

June 5, 2001

Securities and Exchange Commission
450 5th Street N.W.
Judiciary Plaza
Washington, D.C. 20549

Attention: Office of Chief Counsel
Division of Corporation Finance

Re: Merger of Liberty Mutual Holding Company and EIOW MHC

Dear Sir or Madam:

We have been retained as special counsel by both Liberty Mutual Insurance Company, a Massachusetts mutual property and casualty insurance company ("LMIC"), and EMPLOYERS INSURANCE OF WAUSAU A Mutual Company, a Wisconsin mutual property and casualty insurance company ("EIOW"), in connection with (i) the respective proposed reorganizations of LMIC and EIOW into stock insurance companies controlled by mutual holding companies (the "Step One Transactions") and (ii) the Mergers (described below). Upon consummation of the Step One Transactions (which are the subject of two no action requests being submitted concurrently with this request by Skadden, Arps, Slate, Meagher & Flom LLP to the Office of Chief Counsel), (i) LMIC will have formed Liberty Mutual Holding Company, a Massachusetts mutual holding company ("Liberty Mutual Holding Company") and reorganized to Liberty Mutual Insurance Company, a Massachusetts stock insurance company ("Reorganized LMIC"), and (ii) EIOW will have formed Employers Insurance of Wausau Mutual Holding Company, a Wisconsin mutual holding company ("EIOW MHC"), and converted to Employers Insurance Company of Wausau, a Wisconsin stock insurance company ("Converted EIOW").

As soon as possible after completion of the Step One Transactions, subject to the receipt of all applicable member and regulatory approvals, the respective Boards of Directors of the newly formed Liberty Mutual Holding Company and EIOW MHC intend to merge EIOW MHC with and into Liberty Mutual Holding Company, with Liberty Mutual Holding Company being the surviving entity. The merger of EIOW MHC with and into Liberty Mutual Holding Company (the "MHC Merger") will be effected under the applicable provisions of the Massachusetts and

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Wisconsin insurance laws (respectively, the "Massachusetts General Laws" and the "Wisconsin Insurance Code"). Simultaneous with the MHC Merger, Converted EIOW will merge with Wausau Insurance Acquisition Corporation¹, a to-be-formed Wisconsin stock property and casualty insurance company wholly owned by Liberty Mutual Holding Company ("Merger Sub"), with Converted EIOW being the surviving entity (the "Subsidiary Merger" and together with the MHC Merger, the "Mergers"). For the convenience of the staff of the Division of Corporation Finance (the "Staff"), copies of the relevant provisions of the Massachusetts General Laws and the Wisconsin Insurance Code are attached hereto as Exhibit A.

On the effective date of the Mergers (the "Effective Date"), EIOW MHC will cease to exist, and the membership interests of the members of EIOW MHC will be extinguished, and such membership interests will be replaced by membership interests in Liberty Mutual Holding Company. Also on the Effective Date and by virtue of the Mergers, Merger Sub will cease to exist, and all of the shares of voting stock of Converted EIOW will be held by Liberty Mutual Holding Company, which will in turn transfer such shares to LMHC Massachusetts Holdings Inc., a to-be-formed Massachusetts stock holding company that will be a direct, wholly-owned subsidiary of Liberty Mutual Holding Company ("LMHC Massachusetts Holdings"). In turn, LMHC Massachusetts Holdings will immediately transfer the shares of voting stock of Converted EIOW to Liberty Mutual Group Inc., a to-be-formed Massachusetts stock holding company that will be a direct, wholly-owned subsidiary of LMHC Massachusetts Holdings ("LMGI"). A chart setting forth the organizational structure of Liberty Mutual Holding Company before and after the Mergers is attached hereto as Exhibit B.

I. REQUEST

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

¹ Merger Sub will be a Wisconsin insurance corporation formed solely for the purpose of effectuating the Subsidiary Merger and will not be engaging in any activities and will not be incurring any liabilities or obligations other than in connection with its formation. It will have no assets (other than nominal assets contributed upon the formation of Merger Sub).

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"SEC") take any enforcement action if in connection with the Mergers (i) the membership interests of EIOW MHC members are extinguished and such members become members of Liberty Mutual Holding Company and (ii) on and after the Effective Date, holders of policies issued by Converted EIOW automatically become members of Liberty Mutual Holding Company, in each case without registration of the membership interests in Liberty 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").

This request for no action raises certain issues that are addressed in nineteen other requests where the SEC has issued no action letters: The Baltimore Life Insurance Company (publicly available December 11, 2000); National Travelers Life Co. (publicly available December 29, 1999); American Republic Insurance Company (publicly available December 23, 1999); The Security Mutual Life Insurance Company of Lincoln, Nebraska (publicly available November 30, 1999); Trustmark Insurance Company (publicly available August 25, 1999); Mutual of Omaha Insurance Company (publicly available November 27, 1998); National Life Insurance Company (publicly available September 23, 1998); National Capital Reciprocal Insurance Company (publicly available July 10, 1998); Principal Mutual Life Insurance Company (publicly available June 8, 1998); The Ohio National Life Insurance Company (publicly available June 5, 1998); Security Benefit Life Insurance Company (publicly available June 3, 1998); The Minnesota Mutual Life Insurance Company (publicly available May 21, 1998); Provident Mutual Life Insurance Company (publicly available April 7, 1998); FCCI Mutual Insurance Company (publicly available March 30, 1998); Ameritas Life Insurance Corporation (publicly available December 8, 1997); Acacia Mutual Life Insurance Company (publicly available June 27, 1997); Pacific Mutual Life Insurance Company (publicly available April 17, 1997); General American Life Insurance Company (publicly available February 20, 1997); and American Mutual Life Insurance Company (publicly available June 13, 1996).

The Step One Transactions and the Mergers are part of a series of transactions that will result in LMIC, EIOW and Liberty Mutual Fire Insurance Company, a Massachusetts mutual property and casualty insurance company which is also an affiliate of LMIC and EIOW ("LMFIC"), all reorganizing from mutual insurance companies into stock insurance companies and coming under the common ownership of Liberty Mutual Holding Company (the "Global Transaction"). Concurrently with this submission, Skadden, Arps, Slate, Meagher & Flom LLP is submitting requests on behalf of LMIC, EIOW and LMFIC that the Staff also advise those

affiliated companies that it will not recommend any action to be taken by the SEC with respect to the transactions comprising the Global Transaction, in each case without registration of the respective membership interests under the Securities Act or the Securities Exchange Act, if LMIC, LMFIC and EIOW each act in the manner described in such requests.

II. THE MERGERS

A. Massachusetts Mutual Holding Company Merger Law

Massachusetts law permits the merger of a Massachusetts mutual holding company with a mutual holding company formed under the laws of another state (a "foreign" mutual holding company). Mass. Stat. §175:19S(a). When the mutual holding company continuing after the merger is a Massachusetts mutual holding company, the new company must comply with the provisions of the Massachusetts General Laws, Mass. Stat. §§175:19F to 19W, inclusive. In the case of the MHC Merger of EIOW MHC with and into Liberty Mutual Holding Company, the surviving company will be Liberty Mutual Holding Company, which will be formed in compliance with Mass. Stat. §§175:19F to 19W, inclusive. The Massachusetts General Laws also provides:

- (i) the name of the continuing Massachusetts mutual holding company shall be subject to the approval of the Commissioner of the Division of Insurance for the Commonwealth of Massachusetts (the "Massachusetts Commissioner");
- (ii) the members of the mutual holding company whose existence shall cease upon the merger shall become members of the continuing Massachusetts mutual holding company; and
- (iii) all persons with equity rights in any mutual holding company that shall cease upon the merger shall have equity rights² in the continuing, Massachusetts mutual holding company. Mass. Stat. §175:19S(a).

² Under Mass. Stat. 175, §19G, "equity rights" mean "rights in the equity of a mutual holding company conferred by law or such company's articles of organization, including rights to participate in any distribution of equity or assets whether or not incident to a liquidation of the mutual holding company."

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The Massachusetts General Laws requires the parties to the merger of a Massachusetts mutual holding company with a foreign mutual holding company to enter into a written agreement for merger setting forth the terms and conditions of the transaction. Consummation of the merger agreement is subject to the vote of the majority of the board of directors of the Massachusetts mutual holding company, and the approval by the votes of at least two-thirds of the members of the Massachusetts mutual holding company voting at a special members' meeting. The merger agreement is also subject to the approval of the Massachusetts Commissioner who may consider the fairness of the merger, whether the interests of the Massachusetts mutual holding company are protected, and whether the merger is in the public interest. Mass. Stat. 175, §19S(b).

After such a merger is effected, all the rights and properties of the foreign mutual holding company become the property of the Massachusetts mutual holding company, and the continuing Massachusetts company shall also succeed to the obligations and liabilities of the merged company as if they had been incurred or contracted by the Massachusetts company. Mass. Stat. 175, §19S(d).

B. Wisconsin Mutual Holding Company Merger Law

A Wisconsin mutual holding company, such as ELOW MHC, formed under Section 644.02 *et seq.* of the Wisconsin Insurance Code is permitted to merge with a foreign mutual holding company if the merger is permitted under the Wisconsin Insurance Code and under the laws of the other state. Wis. Stat. §611.73(2)(a).

The merger of a Wisconsin mutual holding company into a foreign mutual holding company, with the foreign company emerging as the continuing company, must comply with the provisions of Wis. Stat. §611.73.

The Wisconsin Insurance Code requires the board of directors of a Wisconsin mutual holding company to approve a plan of merger³, the terms of which must include the following:

- (i) the names of the mutual insurance company proposing to merge and the name of the surviving company;
- (ii) the terms and conditions of the merger;
- (iii) the respective interests and rights of the members of the merging mutual insurance company in the surviving mutual insurance company, and
- (iv) any change in the articles of incorporation of the surviving company. Wis. Stat. §611.73(1)(b).

The merger plan must be submitted for the approval of the Commissioner of Insurance for the State of Wisconsin (the "Wisconsin Commissioner") after the vote of the directors but before the vote of the policyholders. The Wisconsin Commissioner shall approve the plan unless she finds, after a public hearing, that the merger would be contrary to the law or to the interests of the insureds of either the Wisconsin company or the Wisconsin insureds of the foreign company.

³ If the by-laws or articles of incorporation of the Wisconsin mutual holding company give members the right to vote on the merger, the board of directors shall direct that the merger plan be submitted to a vote at an annual or special meeting of the members. The plan shall be adopted by a vote of at least two-thirds of the members present. If the by-laws or articles of incorporation do not give members the right to vote, then the board may adopt the merger plan by a majority of the directors in office. Wis. Stat. §611.73(1)(c)(1). The by-laws and articles of incorporation of EIOW that are currently in effect do not give members the right to vote on a merger. The by-laws and articles of incorporation of EIOW MHC, when adopted, are expected to contain identical provisions. See *infra* note 5 and accompanying text.

When the merger plan provides that the foreign mutual holding company is the surviving company, then under Wisconsin law, the effect of the merger is the same as in the case of the merger of Wisconsin mutual holding companies, except as provided by the laws of the domiciliary state of the foreign mutual holding company. Wis. Stat. §611.73(2)(b).

C. Wisconsin Stock Insurance Company Merger Law

Stock insurance corporations in Wisconsin may merge by complying with the provisions set forth in Wis. Stat. §611.72. The plan of merger must be approved by resolution adopted by the board of directors of each corporation and include the following:

- (i) the name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge;
- (ii) the terms and conditions of the merger; and
- (iii) the manner and basis of converting the shares of each corporation into shares, obligations or other securities of the surviving corporation or any other corporation or into cash or other property in whole or part. Wis. Stat. §180.1101.

The Wisconsin Commissioner shall approve the plan of merger if she finds, after a hearing, that it would not violate the law or be contrary to the interests of the insureds of any participating Wisconsin corporation and that:

- (i) After the change of control, the Wisconsin stock insurance corporation would be able to satisfy the requirements for the issuance of a license to write the line or lines of insurance for which it is presently licensed;
- (ii) The effect of the merger would not be to create a monopoly or substantially to lessen competition in insurance in Wisconsin;

(iii) The financial condition of any acquiring party is not likely to jeopardize the financial stability of the Wisconsin stock insurance corporation or prejudice the interests of its Wisconsin policyholders;

(iv) The plans or proposal which the acquiring party has to liquidate the Wisconsin stock insurance corporation, sell its assets, merge it with any person or make any other material change in its business or corporate structure or management, are fair and reasonable to policyholders of the Wisconsin stock insurance corporation or in the public interest; and

(v) The competence and integrity of those persons who would control the operation of the Wisconsin stock insurance corporation are such that it would be in the interest of the policyholders of the corporation and of the public to permit the merger. Wis. Stat. §611.72(3).

D. The Mergers

The consummation of the Step One Transactions is presently anticipated to occur in November of 2001. At such time, the board of directors of each of Liberty Mutual Holding Company, EIOW MHC, Converted EIOW and Merger Sub is expected to approve the entry by each constituent company into an agreement and plan of merger (the "Merger Agreement"), pursuant to which EIOW MHC will merge with and into Liberty Mutual Holding Company and Merger Sub will merge with and into Converted EIOW. As described above, the consummation of the Mergers will be conditioned upon the receipt of certain state insurance regulatory approvals and approvals of members of Liberty Mutual Holding Company.

Upon consummation of the Mergers, (i) EIOW MHC's separate corporate existence will cease by operation of law and Liberty Mutual Holding Company will assume legal ownership of all of the assets of EIOW MHC (including shares of voting stock in Converted EIOW) and (ii) Merger Sub's separate corporate existence will cease by operation of law and Converted EIOW will assume legal ownership of all of the assets of Merger Sub. By virtue of the Mergers, Liberty Mutual Holding Company also will become responsible for all of EIOW MHC's liabilities and obligations and Converted EIOW for all of Merger Sub's liabilities and obligations, if any. While any contract rights that inured to a policyholder by virtue of being the holder of an insurance policy

issued by Converted EIOW remain with Converted EIOW, all membership interests of such policyholder that were in EIOW MHC will be extinguished and replaced with equity rights in Liberty Mutual Holding Company by operation of law.

It is presently contemplated that the Merger Agreement will be approved by the boards of directors of Liberty Mutual Holding Company, EIOW MHC, Converted EIOW and Merger Sub at the time such boards are formed.⁴ As noted above, under the Massachusetts General Laws, the Merger Agreement also must be submitted to the Massachusetts Commissioner for approval. The Massachusetts Commissioner may elect to conduct a public hearing, of which notice is to be given to policyholders and others as the Massachusetts Commissioner deems appropriate, to consider, among other things, the fairness of the terms and conditions of the proposed Mergers, whether the interests of policyholders are protected, and whether the Mergers are in the public interest.

The Massachusetts General Laws also require that the Merger Agreement be approved by a vote of two-thirds of the holders of Reorganized LMIC insurance policies who qualify under Massachusetts law as members of Liberty Mutual Holding Company and who actually vote. Mass. Stat. 175, §19S(b). Accordingly, LMIC intends to give members of Liberty Mutual Holding Company an opportunity to vote on the Mergers at a meeting to be held for all Liberty Mutual Holding Company members.⁵ Materials relating to that meeting which will be forwarded

⁴ LMIC and EIOW anticipate that the Merger Agreement may be amended in connection with obtaining regulatory approvals. If the Merger Agreement is amended, the amended agreement will be submitted to the board of directors of each company, and the amended agreement, rather than the original Merger Agreement, will be the subject of the public hearing and the member meeting for Liberty Mutual Holding Company.

⁵ EIOW is currently meeting with the Wisconsin Insurance Department to determine precisely if the policyholders of Converted EIOW, as members of EIOW MHC, are entitled to vote on the proposed Mergers and, in connection with the solicitation of such votes, to determine the appropriate notification, voting and approval requirement under Wisconsin insurance law. At this time, it is anticipated that EIOW MHC members will not be solicited to vote on the Mergers. However, EIOW policyholders will receive

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to members will conform to applicable Massachusetts regulations for notices of a member meeting to vote on a merger.⁶

E. Membership Interests in Massachusetts and Wisconsin

The proposed Mergers will comply in all respects with the requirements of both Massachusetts and Wisconsin laws and in particular, since Liberty Mutual Holding Company will be the surviving company, with Mass. Stat. §175:19S(a)(iii) and (iv). Upon consummation of the Mergers, members of EIOW MHC will become members of Liberty Mutual Holding Company, and all persons with membership interests in EIOW MHC will have equity rights in Liberty Mutual Holding Company, as required by Massachusetts law.

1. Massachusetts

Under the Massachusetts General Laws, membership interests in a mutual holding company are not characterized as securities. See Mass. Stat. §175:19K(k) (membership interests in a mutual holding company shall not be considered a security). No certificates will be issued evidencing the membership interests in Liberty Mutual Holding Company nor does Massachusetts

⁵ (...continued)
disclosure from EIOW of the proposed Mergers (including the non-solicitation of EIOW MHC member votes) in connection with the restructuring of EIOW from a mutual insurance company to a stock insurance company under a mutual holding company structure and will be voting upon the restructuring. See *infra* note 3 and accompanying text.

⁶ LMIC and EIOW do not intend to file proxy materials with the SEC in connection with the solicitation of votes on the merger proposal in accordance with Section 14(a) under the Securities Exchange Act, and the rules thereunder, which apply to the solicitations of proxies "in respect of any security" because: (i) the solicitation will not be in respect of securities, but rather, in respect of insurance contracts; and (ii) the solicitation of the votes of Liberty Mutual Holding Company members will be effected solely because of, and in full compliance with, the requirements of Massachusetts insurance laws and regulations.

law require such issuance. Rather, a list of members will be kept on the books and records of Liberty Mutual Holding Company. Membership interests in a mutual holding company are not transferable or alienable in any manner whatsoever except if ownership of the insurance policy itself is transferred. Moreover, upon cancellation or expiration of the policy by virtue of which the policyholder's membership in the mutual holding company is derived, the policyholder's membership in the mutual holding company will automatically cease. In other words, all membership interests in Liberty Mutual Holding Company remain in force only so long as the individual remains a policyholder of Reorganized LMIC. When Reorganized LMIC issues additional policies, the holders of such policies automatically acquire membership interests in Liberty Mutual Holding Company. See Mass. Stat. §175:19K(b)(v).

Members of Liberty Mutual Holding Company will be entitled to vote in the election of directors of Liberty Mutual Holding Company and to vote on such other matters as will be presented to them from time to time by Liberty Mutual Holding Company's board of directors. The articles of organization of Liberty Mutual Holding Company will provide that a member shall have only one vote, regardless of the number of policies or contracts of insurance held by that member. As a mutual holding company, Liberty Mutual Holding Company will not issue any capital stock.

The Massachusetts Commissioner will retain jurisdiction at all times over Liberty Mutual Holding Company to assure that policyholders' interests are protected. See Mass. Stat. §175:19K(d)(vii). A Massachusetts mutual holding company cannot dissolve, liquidate or wind-up without the approval of the Massachusetts Commissioner or as ordered by the court pursuant to proceedings brought under Chapter 175, Sections 180A to 180L, inclusive, of the Massachusetts General Laws. See Mass. Stat. §175:19K(j). In the unlikely event of a voluntary dissolution, any surplus which remains after payment of the liabilities shall be distributed to the members of Liberty Mutual Holding Company in a manner determined by the board of directors of Liberty Mutual Holding Company and approved by the Massachusetts Commissioner.

A mutual holding company, such as Liberty Mutual Holding Company, formed pursuant to Chapter 175, Sections 19F to 19W, inclusive, of the Massachusetts General Laws is not authorized to transact the business of insurance. See Mass. Stat. §175:19K(d)(i). In addition, a Massachusetts mutual holding company is governed by the following statutory requirements:

(i) A mutual holding company may not make any payment of income, dividends contingent upon an apportionment of profits, or any other distribution of profits, except to the limited extent provided in the mutual holding company's articles of organization or as otherwise directed or approved by the Massachusetts Commissioner. See Mass. Stat. §175:19K(d)(vii).

(ii) A mutual holding company may not transfer its domicile to any other state without the approval of the Massachusetts Commissioner for a period of five years after formation. See Mass. Stat. §175:19K(m).

(iii) If the total adjusted capital of the reorganized insurer is less than 300% of its authorized control level risk based capital, as of any calendar year-end after the reorganization effective date, then for so long as such deficiency continues, the reorganized insurer shall not, without prior notice to and review by the Massachusetts Commissioner, make any acquisitions of subsidiaries. See Mass. Stat. §175:19K(n).

In addition to those statutory requirements set forth in the Massachusetts MHC Act, Liberty Mutual Holding Company, LMHC Massachusetts Holdings, LMGI and/or the reorganized insurer are subject to further regulation by the Commissioner as a result of a number of undertakings which resulted from discussions with the staff at the Massachusetts Division in connection with the staff's review of LMIC's and LMFIC's plans of reorganization. See our no action requests submitted concurrently to the Staff with this request, entitled "*Reorganization of Liberty Mutual Insurance Company into a stock insurance company under a mutual holding company structure*" and "*Reorganization of Liberty Mutual Fire Insurance Company into a stock insurance company under a mutual holding company structure*", respectively.

2. *Wisconsin*

Under the Wisconsin Insurance Code, membership interests in a mutual holding company are not characterized as securities. See Wis. Stat. §644.22 (membership interest in a Wisconsin

mutual holding company shall not constitute a security). EIOW MHC does not intend to issue certificates evidencing the membership interests in EIOW MHC nor does Wisconsin law require such issuance. Rather, a list of members will be kept on the books and records of EIOW MHC. Membership interests in a mutual holding company are not transferable or alienable in any manner whatsoever except if ownership of the insurance policy itself is transferred. Wis. Stat. §644.07(10)(e). Moreover, upon cancellation or expiration of the policy by virtue of which the policyholder's membership in the mutual holding company is derived, the policyholder's membership in the mutual holding company will automatically cease. Wis. Stat. §644.07(10)(d). In other words, all membership interests remain in force only so long as the individual remains a policyholder of Converted EIOW.

The Wisconsin Commissioner retains jurisdiction at all times over a Wisconsin mutual holding company to assure that policyholders' interests are protected. A Wisconsin mutual holding company cannot dissolve, liquidate or wind-up without the approval of the Wisconsin Commissioner. Wis. Stat. §644.28. In the event of a voluntary or involuntary dissolution, any surplus which remains after payment of the liabilities of EIOW MHC must be distributed to the members of EIOW MHC on a pro-rata basis up to a maximum amount equal to the total premium paid, with interest, and any surplus remaining thereafter will be paid to the Wisconsin state treasury in accordance with Sections 644.28(5) and 645.72(4) of the Wisconsin Insurance Code. Stockholders of Converted EIOW will have no liquidation or other rights with respect to EIOW MHC in their capacities as such.

A mutual holding company, such as EIOW MHC, formed under Wis. Stat. §644.02 *et seq.* of the Wisconsin Insurance Code is not authorized to transact the business of insurance. Wis. Stat. §644.03(2)(a). In addition, a Wisconsin mutual holding company is governed by the following statutory requirements:

- (i) A mutual holding company may engage, directly or indirectly, in a business that is subject to regulation under another Wisconsin statute only if not prohibited by, and subject to all limitations of, the other statute. Wis. Stat. §644.03(2)(b).

(ii) The proposed articles and bylaws of the mutual holding company must comply with the general corporate rules of the State of Wisconsin. Wis. Stat. §644.07(4)(a).

(iii) The Commissioner may, by rule, require that any action taken by the board of a mutual holding company regarding compensation of directors and officers of the mutual holding company be reported to the Commissioner within 30 days after the action is taken. Wis. Stat. §644.19(3).

(iv) A mutual holding company may not be a party to a contract that has the effect of delegating to a person, to the substantial exclusion of the board, the authority to exercise any management control of the mutual holding company or of any of its major corporate functions. Wis. Stat. §644.20.

(v) A Wisconsin mutual holding company shall file such annual reports as may be prescribed by the Commissioner by rule. Wis. Stat. §644.21.

II. DISCUSSION

A. Registration under the Securities Act of 1933

Applying the test developed in *Securities and Exchange Commission v. Howey*, 328 U.S. 293 (1946) ("Howey"), it is our opinion that the extinguishment of membership interests in EIOW MHC and a replacement of such membership interests with membership interests in Liberty Mutual Holding Company would not constitute the offer or sale of a "security" as that term is defined in Section 2(a)(1) of the Securities Act.

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

"[A]ny 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."

1. Membership Interests in Liberty Mutual Holding Company are not Securities

The definition of a security in Section 2(a)(1) of the Securities Act includes interests whose names have commonly accepted meanings, such as any note, stock, bond or debenture, as well as interests of "more variable character [that] were necessarily designated by more descriptive terms." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943). The term "membership interest" is not enumerated as a traditional class of security in Section 2(a)(1) of the Securities Act. However, certain non-traditional equity interests or participations have been found to be securities by virtue of being "investment contracts" or an "interest or instrument commonly known as a security."

In *Securities and Exchange Commission v. Howey*, 328 U.S. 293 (1946) ("Howey") and its progeny, the Supreme Court developed a test that has generally been used to determine whether an instrument is an "investment contract" or "interest or instrument commonly known as a security." While the Howey test specifically focused on "investment contracts," the Supreme Court since Howey has applied the test more broadly. See *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975) ("Forman"). (In Forman, the Supreme Court stated that the Howey test "embodies the essential attributes that run through all of the Court's decisions defining a security.") The Howey test focuses on the economic realities of a transaction. The Supreme Court, in *Reves v. Ernst & Young*, 494 U.S. 56, 64 (1990) ("Reves"), summarized the elements of the Howey test as follows: "(1) an investment; (2) in a common enterprise; (3) with reasonable expectation of profits; (4) to be derived from the entrepreneurial or managerial efforts of others." Membership interests in a mutual holding company do not meet the first and third elements required under the Howey test.

First, an investment is "an exchange for value," most often a monetary contribution. 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" which characterizes an investment. A membership interest in Liberty Mutual Holding Company arises solely from the purchase of an insurance policy from

Reorganized LMIC or Converted EIOW. Holders of insurance policies issued by Reorganized LMIC or Converted EIOW in force on the Effective Date will not be required to make payments in cash or in the form of other property to become members of Liberty Mutual Holding Company; likewise, holders of insurance policies issued after the Mergers are consummated will automatically become members of Liberty Mutual Holding Company by operation of law, without the payment of cash or other property. It is the underwriting practices and rating plans of Reorganized LMIC and Converted EIOW which determine whether a person becomes a policyholder (and therefore a member in Liberty Mutual Holding Company). With respect to an insurance policy, any monies paid by policyholders will be in the form of premiums paid to Reorganized LMIC and Converted EIOW with the intent of obtaining insurance coverage, and not with any profit-making, profit-sharing or investment intent with respect to membership in Liberty Mutual Holding Company. Additionally, there will be no marketing of membership interests as investments or otherwise, because they are simply rights that accompany an insurance policy and are not otherwise transferable.

Second, a membership interest does not provide any "reasonable expectation of profits" for any member of Liberty 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," *id.* (citing *Howey*, 328 U.S. at 299), but rather "by a desire to use or consume the item purchased," the expectation of profit element is not met. *Id.*

The membership interests, in and of themselves, will afford members limited voting rights and such other rights as may be provided under Massachusetts law. Moreover, since membership interests are not transferable separately from the related insurance policy and are extinguished if a member is no longer a policyholder of either Reorganized LMIC or Converted EIOW, it cannot be said that there is any market for the membership interests or that they are "repurchased" at a "profit" by Liberty Mutual Holding Company or by any other person. After the Mergers, membership in Liberty Mutual Holding Company will be an automatic result of obtaining insurance coverage through Reorganized LMIC or Converted EIOW. Accordingly, the membership interests are not securities because the economic reality of becoming a Liberty Mutual Holding Company member is that policyholders part with their money not for the purpose of reaping

profits from the efforts of others, but for the purpose of purchasing insurance, a commodity for personal consumption. See *Forman*, 421 U.S. at 858.

We also believe that the membership interests in Liberty Mutual Holding Company would not constitute a "security" under the criteria applied by the Supreme Court in *Reves*. In *Reves*, the Supreme 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*, 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 Supreme Court noted that the marketing efforts employed in selling an alleged security are relevant to the expectations of the general public. *Id.*, at 69 (noting that "the advertisements for the notes here characterized them as 'investments' and there were no countervailing factors that would have led a reasonable person to question this characterization").

Finally, the absence of "some other factor such as the existence of another regulatory scheme [which] significantly reduces the risk of the instrument..." must be considered. See *Id.* at 67; see also *Marine Bank v. Weaver*, 455 U.S. 551, 557-559 (1982) (certificates of deposit); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 569-570 (1979).

We have analyzed the membership interests of Liberty Mutual Holding Company associated with the issuance of an insurance policy by Reorganized LMIC or by Converted EIOW under the *Reves* criteria, particularly in light of the *Reves* suggestion that the existence of another regulatory scheme might be relevant. Our analysis confirms the conclusion that the membership interests in Liberty Mutual Holding Company do not constitute "securities."

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First, the motivation of the person purchasing an insurance policy from Reorganized LMIC or Converted EIOW is not the expectation of receiving a profit on account of the related membership interest in Liberty Mutual Holding Company. Rather, the policyholder's motivation is to obtain insurance. In addition, Liberty Mutual Holding Company is not attempting "to finance substantial investments" through the issuance of membership interests. In fact, the creation of the membership interests themselves does not directly generate any capital for the "seller" at all.

Second, there is no "plan of distribution" of membership interests; membership interests simply accompany the issuance of an insurance policy from Reorganized LMIC or Converted EIOW, and cannot be separately transferred apart from the policies to which they relate. This fact is reinforced by the Massachusetts General Laws which state: "A description of the membership interests and related factual disclosure shall not be considered to be an inducement to buy insurance...." Mass. Stat. §175:19K(k).

Third, it is difficult to see any way that a policyholder of Reorganized LMIC or Converted EIOW would view the membership interests in Liberty Mutual Holding Company as anything other than an inseparable attribute of the insurance policy to which it attaches, as is the case today. 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, as described above, under the Massachusetts General Laws, membership interests are not characterized as securities. Mass. Stat. §175:19K(k) (membership interests in a mutual holding company shall not be considered a security).

Fourth, the Supreme 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 above, Liberty Mutual Holding Company would be subject to regulation by the Massachusetts Commissioner.

We recognize that the Staff, in its letters to Minnesota Mutual Life Insurance Company, National Life Insurance Company, Ameritas Life Insurance Corporation, to mention a few, noted, among other things, that the mutual holding company established in those transactions would be

subject to a level of regulation equal to that of a domestic insurance company. Although under the Massachusetts General Laws the level of regulation over Liberty Mutual Holding Company by the Massachusetts Commissioner is not "equal" to that of a Massachusetts domestic insurance company, we believe that the Massachusetts regulatory scheme falls squarely within the Reves analysis. The Massachusetts Commissioner will retain oversight over the membership interests in Liberty Mutual Holding Company in order to ensure that policyholders' interests as members are protected; for example, Liberty Mutual Holding Company's articles of organization and bylaws will be approved by the Massachusetts Commissioner; the membership interests themselves will only be issued pursuant to the Plan of Merger which will be approved by the Commissioners of both Wisconsin and Massachusetts only after a finding that the Mergers are in the best interests of the respective companies and fair and equitable to their policyholders in each jurisdiction; following the Mergers, the Massachusetts Commissioner will retain jurisdiction over Liberty Mutual Holding Company; and Liberty Mutual Holding Company may not dissolve without the approval of the Massachusetts Commissioner or a court. See *infra* pp.10-12. Moreover, the additional undertakings incorporated into the plans of reorganization for LMIC and LMFIC ensure that Liberty Mutual Holding Company will be held to a higher standard of regulatory oversight than contemplated by the Massachusetts General Laws. See our requests submitted concurrently to the Staff with this request, entitled "*Reorganization of Liberty Mutual Insurance Company into a stock insurance company under a mutual holding company structure*" and "*Reorganization of Liberty Mutual Fire Insurance Company into a stock insurance company under a mutual holding company structure*", respectively.

Therefore, since the membership interests in Liberty Mutual Holding Company do not meet any of the tests articulated by the Supreme Court for determining whether an instrument is a security under Section 2(a)(1) of the Securities Act, it is our opinion that the membership interests should not be considered securities under the Securities Act. We believe that under the circumstances described above, it is appropriate for the Staff to take a position similar to that taken in the no-action letters issued by the Staff that are described earlier in this letter.

B. Registration under the Securities Exchange Act

Section 12(g) of the Securities Exchange Act requires that certain "issuers" with total assets exceeding \$1,000,000 and a class of "equity securities" held of record by 500 or more persons must register under the Securities Exchange Act. An "issuer" is defined under Section

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3(a)(8) as "any person who issues or proposes to issue any security." The definition of "security" under the Securities Exchange Act "is virtually identical" to the definition under the Securities Act. *Forman*, 421 U.S. at 848 n.12 (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336, 342); see also *Reves*, 494 U.S. at 61 n.1. For the same reasons set forth in the discussion of the Securities Act above, we believe a membership interest is not a security under the Securities Exchange Act. We are therefore of the opinion that Liberty Mutual Holding Company will not be subject to the registration requirements of Section 12(g) of the Securities Exchange Act.

Based on the foregoing, we request that the Staff confirm that it will not recommend any enforcement action to the SEC if, in connection with the merger of EIOW MHC and Liberty Mutual Holding Company, (i) the membership interests of EIOW MHC members are extinguished and such members become members of Liberty Mutual Holding Company and (ii) on and after the Effective Date, holders of policies issued by Converted EIOW automatically become members of Liberty Mutual Holding Company, in each case without registration of the membership interests in Liberty Mutual Holding Company under the Securities Act or the Securities Exchange Act.

Because of the importance of the Mergers to EIOW and LMIC, we would appreciate hearing from you at your earliest convenience. If you should have any questions or would like additional information, please telephone the undersigned at (212) 735-2388, or, in her absence, Robert J. Sullivan at (212) 735-2930.

Sincerely,

/s/: Susan J. Sutherland

Susan J. Sutherland

cc. Michael G. Hyatte, Esq.
Christopher J. Mansfield, Esq.
Richard Quinlan, Esq.

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