ACT 34ICA
SECTION 3
RULE
PUBLIC AVAILABILITY 11/27/98

PUBLIC

November 27, 1998

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF CORPORATION FINANCE

Re: Mutual of Omaha Insurance Company ("Mutual Insurance Company")
Incoming letter dated September 30, 1998

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 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, the Mutual Insurance Company causes its current and future policy holders to become members of the Mutual 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 Holding Company will be substantially the same as membership rights in the Mutual Insurance Company;
- with the Reorganization, the Mutual Insurance Company's policy holders will automatically become members of the Mutual 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;
- the Director of Insurance will approve the Reorganization only after finding that the Reorganization is fair and equitable to existing policy holders;
- the Mutual Holding Company will be subject to insurance regulation at a level equivalent to that applicable to the Mutual Insurance Company before the Reorganization;
- 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 Director of Insurance.

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

This position is 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 a legal conclusion on the question presented.

Sincerely,

Michael Hyatte
Special Counsel

Thomas J. McCusker
Executive Vice President
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September 30, 1998

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

Dear Ms. Dixon:

I am the General Counsel of Mutual of Omaha Insurance Company ("Mutual Insurance Company"), a mutual insurance company incorporated under the laws of the State of Nebraska. I am writing to you in connection with Mutual Insurance Company's proposed reorganization from a mutual insurance company to a stock 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 the Mutual Insurance Holding Company Act, Neb. Rev. Stat. §§ 44-6122 to 44-6142 (the "MHC Act"), which permits the formation of mutual insurance holding companies.[1]

The Reorganization will occur through a series of transactions whereby Mutual Insurance Company will convert from a mutual insurance company to a stock insurance company (the "Stock Insurance Company") owned indirectly by a newly-formed mutual insurance holding company (the "Mutual Holding Company").

On the Effective Date (as defined below), all of the membership interests (as defined below) of Mutual Insurance Company's members will be extinguished, and such members will become members of the Mutual Holding Company. Also on the Effective Date, all of the shares of the capital stock of the Stock Insurance Company (the "Stock Insurance Company Shares") will be issued to the Mutual Holding Company. Immediately following such issuance, the Mutual Holding Company will transfer the Stock Insurance Company Shares to a newly formed intermediate stock holding company ("the Intermediate Stock Holding Company"), in exchange for all of the shares of the capital stock of the Intermediate Stock Holding Company. A chart setting forth the organizational structure of Mutual Insurance Company before and immediately after the Reorganization is attached hereto as Exhibit A.

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[1] For the convenience of the staff of the Division of Corporation Finance (the "Staff"), a copy of the MHC Act, permitting the reorganization of a Nebraska mutual insurance company to a stock insurance company controlled by a mutual holding company, is attached hereto as Exhibit B.

Owners of insurance policies issued or assumed by the Stock Insurance Company after the Effective Date will, pursuant to the MHC Act and the articles of incorporation and bylaws of the Mutual Holding Company, immediately become members of the Mutual Holding Company. The fairness of the terms and conditions of Mutual Insurance Company's Plan of Reorganization (the "Plan") must be approved, under the MHC Act, by the Director of the Department of Insurance of the State of Nebraska (the "Director of Insurance") and by a vote of the members of Mutual Insurance Company.

I am 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 Mutual Insurance 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 by the Stock Insurance 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").

This request for no action is substantially similar to several requests involving mutual insurance holding companies which were recently granted: National Capital Reciprocal Insurance Company (publicly available July 10, 1998) ("National Capital"); Principal Mutual Life Insurance Company (publicly available June 8, 1998) ("Principal Mutual"); The Ohio National Life Insurance Company (publicly available June 5, 1998) ("Ohio National"); Security Benefit Life Insurance Company (publicly available June 3, 1998) ("Security Benefit"); The 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 7, 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").

A. Mutual Insurance Company

Mutual Insurance Company is a mutual insurance company organized under the laws of Nebraska and is licensed to conduct an insurance business in every state of the United States and the District of Columbia. Mutual Insurance Company provides insurance services through the sale of individual health insurance, group health insurance and disability insurance. As a mutual insurance company, Mutual Insurance Company has no capital stock. A member of Mutual Insurance Company owns a policy and, through ownership of such policy, in accordance with Nebraska law, has a membership interest in Mutual Insurance Company. See Neb. Rev. Stat. § 44-217. A "membership interest" consists principally of the right to vote at meetings of policyholders, to receive a distribution of assets remaining after payment of all liabilities in the event of a liquidation and to receive a distribution in the event of a demutualization of Mutual Insurance Company.

B. The Reorganization

Mutual Insurance 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 the MHC Act. The MHC Act provides for the Reorganization, by operation of law, after the occurrence of certain events, including approval of the Plan by the Director of Insurance and the members of Mutual Insurance Company.

In accordance with the MHC Act, the Director of Insurance will hold a public hearing relating to the Reorganization at which members of Mutual Insurance Company and other interested parties will be permitted to appear and be heard. Thereafter, the Director of Insurance will issue an order approving the Plan under the MHC Act only if the Director of Insurance finds that (i) the Plan is fair and equitable to the policyholders, (ii) the Plan does not deprive the policyholders of their property rights or due process of law and (iii) the Stock Insurance Company would meet the minimum requirements to be issued a certificate of authority by the Director of Insurance to transact the business of insurance in Nebraska and the continued operations of the Stock Insurance Company would not be hazardous to future policyholders and the public. Following the Reorganization, the Director of Insurance will retain jurisdiction at all times over the Mutual Holding Company and the Intermediate Stock Holding Company to assure that policyholders' interests are protected. Neb. Rev. Stat. § 44-6125(5)(c).

Under the MHC Act and the Plan, and in accordance with the articles of incorporation and bylaws of Mutual Insurance Company, members of Mutual Insurance Company will be asked to approve the Plan at a special meeting of Mutual Insurance Company. Mutual Insurance Company will distribute by first class mail to each member of Mutual Insurance Company, an information statement setting forth information relating to the special meeting and a copy of the Plan (including a brief description of the Plan), as well as a statement that the Director of Insurance has approved the Plan. The information statement will also include a written proxy permitting the member to vote for or against the Plan.

Subject to certain limited exceptions involving members who owned policies in more than one capacity, each member of Mutual Insurance Company who is a member of Mutual Insurance Company on the date the Plan was initially approved by Mutual Insurance Company's Board of Directors will be entitled to cast one vote at such meeting, irrespective of the number or size of policies owned by such member on the date of such meeting. The affirmative vote of two-thirds of all votes validly cast by members will be required to approve the Plan.

After obtaining the approval of the Plan by the Director of Insurance and the members, Mutual Insurance Company intends to file with the Director of Insurance (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 the policyholders voting in person or by proxy on the Plan. The Plan will become effective on the time and date that the Director of Insurance issues a certificate of authority in response to such filings (the "Effective Date").

Under the Plan, the following actions will take place on the Effective Date: (i) the Mutual Holding Company and the Intermediate Stock Holding Company will be formed, (ii) the membership interests of Mutual Insurance Company's members will be extinguished and such

members will become members of the Mutual Holding Company, (iii) Mutual Insurance Company's corporate existence will continue as a stock insurance subsidiary of the Mutual Holding Company, (iv) the Stock Insurance Company Shares will be issued to the Mutual Holding Company and (v) the Mutual Holding Company will transfer the Stock Insurance Company Shares to the Intermediate Stock Holding Company in exchange for all of the capital stock of the Intermediate Stock Holding Company. The Stock Insurance Company will continue to perform all contractual obligations of Mutual Insurance Company, including those under any policies existing on the Effective Date.

On the Effective Date, the Mutual Holding Company will own, directly or indirectly, all of the outstanding voting stock of the Intermediate Stock Holding Company and the Stock Insurance Company. At some point after the Reorganization, shares of the capital stock of the Intermediate Stock Holding Company or the Stock Insurance Company may be offered to third party investors. The timing and amount of any such offering would be subject to market conditions and the need for capital. Any offering of the voting stock of the Intermediate Stock Holding Company or the Stock Insurance Company would require the prior approval of the Director of Insurance. See Neb. Rev. Stat. § 44-6125(5)(i). Under the MHC Act 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 securities of the Stock Insurance Company. See generally Neb. Rev. Stat. § 44-6124; see also Neb. Rev. Stat. § 44-6125(5) (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).

After the Reorganization, each owner of an in-force policy issued or assumed by Mutual Insurance Company prior to the Effective Date will have (i) an insurance policy issued or assumed by the Stock Insurance Company 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 the MHC Act 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 Mutual Insurance Company, consisting principally of the right to vote at meetings of policyholders, to receive a distribution of assets remaining after the payment of all liabilities in the event of a liquidation and to receive a distribution in the event of the demutualization of Mutual Insurance Company. The articles of incorporation of the Mutual Holding Company will also provide that owners of policies issued or assumed by the Stock Insurance Company after the Effective Date will automatically become members of the Mutual Holding Company.[2]

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[2] The articles of incorporation of the Mutual Holding Company will further provide that each person who or which is a member of (I) an insurance company that reorganizes from a mutual insurance company by merging its policyholders' membership interests into the Mutual Holding Company and continues its corporate existence as a stock insurance company subsidiary of the Mutual Holding Company (an "Additional Reorganized Insurance Company Subsidiary") or (ii) a mutual insurance holding company that merges into the Mutual Holding Company, shall be a member of the Mutual Holding Company in accordance with the plan of reorganization or plan of merger, as the case may be, relating to such transaction. Any consolidation of either a mutual insurance holding company or the membership interests of the members of an Additional Reorganized Insurance Company Subsidiary into the Mutual Holding Company must be approved by the Director of Insurance. See Neb. Rev. Stat. §§ 44-224.07, 44-6125.

Under the MHC Act and the Mutual Holding Company's 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 Director of Insurance. Neb. Rev. Stat. § 44-6125(5)(h). The Mutual Holding Company's articles of incorporation will 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 Director of Insurance or by a court of competent jurisdiction.

Under the articles of incorporation of the Mutual Holding Company, a person who becomes an owner of a policy issued or assumed by the Stock Insurance 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 the 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 policyholder of the Stock Insurance Company.

A membership interest in Mutual Insurance Company operates today in the same way. No person can become a member of the Mutual Holding Company following the Reorganization unless such person owns a policy issued or assumed by the Stock Insurance Company. Because only the owner of a policy can hold a membership interest, the Mutual Holding Company will not issue certificates evidencing membership interests. Instead, a list of members will be kept on the records of the Mutual Holding Company.

Under the MHC Act, the Mutual Holding Company and the Intermediate Stock Holding Company will at all times be subject to the jurisdiction and oversight of the Director of Insurance. See Neb. Rev. Stat. § 44-6125(5)(c). Following the Reorganization, the Mutual Holding Company and the Intermediate Stock Holding Company will be governed by the following statutory requirements:

(i) the Director of Insurance will have jurisdiction over the Mutual Holding Company and the Intermediate Stock Holding Company to assure that policyholder interests are protected (see Neb. Rev. Stat. § 44-6125(5)(c));

(ii) the Mutual Holding Company and the Intermediate Stock 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 Article 2 and Section 44-301 of the Nebraska insurance laws (see Neb. Rev. Stat. § 44-6125(5)(d));

(iii) the Mutual Holding Company will be required to provide to the Director of Insurance 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 Holding Company (see Neb. Rev. Stat. § 44-6135);

(iv) the aggregate pledges and encumbrances of the Mutual Holding Company's assets shall not affect more than forty-nine percent of the Mutual Holding Company's stock in the Intermediate Stock Holding Company or Mutual Insurance Company (see Neb. Rev. Stat. § 44-6125(5)(e));

(v) the Mutual Holding Company must at all times directly or indirectly own a majority of the voting securities of Mutual Insurance Company (see Neb. Rev. Stat. § 44-6124);

(vi) the Mutual Holding Company or the Intermediate Stock Holding Company cannot voluntarily dissolve without the approval of the Director of Insurance (see Neb. Rev. Stat. § 44-6125(5)(j));

(vii) at least fifty percent of the net worth of the Mutual Holding Company must be invested in insurers (see Neb. Rev. Stat. § 44-6125(5)(f));

(viii) the Director of Insurance has the power to order production of any records, books, or other information and papers in the possession of the Mutual Holding Company or its affiliates as are reasonably necessary to ascertain the financial condition of Mutual Insurance Company or to determine compliance with the Nebraska insurance laws (see Neb. Rev. Stat. § 44-6136);

(ix) The Director of Insurance must approve the articles of incorporation of the Mutual Holding Company and the Intermediate Stock Holding Company and any amendments thereto (see Neb. Rev. Stat. §§ 44-6125(5)(d), 44-6126(8) and 44-231);

(x) if any proceeding under the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act is brought against Mutual Insurance Company, the Mutual Holding Company and the Intermediate Stock Insurance Company shall become parties to the proceedings (see Neb. Rev. Stat. § 44-6125(5)(g)); and

(xi) all of the assets of the Mutual Holding Company and the Intermediate Stock Insurance Company are deemed assets of the estate of Mutual Insurance Company to the extent necessary to satisfy claims against Mutual Insurance Company (Id.).

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

Mutual Insurance Company has made no specific determination to undertake any offering of the stock of the Stock Insurance Company or the Intermediate Stock 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 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 Stock Insurance Company or the Intermediate Stock Holding Company. Any stock offerings of these companies would be subject to prior approval of the Director of Insurance. See Neb. Rev. Stat. § 44-6125(i). The approval of the policyholders of the Stock Insurance Company or the members of the Mutual Holding Company may not be required for any sale of stock of the Stock Insurance Company or the Intermediate Stock Holding Company.

Based on the foregoing, it is apparent that the Mutual Holding Company will be subject to regulatory oversight by the Director of Insurance at a level that is substantially equivalent to that imposed upon domestic insurance companies.[3]

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 my opinion that the membership interests in the Mutual Holding Company received by existing members of Mutual Insurance Company in connection with the Reorganization and created from time to time after the Reorganization by virtue of the issuance or assumption of a policy by the Stock Insurance Company would not constitute the offer or sale of a "security" as that term is defined in Section 2(1) of the Securities Act.[4] I note that the Staff has previously taken no-action positions involving this issue in the context of reorganization transactions similar to that contemplated by Mutual Insurance Company. See National Capital; Principal Mutual; Ohio National; Security Benefit; Minnesota Mutual; Provident Mutual; FCCI; Ameritas; Acacia Mutual; Pacific Mutual; General American; and 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,

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[3] Certain provisions of the Nebraska Insurance Laws 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 Holding Company will be subject to extensive regulatory oversight by the Director of Insurance who is directed by the MHC Act to assure that interests of policyholders of the Stock Insurance Company are protected. See Neb. Rev. Stat. § 44-6125(5)(c).

[4] Membership interests in a mutual holding company are not securities under Nebraska law. See Neb. Rev. Stat. § 44-6134.

> 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: an "investment contract" or an "interest or instrument commonly known as a 'security.'"[5]

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'".[6] The Supreme Court, in *Reves v. Ernst & Young, 494 U.S. 56, 64 (1990)* ("Reves"), summarized the elements of the Howey test as:

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[5] Under Section 3(a)(8) of the Securities Act, which exempts traditional insurance policies and annuity contracts from registration requirements, none of the policies are registered or required to be registered with the Commission. 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 securities 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 non-coverage under the definition of security"). Some insurance products with investment components are regulated as investment contracts 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 also 17 C.F.R. § 230.151 (Safe Harbor Definition of Certain Annuity Contracts or Optional Annuity Contracts Within the Meaning of Section 3(a)(8)).

[6] 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 concluding that the Howey test applies in determining whether an interest is an "instrument commonly known as a 'security'").

> (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.

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 by Mutual Insurance 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 by Mutual Insurance Company. Similarly, owners of policies issued or assumed after the Reorganization by the Stock Insurance Company will become members of the Mutual Holding Company automatically upon issuance or assumption of such policies without the payment of cash or other property. The underwriting practices of the Stock Insurance Company will determine whether a person becomes a policyholder (and therefore a member in the Mutual Holding Company) and the premiums to be paid by the policyholder for the policy. With respect to a policy, any monies paid by a policyholder will be in the form of premiums paid to the Stock Insurance 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.[7] 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. 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 Director of Insurance. Neb. Rev. Stat. § 44-6125(5)(h). Moreover, because membership interests are not transferable independent of the policy and are extinguished if a member is no longer a policyholder of the Stock Insurance 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

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[7] Under Section 3(a)(8) of the Securities Act, which exempts traditional insurance policies and annuity contracts from registration requirements, none of the policies are registered or required to be registered with the Commission.

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 and it has no independent value. Accordingly, a prospective policyholder 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.*

The membership interests also would not constitute a "security" under the criteria applied by the Court in *Reves.*[8] In *Reves*, the Court noted four factors that "this Court has held apply in deciding whether a transaction involves a 'security.'"

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.'" *Id.*

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. 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 policyholder'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."

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[8] 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 that have been previously designated by courts as not constituting securities. See *Reves, 494 U.S. at 63-67.*

Second, there is no "plan of distribution" of membership interests. Membership interests simply accompany the issuance or assumption of a policy by the Stock Insurance Company and cannot be transferred apart from the policy to which they relate.[9]

Third, it is difficult to see any way that a policyholder 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 MHC Act, the membership interests are not recognized as securities. See Neb. Rev. Stat. § 44-6134.

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"); 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 Director of Insurance.

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 my opinion that the membership interests should not be considered securities under the Securities Act.[10] 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 National Capital; Principal Mutual; Ohio National; Security Benefit; 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).

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

[10] The inclusion of the Intermediate Stock Holding Company as an intermediate holding company does not affect the conclusion 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 policyholders in receiving such interests.

2. Registration Under the Securities Exchange Act

It is my 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. My opinion is based upon the determination that 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; Landreth, 471 U.S. at 686 n.1.* For the reasons set forth in the discussion of the Securities Act set forth above, I believe a membership interest is not a security under the Securities Exchange Act. I therefore am 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 my 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 my opinion 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).

My conclusion is supported by a number of no-action letters issued by the Staff. See Principal 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, I 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 Mutual Insurance 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 Insurance 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.

Because of the importance of the Reorganization to Mutual Insurance Company, I would appreciate hearing from you at your earliest convenience. If you anticipate formulating a response not consistent with any interpretation or position stated in this request, I 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 me at (402) 351-5845 or Michael Huss at (402) 351-5225. In accordance with Release No. 33-6269, seven additional copies of this letter are enclosed.

Very truly yours,