 U.S. at 71-73;see also17 C.F.R. § 230.151 (Safe Harbor Definition of Certain 'Annuity Contracts or Optional An-

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nuity Contracts' Within the Meaning of Section 3(a)(8)). The fact that the policyholders are members of the Mutual Insurance Holding Company while their insurance policies are written by the Reorganized Stock Insurer does not affect the securities law treatment of the insurance policies, which are not considered securities under the Securities Act, or those other insurance products that are subject to the Securities Act. Conventional insurance would be purchased through the Reorganized Stock Insurer and, as a result, a policyholder by operation of law would become a Mutual Insurance Holding Company member. No "specific consideration in return for a separable financial interest with the characteristics of a security" is paid for the membership interest, but only the insurance policy or annuity contract is purchased. International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 559 (1979) (noncontributory pension plan). Accordingly, conventional insurance policies available from the Reorganized Stock Insurer and the related non-separable membership interests, which terminate when the insurance terminates, would constitute "insurance," not "securities," as those terms are commonly understood. Likewise, the existence of membership interests in the Mutual Insurance Holding Company would not affect the securities law treatment of investment products that are considered securities under the Securities Act, and which would continue to be subject to registration as before.

End of Footnote(s).***8** In Howey, the Supreme Court developed a test that has generally been utilized to determine whether an instrument is an "investment contract" or ""interest or instrument commonly known as a 'security."D'[FN4] The Supreme Court, in Reves v. Ernst & Young, 494 U.S. 56, 64 (1990), summarized the elements of the Howey test as:

FN4. While the Howey test specifically focused on "investment contracts" the Court since Howey has applied the test more broadly. See United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852 (1975) (stating the Howey test ""embodies the essential attributes that run through all of the Court's decisions defining a security"); Landreth Timber Co. v. Landreth, 471 U.S. 681, 691 n.5 (1985) (criticizing Forman but concluding that the Howey test applies in determining whether an interest is an "instrument commonly known as a "security"D').

End of Footnote(s).(1) an investment; (2) in a common enterprise; (3) with reasonable expectation of profits; and (4) to be derived from the entrepreneurial or managerial efforts of others.

Membership interests in a mutual insurance holding company do not meet the first and third elements required under the Howey test.

First, an investment is "an exchange for value," most often a monetary contribution. Uselton v. Commercial Lovelace Motor Freight, Inc., 940 F.2d 564, 574-75 (10th Cir. 1991). A membership interest is not issued or created as the result of an "exchange for value" which characterizes an investment. A membership interest is created only upon the purchase of the Policy. Holders of existing Policies issued by Baltimore Life will not be required to make payments in cash or in the form of other property to become members of the Mutual Insurance Holding Company in the reorganization; likewise, holders of Policies issued after the reorganization will become members automatically by operation of law and by operation of the Mutual Insurance Holding Company's corporate documents, without the payment of cash or other property separate from the consideration paid for the insurance or annuity benefits provided by the Policy. It is the underwriting action of the Reorganized Stock Insurer, approving the application of the policyholder, and the payment by the policyholder of the premiums for the insurance or annuity benefits of the Policy, which determines whether a person becomes and remains a policyholder (and therefore a member in the Mutual Insurance Holding Company). Any monies paid by policyholders would be in the form of premiums paid to the Reorganized Stock Insurer with the intent to obtain insurance, and not with any profit-making, profit-sharing or investment intent with respect to membership in the Mutual In-

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surance Holding Company separate and apart from the policyholder's rights under the Policy. Additionally, there will be no marketing of membership interests as investments or otherwise, because they are simply rights that accompany a Policy.

***9** Second, a membership interest simply does not entail for a member any ""reasonable expectation of profits" of the Mutual Insurance Holding Company. Profits are defined under the Howey test as "either capital appreciation resulting from the development of the initial investment … or participation in earnings resulting from the initial use of investors' funds." United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852 (1975). Where a person is not ""'attracted solely by the prospects of a return' on his investment," Forman, 421 U.S. at 852 (citing Howey, 328 U.S. at 299), but rather "by a desire to use or consume the item purchased," the expectation of profit element is not met.

Under its articles of incorporation, the Mutual Insurance Holding Company will not be permitted to pay dividends to members or make other distributions or payments of income or profits to its members, except upon a dissolution or liquidation of the company or as otherwise directed or approved by the Commissioner. Moreover, since membership interests are not transferable independent of the Policy and are extinguished if a member is no longer an owner of a Policy of the Reorganized Stock Insurer, it cannot be said that there is any market for the membership interests or that they are "repurchased" at a "profit" by the Mutual Insurance Holding Company or by any other person. A holder of a membership interest, therefore, has no ability to realize any profit on the interest. Rather, the membership interest derives solely from ownership of a Policy providing insurance risk protection; it has no independent value. Under these circumstances, we conclude that a person with a membership interest cannot be said to be motivated to become a member "solely by the prospects of a return" on the membership interest. See Forman, 421 U.S. at 852.

Finally, we believe that the membership interests would not constitute a ""security" under the criteria applied by the Court in Reves.[FN5] In Reves, the Court noted four factors that "this Court has held apply in deciding whether a transaction involves a 'security"D':

FN5. The Court in Reves considered whether promissory notes issued by a farmers' cooperative constituted "notes" under the Securities Exchange Act definition of "security." In analyzing whether a note is within the definition of security, the Court followed the "family resemblance test," which provides that a note is not a security if it bears a resemblance to notes which have been previously designated by courts as not constituting securities. Reves, 494 U.S. at 63-67.

End of Footnote(s).***10** First, the transaction in which the instrument was received must be reviewed to assess the motivations that would prompt a reasonable seller and buyer to enter into it. "If the seller's purpose is to raise money for the general use of the business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be considered a 'security."D'Id, at 66.

Second, "the plan of distribution of the instrument" must be examined "to determine whether it is an instrument in which there is 'common trading for speculation or investment …."'Id.

Third, the "reasonable expectations of the investing public" must be examined. Id. In this regard, the Court noted that the marketing efforts employed in selling an alleged security are relevant to the expectations of the general public. Id., at 69 (noting that "the advertisements for the notes here characterized them as 'investments' … and there were no countervailing factors that would have led a reasonable person to question this characterization").

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> Finally, the presence of "some other factor such as the existence of another regulatory scheme [which] significantly reduces the risk of the instrument …" must be reviewed. Id., at 67.

We have analyzed the membership interests associated with the issuance of a Policy under the Reves criteria, particularly in light of its suggestion that the existence of another regulatory scheme might be relevant. Our analysis confirms our conclusion that the membership interests do not constitute ""securities."

First, the motivation of the person purchasing the Policy is not the expectation of receiving a profit on account of the related membership interest. Rather, the policyholder's motivation is to obtain the insurance or annuity benefits of the Policy. In addition, the Mutual Insurance Holding Company is not attempting "to finance substantial investments" through the mechanism of membership interests. In fact, the creation of a membership interest does not thereby generate capital for the "seller."

Second, there is no "plan of distribution" of membership interests; membership interests simply accompany the issuance of a Policy from the Reorganized Stock Insurer, and cannot be transferred apart from the Policies to which they relate.

Third, a membership interest cannot be viewed by the policyholder as anything other than an inseparable attribute of the Policy to which it attaches, as is the case today. Such a characterization is warranted for a number of reasons, including that the membership interests will not be marketed to the general public as interests which would give rise to a profit expectancy and no certificates will be issued in respect of the membership interests.

***11** Fourth, a membership interest creates no "risk" for the policyholder. As noted above, a membership interest has no independent value: no dividends or other distributions of profits can be paid on the interest, except upon a dissolution or liquidation of the company or as otherwise approved by the Commissioner, and the interest cannot be transferred separately from the Policy. Unlike the examples cited by the Court in Reves where the presence of a regulatory scheme reduced the risk to the holder of the instrument,[FN6] the membership interest has no "risk" that needs to be reduced by a regulatory scheme.

FN6. Cf. Marine Bank v. Weaver, 455 U.S. 551 (1982) (certificates of deposit insured by the Federal Deposit Insurance Corporation) and Teamsters v. Daniel, 439 U.S. 551 (1979) (pension plan regulated under the Employee Retirement Income Security Act of 1974).

End of Footnote(s).Finally, the Mutual Insurance Holding Company will be subject to a level of regulation substantially equivalent to that of Baltimore Life prior to the reorganization. See infra.[FN7]

FN7. The Reves test itself does not necessarily require the existence of a regulatory regime, but only "some factor," such as a regulatory regime, that will reduce the risk of the instrument. Reves, 494 U.S. at 66. We further note in this regard that in many other cases interpreting the term "security" the Court and the Staff have not required the existence of another regulatory scheme in characterizing whether the instrument at hand was a security. See, e.ggggg., SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943), Forman, 421 U.S. 837 (1975), Dairyman, Inc. (publicly available Jan. 29, 1993), 1993 WL 33275 (S.E.C.).

End of Footnote(s).Therefore, since the membership interests do not meet any of the tests articulated by the Supreme Court for determining whether an instrument is a security under Section 2(a)(1) of the Securities Act, it is our opinion that the membership interests should not be considered securities under the Act.[FN8] We believe that under the circumstances described above, it is appropriate for the staff to take a position similar to that

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taken in several past No-Action letters issued by the staff, including the Mutual Insurance Holding Company Letters; Construction Trades Purchasing Group (publicly available October 1, 1993); Subway Owners' Mutual Insurance Company (publicly available September 28, 1992); National Transport Assurance Alliance, Inc. (publicly available February 22, 1989); Cal Accountants Mutual Insurance Co. (publicly available November 16, 1988); Consortium of Licensed-Beverage Retailers Association (publicly available October 13, 1987); Medmarc Insurance Company (publicly available October 2, 1987); First Monetary Mutual Ltd. (publicly available March 25, 1987); Home Mortgage Access Holding Corporation (publicly available March 23, 1984); Attorney's Liability Assurance Society Ltd. (publicly available February 12, 1979).

FN8. The interposition of an intermediate holding company does not affect our opinion that the membership interests are not securities. See the Mutual Insurance Holding Company Letters, supra.

End of Footnote(s).2. Registration Under the Securities Exchange Act
***12** Section 12(g) of the Securities Exchange Act requires that certain “issuers” with total assets exceeding $1,000,000 and a class of “equity securities” held of record by 500 or more persons must register under the Securities Exchange Act. An “issuer” is defined under Section 3(a)(8) as “any person who issues or proposes to issue any security.”The definition of “security” under the Securities Exchange Act “is virtually identical” to the definition under the Securities Act. Forman, 421 U.S. at 848 n.12 (citing Tcherepnin v. Knight, 389 U.S. 332, 336, 342);see also Reves, 494 U.S. at 61 n.1;Landreth, 471 U.S. at 686 n.1. For the same reasons set forth in the discussion of the Securities Act above, we believe a membership interest is not a security under the Securities Exchange Act. We are therefore of the opinion that the Mutual Insurance Holding Company will not be subject to the registration requirements of Section 12(g) of the Securities Exchange Act.

* * *

Based on the foregoing, we request that the Staff confirm that it will not recommend any enforcement action to the Commission if, in connection with the reorganization of Baltimore Life and operation of the Mutual Insurance Holding Company, (i) the membership interests of Baltimore Life's policyholders are extinguished and such policyholders immediately become members of the Mutual Insurance Holding Company and (ii) after the Effective Date, owners of Policies issued by the Reorganized Stock Insurer automatically become members of the Mutual Insurance Holding Company, in each case without registration of the membership interests in the Mutual Insurance Holding Company under the Securities Act or the Securities Exchange Act.

Because of the importance of the reorganization to Baltimore Life, we would appreciate hearing from you at your earliest convenience. If you should have any questions or would like additional information, please telephone the undersigned at (212) 909-6655.

Sincerely,

James C. Scoville
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, NY 10022
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2000 WL 1829398 (S.E.C. No - Action Letter)

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