1999 WL 1276640 (S.E.C. No - Action Letter)

(SEC No-Action Letter)

***1 Woodmen**
Accident
and
Life
Company

Publicly Available December 28, 1999

SEC LETTER

1934 Act / s 3(a) (8)
1933 Act / s 5
1933 Act / s 2(a) (1)

December 28, 1999
Publicly Available December 28, 1999

Re: **Woodmen Accident** and **Life Company** (“Woodmen”)

Incoming letter dated December 28, 1999

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, Woodmen 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 Nebraska 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 Woodmen;
- with the Reorganization, Woodmen's policy holders will automatically become members of the Mutual Insurance Holding Company;
- the Reorganization is subject to approval by the Director of the Department of Insurance of the State of Nebraska (“Director of Insurance”) after notice to policy holders and a public hearing where policy holders are entitled to appear;

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• the Director of Insurance will approve the Reorganization only after finding that the Reorganization is fair and equitable to existing policy holders;
• the Mutual Insurance Holding Company will be subject to insurance regulation at a level equivalent to that applicable to Woodmen before the Reorganization;
• 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 Director of Insurance.

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,

Theresa Regan
Special Counsel

LETTER TO SEC

December 28, 1999

CATHERINE T. DIXON, 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. 20549 **Woodmen Accident** and **Life Company**

Dear Ms. Dixon:

We are special counsel to **Woodmen Accident** and **Life Company**, a Nebraska mutual life insurance company (“Woodmen”), in connection with Woodmen'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 Mutual Insurance Holding Company Act, Sections 44-6122 to 44-6142 of the Revised Reissued Statutes of Nebraska (the “Insurance Statute”), which permits the formation of mutual insurance holding companies.

***2** The reorganization would occur through a transaction in which Woodmen would reorganize from a mutual life insurance company to a stock life insurance company (referred to herein as the “Reorganized Stock Company”) 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 Woodmen's policyholders in Woodmen 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 Company will be issued to a newly formed intermediate stock holding company (the “Intermediate Holding Company”), and all the Intermediate Holding Company's shares will be owned

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by the Mutual Insurance Holding Company. Owners of policies with membership rights (each such policy a "Policy") issued by the Reorganized Stock Company after the Effective Date will, pursuant to Woodmen's Plan of Reorganization, dated as of August 26, 1999 (the "Plan"), and the articles of incorporation and by-laws of the Mutual Insurance Holding Company, immediately become members of the Mutual Insurance Holding Company. Under Sections 44-6122 to 44-6142 of the Insurance Statute, the fairness of the terms and conditions of the Plan must be approved in advance by the Director of the Department of Insurance of the State of Nebraska (the "Nebraska Director"), as well as by a policyholder vote.[FN1]

FN1. For your convenience, a copy of Sections 44-6122 to 44-6142 of the Insurance Statute, permitting the reorganization of Nebraska mutual insurance companies into stock companies controlled by mutual insurance holding companies, along with the other sections of Nebraska law cited in this letter, are attached hereto as Exhibit A. Unless otherwise indicated, references to section numbers are to sections of the Insurance Statute.

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 Woodmen and operation of the Mutual Insurance Holding Company, (i) the membership interests of Woodmen'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 Company 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").

Woodmen is a mutual life insurance company organized under the laws of Nebraska and is licensed in 30 states. As of June 30, 1999, Woodmen's assets were in excess of $756 million and unassigned surplus was in excess of $87 million. Woodmen offers a range of financial products and services, including permanent life insurance, term life insurance, fixed annuities and disability income insurance[FN2].

FN2. Woodmen does not currently offer variable life insurance products and annuities that are required to be registered with the Commission. If such products are offered in the future, Woodmen represents that the Reorganized Stock Company will comply with all applicable provisions of the Securities Act regarding such products.

End of Footnote(s).***3** As a mutual life insurance company, Woodmen has no authorized, issued or outstanding capital stock. The policyholders of Woodmen, through the purchase of insurance policies, acquire both insurance coverage and, in accordance with the Insurance Statute, certain membership interests in Woodmen, consisting generally of the right to vote on the election of directors of Woodmen and on other matters, the right to receive distributions of Woodmen's surplus in the event of the liquidation of Woodmen and the right to receive distributions in the event of the demutualization of Woodmen (such rights to vote and other rights collectively referred to herein as "membership interests").See, e.g., Section 44-217.

THE PROPOSED REORGANIZATION

Woodmen 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 Sections 44-6122 to 44-6142 of the Insurance Statute.

Section 44-6125 permits the reorganization of a Nebraska mutual life insurance company to a stock life insur-

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ance company that is a majority-owned subsidiary of a mutual insurance holding company. Sections 44-6126 to 44-6130 permit such a reorganization only after the occurrence of certain events, including (i) approval of a formal plan of reorganization by the mutual insurance company's board of directors, (ii) approval of the plan of reorganization by the Nebraska Director after holding a public hearing regarding it, and (iii) approval of the plan of reorganization by a vote of the mutual insurance company's policyholders.

Pursuant to Section 44-6126, the Plan must be approved by Woodmen's Board of Directors. The Plan was approved by Woodmen's Board of Directors on August 26, 1999.

Also pursuant to Section 44-6126, the Plan, together with other materials required under that section and by the Nebraska Director, must then be filed with the Nebraska Director for review and approval. The Plan was filed with the Nebraska Director on August 26, 1999. As required by Section 44-6127 and as provided in the Plan, the Nebraska Director held a public hearing on the Plan on October 14, 1999 at which the policyholders of the mutual insurance company and other interested parties were permitted to appear and be heard. Woodmen provided notice of the public hearing satisfactory to the Nebraska Director. Under Section 44-6128, the Nebraska Director thereafter approved the Plan finding that (i) the Plan is fair and equitable to Woodmen's policyholders, (ii) the Plan does not deprive Woodmen's policyholders of their property rights or due process of law and (iii) the Reorganized Stock Company meets the minimum requirements to be issued a certificate of authority by the Nebraska Director to transact the business of insurance in Nebraska and the continued operations of the Reorganized Stock Company are not hazardous to the future policyholders of the Reorganized Stock Company and the public. Following the reorganization, the Nebraska Director will obtain jurisdiction at all times over the Mutual Insurance Holding Company and the Intermediate Holding Company to assure that the Woodmen policyholders' interests are protected. See Section 44-6125(5)(c).

***4** Under Section 44-6129(1) and the Plan, policyholders of Woodmen are required to approve the Plan and the transactions required to implement the reorganization, including amendment and restatement of Woodmen's amended and substituted articles of incorporation, at a special meeting of policyholders (the “Policyholder Meeting”). Subject to certain limited exceptions involving policyholders who owned Policies in more than one capacity, each policyholder who was a policyholder on the date the Plan was initially approved by the Board of Directors of Woodmen (“Voting Policyholders”) is entitled to cast one vote at the Policyholder Meeting, irrespective of the number or size of Policies owned by such policyholder. Woodmen shall mail notice of the Policyholder Meeting to Voting Policyholders, in a form satisfactory to the Nebraska Director, within 45 days of the Nebraska Director's approval of the Plan and at least 30 days before the Policyholder Meeting. Such notice was mailed by first-class mail to the last known address of each Voting Policyholder as it appeared on the records of Woodmen and was accompanied by (i) a brief description of the Plan and a statement that the Nebraska Director had approved the Plan, and (ii) a proxy to vote for, against or abstain from voting for the proposal to approve and adopt the Plan and the transactions required to implement the reorganization. As required by the Plan and the Insurance Statute, the Plan and the transactions required to implement the reorganization were approved by the affirmative vote of more than two-thirds of all votes cast by Voting Policyholders at the Policyholder Meeting held on December 16, 1999.

After obtaining the approval of the Plan by Voting Policyholders and the Nebraska Director, Woodmen will file with the Nebraska Director (i) a certificate stating that all of the conditions set forth in the Plan have been satisfied and (ii) a certificate setting forth the vote and certifying that the Plan was approved by not less than two-thirds of Voting Policyholders voting in person or by proxy on the Plan. Pursuant to Section 44-6130, the Plan will become effective on the date the Nebraska Director issues a certificate of authority in response to such fil-

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ings (the “Effective Date”).

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

Under the Insurance Statute 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 Woodmen's policyholders will be extinguished and the policyholders will immediately become members of the Mutual Insurance Holding Company, (iii) Woodmen 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 Company will continue to perform all contractual obligations of Woodmen including those under any existing insurance policy.

***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 or the Reorganized Stock 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. Any offering of the stock of the Intermediate Holding Company or the Reorganized Stock Company would require the prior approval of the Nebraska Director. See Section 44-6125(5)(i). Under the Insurance Statute and the articles of incorporation of the Mutual Insurance Holding Company, after the Effective Date, the Mutual Insurance Holding Company must at all times own, directly or indirectly, a majority of the outstanding voting securities of the Reorganized Stock Company. See 44-6124; see also 44-6125(5)(e) (the aggregate pledges and encumbrances of a mutual insurance holding company's assets shall not affect more than forty-nine percent of the mutual insurance holding company's stock in the intermediate holding company or the reorganized stock company).

After the reorganization, each owner of a policy will have (i) a Reorganized Stock Company insurance policy and (ii) a membership interest in the Mutual Insurance Holding Company. Under the Insurance Statute and the Mutual Insurance Holding Company's articles of incorporation, the interests of members of the Mutual Insurance Holding Company will be substantially the same as those they had as members of Woodmen, 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 distributions of surplus from the Mutual Insurance Holding Company in the event of the liquidation of the Mutual Insurance Holding Company and to receive a distribution in the event of the demutualization of the Mutual Insurance Holding Company, as well as any other rights as are provided by statute, regulation and order of the Nebraska Director. Under the Insurance Statute and 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 Nebraska Director. See 44-6125(5)(h). The Mutual Insurance Holding Company's articles of incorporation will 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 shall be distributed to its members as approved by the Nebraska Director.

Membership interests in a Mutual Insurance Holding Company are exempt from registration as securities under Nebraska law. See Section 44-6134. The articles of incorporation of the Mutual Insurance Holding Company

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will provide that owners of Policies issued by the Reorganized Stock Company 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 Nebraska law.

***6** Under the articles of incorporation 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 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 Woodmen 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.

Under the Insurance Statute, the Mutual Holding Company and the Intermediate Holding Company will at all times be subject to the jurisdiction and oversight of the Nebraska Director. See Section 44-6125(5)(c). Following the reorganization, the Mutual Insurance Holding Company and the Intermediate Holding Company will be governed by the following statutory requirements:

(i) the Nebraska Director will have jurisdiction over the Mutual Insurance Holding Company and the Intermediate Holding Company to assure that policyholder interests are protected (see Section 44-6125(5)(c));

(ii) the Mutual Insurance Holding Company and the Intermediate Holding Company shall be treated as domestic insurers subject to the Nebraska Insurers Demutualization Act, the Nebraska Insurers Supervision, Rehabilitation and Liquidation Act, and the general rules applicable to the organization of insurance companies set forth in Chapter 44, Article 2 and Section 44-301 of the Insurance Statute (see Section 44-6125(5)(d);

(iii) no domestic mutual insurance company may reorganize by merging its policyholders' membership interests into the Mutual Insurance Holding Company except with the approval of the Nebraska Director (see Section 44-6125(2)); no person may enter into an agreement to merge or otherwise to acquire control of a domestic mutual insurance company except in accordance with the regulatory approval required by Section 44-2126(1); the Mutual Insurance Holding Company is deemed a “domestic mutual insurance company” for purposes of Section 44-2126;

(iv) the Mutual Insurance Holding Company will be required to provide to the Nebraska Director an annual statement containing financial statements and a confidential statement disclosing any intention to pledge, borrow against, alienate, hypothecate, or in any way encumber the assets of the Mutual Insurance Holding Company (see Section 44-6135);

(v) the aggregate pledges and encumbrances of the Mutual Insurance Holding Company's assets shall not affect more than forty-nine percent of the Mutual Insurance Holding Company's stock in the Intermediate Holding Company or Woodmen (see Section 44-6125(5)(e));

(vi) the Mutual Insurance Holding Company must at all times directly or indirectly own a majority of the voting securities of Woodmen (see Section 44-6124);

***7** (vii) the Mutual Insurance Holding Company or the Intermediate Holding Company cannot voluntarily dissolve without the approval of the Nebraska Director (see Section 44-6125(5)(j));

(viii) at least fifty percent of the net worth of the Mutual Insurance Holding Company must be invested in insurers (see Section 44-6125(5)(f));

(ix) the Nebraska Director has the power to order production of any records, books, or other information and papers in the possession of the Mutual Insurance Holding Company or its affiliates as are reasonably neces-

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sary to ascertain the financial condition of Woodmen or to determine compliance with the Insurance Statute (see Section 44-6136);
(x) the Nebraska Director must approve the articles of incorporation of the Mutual Insurance Holding Company, the Intermediate Holding Company and the Reorganized Stock Company and any amendments thereto (see Sections 44-6125(5)(d), 44-6126(8) and 44-231);
(xi) if any proceeding under the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act is brought against the Reorganized Stock Company, the Mutual Insurance Holding Company and the Intermediate Holding Company shall become parties to the proceeding (see Section 44-6125(5)(g)); and
(xii) all of the assets of the Mutual Insurance Holding Company and the Intermediate Insurance Company are deemed assets of the estate of the Reorganized Stock Company to the extent necessary to satisfy claims against the Reorganized Stock Company (Id.).

In addition to the statutory requirements set forth above, the Mutual Insurance Holding Company and the Intermediate Holding Company will be subject to the provisions of the Nebraska Holding Company System Act. See Sections 44-2120 et. seq. As a result, any transaction between the Mutual Insurance Holding Company and the Reorganized Stock Company and any affiliates within the insurance holding company system must, among other things, be on terms that are fair and reasonable. See Section 44-2133. In addition, certain transactions between the Mutual Insurance Holding Company and the Reorganized Stock Company may not be entered into unless the Nebraska Director has been notified in writing at least 30 days prior to the transaction and the Nebraska Director does not disapprove the transaction within that period. Id.

Woodmen has made no specific determination to undertake any offering of the stock of the Reorganized Stock Company or the Intermediate Holding Company. Any determination to offer shares of any such company in the future would depend on numerous facts, including the then current needs of the Mutual Insurance Holding Company for additional capital to facilitate internal growth or acquisition of other insurance or financial services entities, relevant equity market conditions and the financial and business performance and prospects of the Reorganized Stock Company or the Intermediate Holding Company. Any stock offerings of these companies would be subject to prior approval of the Nebraska Director. See Section 44-6125(i). The approval of the policyholders of the Reorganized Stock Company or the members of the Mutual Insurance Holding Company may not be required for any sale of stock of the Reorganized Stock Company or the Intermediate Holding Company.

***8** Based on the foregoing, it is apparent that the Mutual Insurance Holding Company will be subject to regulatory oversight by the Nebraska Director at a level that is substantially equivalent to that imposed upon domestic insurance companies.[FN3]

FN3. Certain provisions of the Insurance Statute 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, the Mutual Insurance Holding Company will be subject to extensive regulatory oversight by the Nebraska Director who is directed by Section 44-6125(5)(c) to assure that interests of policyholders of the Reorganized Stock Company are protected.

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

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Woodmen's policyholders in connection with the reorganization and created from time to time in the Mutual 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 Woodmen. 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) ("Mutual of Omaha"); 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) ("Principal Mutual"); 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) ("American Mutual") (collectively, the "Mutual Insurance Holding Company Letters").

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

> ***9** [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.'"[FN4]

FN4. 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 Annuity Contracts' Within the Meaning of Section 3(a)(8)). The fact that the policyholders are members of the

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Mutual Insurance Holding Company while their insurance policies are written by the Reorganized Stock Company 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 Company 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 Company and the related nonseparable 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).***10** 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.'"[FN5] The Supreme Court, in Reves v. Ernst & Young, 494 U.S. 56, 64 (1990), recently summarized the elements of the Howey test as:

FN5. 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'").

End of Footnote(s).(1) an investment; (2) in a common enterprise; (3) with reasonable expectation of profits; (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 Woodmen 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 Company, 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 Company with the intent to obtain insurance, and not with any profit-making, profit-sharing or investment intent with respect to membership in the Mutual Insurance Holding Company separate and apart from the policyholder's rights under the Policy. Additionally, there will be

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no marketing of membership interests as investments or otherwise, because they are simply rights that accompany a Policy.

***11** 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 Nebraska Director. 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 Company, 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.[FN6] In Reves, the Court noted four factors that "this Court has held apply in deciding whether a transaction involves a 'security"':

FN6. 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).***12** 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."'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").
> Finally, the presence of "some other factor such as the existence of another regulatory scheme [which] sig-

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nificantly 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 memberships 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 Company, 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, no certificates will be issued in respect of the membership interests and, under the Insurance Statute, the membership interests are not recognized as securities.

***13** 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 Nebraska Director, 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,[FN7] the membership interest has no "risk" that needs to be reduced by a regulatory scheme.

FN7. 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 Woodmen prior to the reorganization. As noted above, stock offerings by the Intermediate Holding Company and the Reorganized Stock Company will be subject to approval by the Nebraska Director; and the Nebraska Director will be entitled to audit and examine the financial condition of the Mutual Insurance Holding Company. In addition, the Nebraska Director will retain oversight over the membership interests in order to ensure that policyholders' interests as members are protected: for example, the Mutual Insurance Holding Company's articles of incorporation and by-laws will be approved by the Nebraska Director; the membership interests themselves may only be created pursuant to a plan of reorganization which has been approved by the Nebraska Director after finding, among other things, that the plan is fair and equitable to Woodmen's policyholders; following reorganization, the Nebraska Director will retain jurisdiction over the Mutual Insurance Holding Company; and the Mutual Insurance Holding Company may not dissolve without the approval of the Nebraska Director.[FN8] See infra.

FN8. The Reves test itself does not necessarily require the existence of a regulatory regime, but only "some

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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. g., 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).***14** 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.[FN9] We believe that under the circumstances described above, it is appropriate for the staff to take a position similar to that 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).

FN9. 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

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 Woodmen and operation of the Mutual Insurance Holding Company, (i) the membership interests of Woodmen'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 Company 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.

***15** Because of the importance of the reorganization to Woodmen, 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.

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Sincerely,

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1999 WL 1276640 (S.E.C. No - Action Letter)

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