1999 WL 1268878 (S.E.C. No - Action Letter)

(SEC No-Action Letter)

***1** National Travelers Life Co.

Publicly Available December 29, 1999

SEC LETTER

1940 Act / s 3(a)
1933 Act / s 2(a)(1)
1934 Act / s 3(a)(8)
1934 Act / s 12(g)

December 29, 1999
Publicly Available December 29, 1999

Re: National Travelers Life Co. (the “Company”)

Incoming letter dated December 11, 1999

Based on the facts presented, but without necessarily agreeing with your analysis, the Division will not recommend enforcement action to the Commission if the Company, in reliance on your opinion of counsel that membership interests in the Mutual Holding Company (as defined in your letter) are not “securities” within the meaning of Section 2(a)(1) of the Securities Act, causes: (1) the Company's existing policyholders to become holders of membership interests in the Mutual Holding Company pursuant to the described reorganization (“Reorganization”); and (2) after the Reorganization, new policyholders automatically to receive membership interests in the Mutual Holding Company without registration under the Securities act of 1933 or the Securities Exchange Act of 1934.

In reaching this position, we particularly note that:

- the Reorganization will be undertaken in accordance with the referenced Iowa law permitting the formation of mutual insurance holding companies;
- membership rights of members of the Mutual Holding Company will be substantially the same as membership rights in the Company;
- with the Reorganization, the Company's policyholders automatically will become members of the Mutual Holding Company;
- the Reorganization was approved by the Commissioner of Insurance of the State of Iowa (the “Commissioner”) after notice to policyholders and a public hearing where policyholders at which policyholders were entitled to appear;
- the Commissioner's approval was granted only after a determination that the Reorganization is fair and

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equitable to existing policyholders;
• the Mutual Holding Company will be subject to regulation by the Commissioner at a level equivalent to that of the Company before the Reorganization; and
• the Mutual 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 Commissioner.

The Division of Investment Management has asked us to inform you that, on the basis of the facts presented but without necessarily agreeing with your legal analysis, it would not recommend enforcement action to the Commission under the Investment Company Act of 1940 (the "1940 Act") if the Mutual Holding Company is operated in the manner you describe without registration under the 1940 Act, in reliance upon your opinion of counsel that the Mutual Holding Company is not an investment company under Section 3 of the 1940 Act.

These positions are based on the representations made to the Divisions in your letter. Different facts or conditions might require a different result. This letter expresses the Divisions' position on enforcement action only and does not express any legal conclusions on the questions presented.

***2** Sincerely,

Elizabeth M. Murphy
Special Counsel

LETTER TO SEC

December 11, 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. 20549Re: **National Travelers Life Company**

Dear Ms. Dixon:

We are counsel to **National Travelers Life Company**, an Iowa mutual life insurance company ("the Existing Company"), in connection with the Existing Company'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, is referred to herein as the "Reorganization" and will be effected under Section 521A.14 of Title XIII of the Iowa Code and the regulations promulgated thereunder ("Section 521A.14"), which permit the formation of mutual insurance holding companies.

The Reorganization will occur through a series of transactions whereby the Existing Company will convert from a mutual life insurance company to a stock life insurance company (the "Stock Life Company") owned indirectly by a newly formed mutual insurance holding company, National Travelers Life Mutual Holding Company (the "Mutual Holding Company"). On the Effective Date (as defined below), all of the membership interests (as defined below) of the Existing Company's members will be extinguished, and such members will become mem-

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bers of the Mutual Holding Company. Also on the Effective Date, all the shares of the capital stock of the Stock Life Company (the “Life Company Shares”) will be issued to the Mutual Holding Company. Immediately following such issuance, the Mutual Holding Company will transfer the Life Company Shares to National Travelers Company, a newly formed stock company (“Intermediate Stock Company”), in exchange for all of the shares of the capital stock of the Intermediate Stock Company. A chart setting forth the organizational structure of the Existing Company before and immediately after the Reorganization is attached hereto as Exhibit A. Owners of insurance policies and annuity contracts (“Policies”) issued or assumed through assumption reinsurance by the Stock Life Company after the Effective Date will, pursuant to Section 521A.14 and the articles of incorporation and by-laws of the Mutual Holding Company, immediately become members of the Mutual Holding Company. The fairness of the terms and conditions of the Existing Company's Plan of Reorganization (the “Plan”) must be approved, under Section 521A.14, by the Commissioner of Insurance of the State of Iowa (the “Iowa Commissioner”) and, under Section 521A.14 and the articles of incorporation and by-laws of the Existing Company, by a vote of the members of the Existing Company.[FN1]

FN1. For the convenience of the staff of the Division of Corporation Finance (the “Staff”), a copy of Section 521A.14, permitting the reorganization of an Iowa mutual insurance company to a stock insurance company controlled by a mutual holding company, is attached hereto as Exhibit B.

End of Footnote(s).***3** 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, (i) the membership interests of the Existing Company's members are extinguished and such members become members of the Mutual Holding Company and (ii) after the Effective Date, owners of Policies issued or assumed through assumption reinsurance by the Stock Life Company automatically become members of the Mutual Holding Company, in each case without registration of the membership interests in the Mutual 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”), and without registration of the Mutual Holding Company as an investment company under the Investment Company Act of 1940, as amended (the “Investment Company Act”).

A. The Existing Company

The Existing Company is a mutual insurance company organized under the laws of Iowa and is licensed to conduct an insurance business in forty states. The Existing Company provides insurance products for both the individual and work-site marketplace, including life insurance, individual major medical coverage, annuity products, cancer, disability and critical illness insurance. As a mutual insurance company, the Existing Company has no capital stock. A member of the Existing Company owns a Policy and, through ownership of such Policy, in accordance with the Existing Company's articles of incorporation and by-laws, has a membership interest in the Existing Company. A “membership interest” consists principally of the right to vote on the election of directors of the Existing Company and on other matters that properly come before the members, and to receive distributions of the Existing Company's surplus in the event of the dissolution or liquidation of the Existing Company.[FN2]

FN2. Regardless of whether the Policy underlying a membership interest is an insurance policy or an annuity contract, membership interests are the same.

End of Footnote(s).B. The Reorganization

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The Existing Company proposes to convert from a mutual insurance company to a stock insurance company ultimately controlled by a mutual insurance holding company in accordance with the provisions of Section 521A.14 . Section 521A.14 provides for the Reorganization, by operation of law, after the occurrence of certain events, including approval of the Plan by the Iowa Commissioner and the members of the Existing Company. The Plan was approved and adopted by the Existing Company's Board of Directors on October 8, 1999, subject to any modifications that might be required by the Iowa Commissioner.

In accordance with Section 521A.14, the Iowa Commissioner held a public hearing on November 19, 1999, relating to the Reorganization at which members of the Existing Company and other interested parties were permitted to appear and be heard. At the conclusion of such hearing, the Iowa Commissioner indicated that within thirty days of such hearing, the Iowa Commissioner would issue an order finding whether, under the Plan, (i) the interests of the Existing Company's policyowners are properly preserved and protected, (ii) the Plan is fair and equitable to such policyowners and (iii) the financial condition of the Existing Company will not be diminished. Following the approval of the Reorganization, the Iowa Commissioner will retain jurisdiction at all times over the Mutual Holding Company, the Intermediate Stock Company and the Stock Life Company to assure that the Stock Life Company's policyowners' interests are protected.[FN3]

FN3. Section 521A.14(1)(a); Iowa Administrative Code, Section 191-46.5(1).

End of Footnote(s).***4** Under Section 521A.14 and the Plan, and in accordance with the articles of incorporation and by-laws of the Existing Company, the Plan was submitted for approval to the members of the Existing Company at a Special Meeting of the Existing Company (the “Special Meeting”) held on November 18, 1999. The Existing Company distributed on or about October 8, 1999, to each member of the Existing Company who was a member on September 30, 1999 (the “Mailing Record Date”) a Policyholder Information Statement setting forth information relating to the Special Meeting and a copy of the Plan.[FN4] Each member of the Existing Company who was a member of the Existing Company with a policy in force on the Mailing Record Date of the Special Meeting, regardless of whether such member was a member of the Existing Company on the date of the Special Meeting, was entitled to cast one vote at such meeting, irrespective of the number or size of Policies owned by such member on the Mailing Record Date or date of such meeting. The affirmative vote of at least two-thirds of all votes validly cast by Eligible Members was required to approve the Plan. At the Special Meeting, the Plan was approved by ninety-three and six-tenths percent (93.6%) of all votes validly cast by Eligible Members and thus the requisite approval was obtained.

FN4. In accordance with its articles of incorporation and the Plan, the Existing Company also will publish notice of the place and time of the Special Meeting in a newspaper of general circulation in Des Moines, Iowa.

End of Footnote(s).After satisfaction of all conditions to the effectiveness of the Plan, the Existing Company shall file with the Secretary of State of the State of Iowa (i) the election by the Existing Company to adopt certain provisions of the Iowa Code governing stock corporations and (ii) the amended and restated articles of incorporation of the Existing Company, as approved by the Iowa Commissioner and the Attorney General of the State of Iowa (the “Attorney General”).[FN5] The Plan will become effective on the time and date of such filings (the “Effective Date”).

FN5. The articles of incorporation of the Mutual Holding Company will also be subject to approval by the Iowa Commissioner and the Attorney General, in the same manner as those of a domestic insurance company. See Section 521A.14(3).

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End of Footnote(s).Under the Plan, the following actions will take place on the Effective Date: (i) the membership interests of the Existing Company's members will be extinguished and such members will become members of the Mutual Holding Company, (ii) the Existing Company will become a stock insurance company and the Life Company Shares will be issued to the Mutual Holding Company and (iii) the Mutual Holding Company will transfer the Life Company Shares to the Intermediate Stock Company in exchange for all the capital stock of the Intermediate Stock Company. The Stock Life Company will continue to perform all contractual obligations of the Existing Company, including those under any Policies existing on the Effective Date.

***5** On the Effective Date, the Mutual Holding Company will own, directly or indirectly, all of the outstanding voting stock of the Intermediate Stock Company and the Stock Life Company. At some point after the Reorganization, shares of the capital stock of the Intermediate Stock Company, the Stock Life Company or another affiliate of the Mutual Holding Company may be offered to third party investors. The timing and amount of any such offering would be subject to market conditions, the need for capital and other factors deemed relevant by the Board of the applicable companies. The initial offering of the voting stock of the Intermediate Stock Company, the Stock Life Company or another affiliate of the Mutual Holding Company would require the prior approval of the Iowa Commissioner.[FN6] Under Section 521A.14 and the articles of incorporation of the Mutual Holding Company, after the Effective Date, the Mutual Holding Company must at all times own, directly or indirectly, a majority of the outstanding voting shares of the Stock Life Company. See Section 521A.14(1)(b); see also Section 521A.14(7) (any transfer or pledge of a majority interest in the voting shares of the Stock Life Company shall be deemed void to the extent necessary for the Mutual Holding Company to maintain unencumbered majority control).

FN6. See Iowa Administrative Code, Section 191-46.1(3).

End of Footnote(s).After the Reorganization, each owner of a Policy issued or assumed through assumption reinsurance by the Existing Company prior to the Effective Date will have (i) a Policy and (ii) a membership interest in the Mutual Holding Company, so long as such Policy is not transferred or surrendered and remains in force. Under Section 521A.14 and the Mutual Holding Company's articles of incorporation, the “membership interests” of members of the Mutual Holding Company will be substantially the same as those they had as members of the Existing Company, consisting principally of the right to vote on the election of directors of the Mutual Holding Company and on other matters that properly come before the members, and to receive distributions of assets from the Mutual Holding Company in the event of the dissolution or liquidation of the Mutual Holding Company. The articles of incorporation of the Mutual Holding Company will also provide that owners of Policies issued or assumed through assumption reinsurance by the Stock Life Company provided after the Effective Date will automatically become members of the Mutual Holding Company.[FN7]

FN7. The articles of incorporation of the Mutual Holding Company further provide that each person which (i) is a member of a mutual insurance company that merges its members' membership interests into the Mutual Holding Company and continues its existence as a stock insurance company subsidiary of the Mutual Holding Company (an “Additional Insurance Company Subsidiary”) or (ii) is a member of a mutual insurance holding company that merges with and into the Mutual Holding Company shall be a member of the Mutual Holding Company in accordance with the plan of reorganization or merger, as the case may be, relating to such transaction and the by-laws of the Mutual Holding Company. Any merger of either a mutual insurance holding company or the membership interests of the members of an Additional Insurance Company Subsidiary into the Mutual Holding Company must be approved by the Iowa Commissioner.

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End of Footnote(s).***6** Under its articles of incorporation, the Mutual Holding Company will not be permitted to pay any dividends or make any other distributions to its members, except as directed or approved by the Iowa Commissioner or in the event of the dissolution, liquidation or winding up and dissolution of the Mutual Holding Company. The Mutual Holding Company's articles of incorporation provide that in the event of a dissolution, liquidation or winding up and dissolution of the Mutual Holding Company, any assets that remain after payment of all of the Mutual Holding Company's liabilities shall be distributed to the members as approved by the Iowa Commissioner.

The Board of Directors of the Mutual Holding Company may, subject to the approval of the Iowa Commissioner, from time to time, waive receipt by the Mutual Holding Company of any or all dividends, or any part thereof, from any of its subsidiaries upon the condition that the amount of any dividends so waived be held or used in such a way as to inure to the exclusive benefit of the members of the Mutual Holding Company.

As previously stated, under the articles of incorporation of the Mutual Holding Company, a person who becomes an owner of a Policy issued or assumed through assumption reinsurance by the Stock Life Company will automatically become a member of the Mutual Holding Company. Membership interests in the Mutual 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. Upon lapse or termination of a Policy, the membership interest in the Mutual Holding Company represented by the Policy will automatically terminate and cease, and the respective member will no longer be entitled to receive any distribution or compensation from the Mutual Holding Company in respect of such membership interest. The membership interest of a member of the Mutual Holding Company then will exist only for the period during which the member is a policyowner of the Stock Life Company. A membership interest in the Existing Company operates today in the same way. Subject to certain limited exceptions, no person can become a member of the Mutual Holding Company following the Reorganization unless such person owns a Policy issued or assumed through assumption reinsurance by the Stock Life Company.[FN8] Because a membership interest will be held by the owner of a Policy, the Mutual Holding Company will not issue certificates evidencing membership interests. Instead, a list of members will be kept on the books and records of the Mutual Holding Company.

FN8. See note 7.

End of Footnote(s).Under Section 521A.14, the Mutual Holding Company will be at all times subject to the jurisdiction and oversight of the Iowa Commissioner. Moreover, as an intermediate holding company subsidiary of a mutual insurance holding company, the Intermediate Stock Company will also be subject to the jurisdiction of the Iowa Commissioner as if it were a mutual insurance holding company. See Section 521A.14(7).

***7** Following the Reorganization, the Mutual Holding Company will be governed by the following statutory and regulatory requirements:

(i) the Iowa Commissioner will retain jurisdiction at all times over a mutual insurance holding company to assure that policyowner interests are protected (see Section 521A.14(1)(a));

(ii) a mutual insurance holding company's articles of incorporation and any amendments to such articles are subject to approval by the Iowa Commissioner and the Attorney General in the same manner as those of a domestic insurance company (see Section 521A.14(3));

(iii) a mutual insurance holding company is deemed to be an insurer subject to the Iowa Insurer Supervision, Re-

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habilitation and Liquidation Act, Iowa Code, Chapter 507C, in the same manner as a domestic insurance company, and a mutual insurance holding company's assets are available to satisfy claims of policyowners of the stock life company subsidiary in a liquidation in the same manner as a domestic insurance company (see Section 521A.14(4));

(iv) a mutual insurance holding company, and its subsidiaries and affiliates, are subject to all provisions of the Iowa Insurance Holding Company Systems Act and all material transactions between subsidiaries and affiliates of a mutual insurance holding company must be approved by a majority of the board of directors of the mutual insurance holding company as (A) fair and reasonable and (B) made on terms and conditions not less favorable than those available from unaffiliated third parties, which are the same standards for material transactions between a mutual insurance company and its subsidiaries and affiliates (see Iowa Administrative Code, Sections 191-46.2, 191-46.6(1) and 191-46.11(1); Iowa Code, Chapter 521A);

(v) a mutual insurance holding company is subject to the provisions of the Iowa Insurance Holding Company Systems Act to the same extent as domestic insurance companies; accordingly, its ability to engage in non-insurance related activities through its subsidiaries is limited to the same extent as a domestic insurance company (see Iowa Code, Section 521A.2; Iowa Administrative Code, Section 191-46.6(1));

(vi) a mutual insurance holding company is required to provide to the Iowa Division of Insurance an annual report containing historical and prospective information, including financial statements, an investment plan covering all assets, any intention it has of borrowing money and information regarding any “closed block” formed as part of a reorganization (see Iowa Administrative Code, Section 191-46.6(4));

***8** (vii) the majority of the voting shares of the capital stock of the stock life company subsidiary (which is required at all times to be owned, directly or indirectly, by the mutual insurance holding company) may not be conveyed, transferred, assigned, pledged, subjected to a security interest or lien, encumbered, or otherwise hypothecated or alienated by the mutual insurance holding company or any intermediate holding company (see Section 521A.14(7));

(viii) any conveyance, transfer, assignment, pledge, security interest, lien, encumbrance or hypothecation or alienation by a mutual insurance holding company, or any intermediate holding company, in or on the majority of the voting shares of the stock life company subsidiary shall be deemed void in inverse chronological order of the date of such transaction to the extent necessary to give the mutual insurance holding company unencumbered direct or indirect ownership of a majority of such voting shares (see Section 521A.14(7)); and

(ix) a mutual insurance holding company may not merge with, be acquired by or acquire another entity without approval of the Iowa Commissioner in accordance with the requirements of Chapter 521 of the Iowa Code (relating to consolidation and reinsurance) and Chapter 521A of the Iowa Code (the Insurance Holding Company Systems Act) (seeIowa Code, Sections 521.9 and 521A.3; Iowa Code Administrative Code, Section 191-46.6(3)). In addition, in the case of a consolidation or reinsurance contract involving a mutual insurance holding company, approval by the Iowa Attorney General is required (seeIowa Code, Section 521.5).

Following the Reorganization, merger and acquisition activity of the Mutual Holding Company will be subject to regulation at a level that is at least equal to the level of regulation that currently is imposed on the Existing Company. SeeIowa Administrative Code, Section 191-46.6(3); Iowa Code, Chapters 521 and 521A.

The Mutual Holding Company will not be able to dissolve or liquidate without the approval of the Iowa Com-

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missioner. SeeSection 521A.14(4). In the unlikely event of a dissolution, liquidation or winding up and liquidation of the Mutual Holding Company, the articles of incorporation of the Mutual Holding Company provide that at the time of such dissolution, liquidation or winding up and dissolution any assets which remain after payment of all liabilities shall be distributed to the members as approved by the Iowa Commissioner.

Section 521A.14(4) provides that the Mutual Holding Company automatically will be a party in any proceeding commenced against the Stock Life Company under Chapter 507C of Title XIII of the Iowa Code for the purpose of liquidating, rehabilitating, conserving or otherwise reorganizing the Stock Life Company. Section 521A.14(4) further provides that the assets of the Mutual Holding Company will be available to satisfy the claims of the policyowners of the Stock Life Company.

***9** The Existing Company has made no specific determination to undertake any offering of the stock of the Stock Life Company, the Intermediate Stock Company or any other affiliate of the Mutual Holding Company, and 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 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 Mutual Holding Company. Any stock offerings of these companies would be subject to regulation by the Iowa Commissioner under applicable law and regulations. The approval of the policyowners of the Stock Life Company or the members of the Mutual Holding Company will not be required for any sale of stock of the Stock Life Company, the Intermediate Stock Company or any other affiliate of the Mutual Holding Company. Pursuant to Section 521A.14, an application for approval of the Iowa Commissioner of a stock offering must contain a description of stock subscription rights, if any, to be afforded members of the Mutual Holding Company in conjunction with the stock offering. SeeIowa Administrative Code, Section 191-46.10(2)(e).

If the Iowa Commissioner finds that activities within a mutual holding company system have violated provisions of the Iowa Code or any administrative rules or act to circumvent requirements or prohibitions contained in the Iowa Code or administrative rules, the Iowa Commissioner may prohibit or order rescission of any transaction relating to those activities. See Iowa Administrative Code, Section 191-46.11(2).

Based on the foregoing, it is apparent that the Mutual Holding Company will be subject to regulatory oversight by the Iowa Commissioner at a level that is substantially equivalent to that imposed upon domestic insurance companies.[FN9]

FN9. Certain provisions of the Iowa Code 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. As set forth above, however, the Mutual Holding Company will be subject to extensive regulatory oversight by the Iowa Commissioner who is directed by the Iowa Code to assure that policyowners of the Stock Life Insurer are protected. See Section 521A.14(1)(a).

End of Footnote(s).C. Discussion
1. Registration under the Securities Act

Applying the test developed in Securities and Exchange Commission v. Howey, 328 U.S. 293 (1946) ("Howey"), and its progeny, it is our opinion that the membership interests in the Mutual Holding Company received by existing members of the Existing Company in connection with the Reorganization and created from time to time after the Reorganization by virtue of the issuance or assumption through assumption reinsurance of

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a Policy by the Stock Life Company would not constitute the offer or sale of a "security" as that term is defined in Section 2(1) of the Securities Act.[FN10] 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 the Existing Company. See Principal Mutual Life Insurance Company (publicly available June 8, 1998) ("Principal"); Ohio National Life Insurance Company (publicly available June 5, 1998) ("Ohio"); Security Benefit Life Insurance Company (publicly available June 3, 1998) ("Security"); Minnesota Mutual Life Insurance Company (publicly available May 21, 1998) ("Minnesota Mutual") Provident Mutual Life Insurance Company (publicly available April 7, 1998) ("Provident Mutual"); FCCI Mutual Insurance Company (publicly available March 30, 1998) ("FCCI"); Ameritas Life Insurance Corporation (publicly available December 8, 1997) ("Ameritas"); Acacia Mutual Life Insurance Company (publicly available June 27, 1997) ("Acacia Mutual"); Pacific Mutual Life Insurance Company (publicly available April 17, 1997) ("Pacific Mutual"); General American Life Insurance Company (publicly available February 20, 1997) ("General American"); and American Mutual Life Insurance Company (publicly available June 13, 1996) ("American Mutual"). Section 2(1) of the Securities Act, in pertinent part, defines the term "security" to include: any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization 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.

FN10. Membership interests in a mutual holding company are not securities under Iowa law. See Section 521A.14(6).

End of Footnote(s).***10** 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, viz., an "investment contract" or an "interest or instrument commonly known as a "security".[FN11]

FN11. Insurance policies, including their related membership interests in the insurer, are generally not considered securities. See H.R. Rep. No. 85, 73rd Cong., 1st Sess. 15 (1933); See also SEC v. Variable Annuity Life Insurance Company of America, 359 U.S. 65 (1959). To the extent that the Stock Life Company offers variable life insurance products and annuities, such insurance products would be registered as required with the Commission in accordance with applicable law. Independent Brokerage Network Services, L L.C., a subsidiary of the Existing Company and which after the Reorganization will be a subsidiary of the Stock Life Company, is a registered broker-dealer and sells variable insurance products issued by independent third parties on a contract basis. Such products are registered with the Commission by such independent third parties.

End of Footnote(s).In Howey, the Supreme Court developed a test that has generally been used to determine whether an instrument is an "investment contract" or an "interest or instrument commonly known as a 'security'."[FN12] The Supreme Court, in Reves v. Ernst & Young, 494 U.S. 56, 64 (1990) ("Reves"), summarized the elements of the Howey test as:

FN12. 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) ("Forman") (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) ("Landreth") (criticizing Forman but

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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 the Mutual Holding Company do not meet the first and third elements of the Howey test.

***11** First, an investment is characterized by "an exchange for value," most often a monetary contribution. See Uselton v. Commercial Lovelace Motor Freight, Inc., 940 F.2d 564, 574-75 (10th Cir. 1991). See also Howey, 328 U.S. at 301.A membership interest is not issued or created as the result of an "exchange for value." A membership interest is created only upon the purchase of a Policy. Owners of existing Policies issued or assumed through assumption reinsurance by the Existing Company will not be required to make payments in cash or in the form of other property to become members of the Mutual Holding Company in the Reorganization. Their membership interests in the Mutual Holding Company will result from their ownership of a Policy previously issued or assumed through assumption reinsurance by the Existing Company. Similarly, owners of Policies issued or assumed through assumption reinsurance after the Reorganization by the Stock Life Company will become members of the Mutual Holding Company automatically upon issuance or assumption through assumption reinsurance of such Policies without the payment of cash or other property. The underwriting practices of the Stock Life Company will determine whether a person becomes a policyowner (and therefore a member in the Mutual Holding Company) and the premiums to be paid by the policyowner for the Policy. With respect to a Policy, any monies paid by a policyowner will be in the form of premiums paid to the Stock Life Company with the intent to obtain insurance coverage and not with any profit-making, profit-sharing or investment intent with respect to membership in the Mutual Holding Company. The membership interests in the Mutual Holding Company will also not be marketed as investments.

Second, a membership interest does not provide a member with any "reasonable expectation of profits" of the Mutual 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."See Forman, 421 U.S. at 837, 852.Where a person is not "'attracted solely by the prospects of a return on his investment," but rather "by a desire to use or consume the item purchased," the expectation of profit element is not met. See Forman, 421 U.S. at 852.

There is no expectation of profit with respect to the membership interests in the Mutual Holding Company. Under its articles of incorporation, the Mutual Holding Company will not be permitted to pay any dividends or make any other distributions to its members, except as directed or approved by the Iowa Commissioner or in the event of the dissolution, liquidation or winding up and dissolution of the Mutual Holding Company as approved by the Commissioner. See alsoIowa Administrative Code, Section 191-46.6(6) (providing that no member of the Mutual Holding Company shall receive on account of its membership interest any payment of a policy credit, dividend or other distribution unless approved by the Iowa Commissioner). Moreover, because membership interests are not transferable independent of the Policy and are extinguished if a member is no longer a policyowner of the Stock Life Company, it cannot be said that there is a market for the membership interests or that they can be "repurchased" at a "profit" by the Mutual Holding Company or by any other person. An owner of a membership interest has no ability to realize any profit on such interest. Rather, the membership interest is evidence of a Policy providing insurance risk protection. It has no independent value. Accordingly, a prospective policy-

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owner will not be motivated to become a member of the Mutual Holding Company "solely by the prospects of a return" on the membership interest. See Forman, 421 U.S. at 852.

***12** The membership interests also would not constitute a "security" under the criteria applied by the Court in Reves.[FN13] In Reves, the Court noted four factors that "this Court has held apply in deciding whether a transaction involves a 'security."'

FN13. 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. See Reves, 494 U.S. at 63-67.

End of Footnote(s).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. See Reves, 494 U.S. at 66."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.[FN14]

FN14. Id.

End of Footnote(s).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."[FN15]

FN15. Id.

End of Footnote(s).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. See Reves, 494 U.S. 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] significantly reduces the risk of the instrument…" must be considered. See Reves, 494 U.S. at 67.

Under the four criteria set forth in Reves for determining whether an instrument is a "security", a membership interest in the Mutual Holding Company would not constitute a security. First, the motivation of the person purchasing a Policy is not the expectation of receiving a profit on account of the related membership interest. Rather, the policyowner's motivation is to obtain insurance. In addition, the Mutual Holding Company is not attempting "to finance substantial investments" through the sale of memberships interests. In fact, the creation of the membership interests does not generate any capital for the "seller."

***13** Second, there is no "plan of distribution" of membership interests. Membership interests simply accompany the issuance or assumption of a Policy by the Stock Life Company and cannot be transferred apart from the Policy to which they relate.[FN16]

FN16. See also Forman, 421 U.S. at 851-52 (traditional characteristic of a security is negotiability).

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End of Footnote(s).Third, it is difficult to see any way that a policyowner would view the membership interest 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 Iowa Code, the membership interests are not recognized as securities. SeeSection 521A.14(6).

Fourth, the Court in Reves stressed the significance of an alternative regulatory scheme that might reduce the risks associated with the interest alleged to constitute a security. See Reves, 494 U.S. at 67 ("the existence of another regulatory scheme" may "significantly reduce the risk of the instrument, thereby rendering application of the Securities Act unnecessary"); see also Marine Bank v. Weaver, 455 U.S. 551, 557-559 (1982). This factor suggests that the membership interests would not constitute securities because, as discussed in Section B hereof, the Mutual Holding Company would be subject to extensive regulation by the Iowa Commissioner.

Because the membership interests do not meet the tests articulated by the Supreme Court in Howey and Reves for determining whether an instrument is a security under Section 2(1) of the Securities Act, it is our opinion that the membership interests should not be considered securities under the Securities Act.[FN17] 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 Principal; Ohio; Security; Minnesota Mutual; Provident Mutual; FCCI; Ameritas; Acacia Mutual; Pacific Mutual; General American; American Mutual; 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); and Attorney's Liability Assurance Society Ltd. (publicly available February 12, 1979).

FN17. The inclusion of the Intermediate Stock Company as an intermediate holding company does not affect our opinion that the membership interests are not securities. Such inclusion has no economic effect on the owners of the membership interests or any effect on the reasonable expectations of policyowners in receiving such interests.

End of Footnote(s).2. Registration Under the Securities Exchange Act

***14** It is our opinion that, based upon the foregoing facts and the analyses set forth herein, the Mutual Holding Company would not, upon consummation of the Reorganization, be subject to the registration requirements of the Securities Exchange Act. Our opinion is based upon our determination that, as discussed above, the membership interests in the Mutual Holding Company should not be classified as "securities" under the Federal securities laws.

Under Section 12(g) of the Securities Exchange Act and the rules promulgated thereunder, certain "issuers" with total assets exceeding $10,000,000 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) of the Securities Exchange Act 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. See Forman, 421 U.S. at 848 n.12 (citing Tcherepnin v. Knight, 389 U.S. 332, 336, 342 (1967)); see also Reves, 494 U.S. at 61 n.1;

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Landreth, 471 U.S. at 686 n.1. For the same reasons set forth in the discussion of the Securities Act set forth above, we believe a membership interest is not a security under the Securities Exchange Act. We therefore are of the opinion that the Mutual Holding Company will not issue, and does not intend to issue, a security, and, accordingly, will not be subject to the registration requirements of Section 12(g) of the Securities Exchange Act.

3. Registration Under the Investment Company Act

It is our opinion that the Mutual Holding Company should not be required to register as an investment company under the Investment Company Act because the Mutual Holding Company does not satisfy the threshold definition of an "investment company" under the Investment Company Act. The prefatory language of Section 3(a) of the Investment Company Act defines an "investment company" as any "issuer" that satisfies any one or more of subparagraphs (1), (2) and (3) of that section. 15 U.S.C.A. Section 80a-3(a) (West 1981).Section 2(a)(22) of the Investment Company Act defines an issuer as "every person who issues or proposes to issue any security, or has outstanding any security which it has issued."15 U.S.C.A. Section 80a-2(22).Section 2(a)(36) of the Investment Company Act defines "security" in the same manner as "security" is defined in Section 2(1) of the Securities Act. For the reasons noted above, it is our view that the Mutual Holding Company membership interests are not securities under Section 2(a)(36), that the Mutual Holding Company, therefore, is not an issuer under Section 2(a)(22), and that the Mutual Holding Company, therefore, is not an investment company under Section 3(a).

***15** Our conclusion is supported by a number of no-action letters issued by the Staff. See Principal; Ohio; Security; Minnesota Mutual; American Mutual; Mutual Benefit Life Insurance Company et al. (publicly available April 21, 1994); AAI Mutual Holdings Corp. et al. (publicly available July 1, 1991); Investment Company Institute (publicly available June 9, 1987); Energy Insurance Mutual Fund (publicly available August 16, 1986); Attorneys Insurance Mutual (publicly available July 10, 1986); Podiatric Assurance Co. (publicly available February 19, 1985); and Attorney's Liability Assurance Society Ltd. (publicly available February 12, 1979).

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

This letter supplements the letter sent to you previously on October 4, 1999.

Because of the importance of the Reorganization to the Existing Company, we would appreciate hearing from you at your earliest convenience. In the event you anticipate formulating a response not consistent with any interpretation or position stated in this request, we would appreciate the opportunity to discuss the matter with the Staff prior to any final decision. If you should have any questions or would like additional information, please telephone the undersigned at (515) 283-4664. In accordance with Release No. 33-6269, seven additional copies of this letter are enclosed.

Very truly yours,

Garth D. Adams, Esq.

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