may decline to file such an action in the absence of sufficient evidence to establish all the essential elements of the unlawful act. For a similar construction of a statute relating to the discretionary power of the Attorney General concerning the question as to whether or not an action will be filed, see State ex rel. Licking Tp. v. Clamme et al. (1923), 80 Ind. App. 147, 134 N. E. 676.

OFFICIAL OPINION NO. 43
October 13, 1955

Honorable Leonard T. Conrad
State Senator
1528 South Center Street
Terre Haute, Indiana

Dear Senator Conrad:

This is in reply to your request for an Official Opinion in which you inquire as to the following:

"Pursuant to H. B. 168, Chapter 15 of the Acts of 1953, I desire an opinion from your office.

"As an example, I will use the Travelers Protective Association of America, commonly referred to as the T. P. A. The T. P. A. is a fraternal beneficiary association, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit.

"I submit the following questions:

"1. At the present time, the T. P. A. issues a certificate of membership to its members, as required by its bylaws and constitution. Would the T. P. A. be required, under this law, to issue a standard form insurance policy?

"2. Would the T. P. A. be required to submit for approval by the Commissioner of Insurance all changes in benefits before said benefits could be made applicable in Indiana?"
“3. At the present time, T. P. A. members recommend or solicit, without compensation, new members. Would these T. P. A. members be classed as insurance agents?”

Fraternal beneficiary associations may be organized and operated under and pursuant to Article X of the Indiana Insurance Law; see Acts of 1935, Ch. 162, Secs. 181 'to 208, as found in Burns' Indiana Statutes (1952 Repl.), Sections 39-4401 to 39-4428.

I have been informed by the Insurance Commissioner of Indiana that the Travelers' Protective Association is a fraternal beneficiary association, organized in the State of Missouri, admitted to do business in Indiana, and writing only accident insurance. Under Indiana law the agreement, or contract, between the association and its members consists of the certificate of membership, the articles of association, the constitution and by-laws of the society and the application for membership signed by the applicant, and all amendments to each thereof. See the Acts of 1935, Ch. 162, Sec. 187, as found in Burns' Indiana Statutes (1952 Repl.), Section 39-4407.

The Indiana Insurance Law of 1935 contained certain standard provisions for health and accident policies. These mandatory provisions were contained in the Acts of 1935, Ch. 162, Sec. 174, as found in Burns' Indiana Statutes (1952 Repl.), Section 39-4306, but such provisions do not appear to have originally been applicable to fraternal beneficiary associations which were exempted therefrom under the Acts of 1935, Ch. 162, Sec. 208, as found in Burns' Indiana Statutes (1952 Repl.), Section 39-4428, which provides as follows:

“All fraternal benefit societies or fraternal beneficiary associations shall be exempt from all the provisions of the insurance laws of this state, now in effect or which may hereafter be enacted unless such societies or associations are specifically referred to therein except the provisions of this article and Part 1 and Part 2 of this act, not only in governmental relations with the state, but for every other purpose.”

Subsequently, Section 174 of the Indiana Insurance Law, supra, dealing with standard provisions for health and acci-
dent policies was amended so as to provide, among other things, that such standard provisions were to be applicable to fraternal benefit associations or societies; see the Acts of 1947, Ch. 58, Sec. 1, as found in Burns’ Indiana Statutes (1952 Repl.), Section 39-4306. The apparent purpose of this amendment was to place fraternal beneficiary associations on the same basis as life insurance companies insofar as the standard provisions required to be stated in life insurance policies were concerned.

Thereafter, in 1953, the Indiana Insurance Law, Section 174, supra, as amended, was repealed and the law relating to standard provisions for health and accident policies was re-enacted with certain changes and additions by the Acts of 1953, Ch. 15, Sec. 169.1, as found in Burns’ Indiana Statutes (1952 Repl., 1955 Supp.), Section 39-4251. Section 169.1 of said Act, supra, expressly applies to fraternal benefit associations or societies and provides, among other things, that the term “policy of accident and sickness insurance” as used in said Act includes any policy or contract covering one or more of the kinds of insurance described in Classes I (b) or II (a) of the Acts of 1935, Ch. 162, Sec. 59, as found in Burns’ Indiana Statutes (1952 Repl.), Section 39-3501, which is the Indiana Insurance Law.

The kind of insurance described in Class I (b) of the Indiana Insurance Law, supra, is insurance against bodily injury or death by accident and against disablement resulting from sickness and every insurance appertaining thereto; the insurance described in Class II (a) of said Act, supra, is insurance for any person against bodily injury, disablement or death resulting from accident and against disablement resulting from disease and every insurance appertaining thereto.

These classifications of insurance, at the time of the enactment of the Insurance Law in 1935 do not appear to have been applicable to fraternal beneficiary associations in view of the exemption provisions relating thereto and contained in the Acts of 1935, Ch. 162, Sec. 208, supra. However, the specific reference to said classifications of insurance in the 1953 Act clearly bring the insurance features afforded by fraternal beneficiary associations within the insurance classifications above referred to and, I think, makes the Acts of 1953, Ch. 15,
supra, generally applicable to said associations insofar as standard provisions in health and accident policies are concerned.

As previously stated, the terms of the contract between the fraternal beneficiary association and its members is fixed by the certificate of membership, the articles of association, or incorporation, the constitution and by-laws of the society, and the application for membership, together with all amendments to each thereof. It has been held, however, that certificates of membership in mutual benefit societies are in legal effect policies of insurance which are in many respects governed by the same rules as those which prevail in cases of ordinary contracts of insurance, the Elkhart Mutual Aid Benevolent & Relief Assn. v. Houghton (1884), 98 Ind. 149; The Presbyterian Mutual Assurance Fund v. Allen (1885), 106 Ind. 593, 7 N. E. 317; Holland, Gdn. v. Taylor et al. (1887), 111 Ind. 121, 126, 12 N. E. 116.

It has also generally been held that one of the essential reasons for providing the standard form of policy is that the entire contract may be contained in a single instrument that at all times may be in the hands of the policyholder, Orr v. National Fire Ins. Co. of Hartford (1926), 50 S. D. 519, 210 N. W. 744, affirmed 52 S. D. 513, 219 N. W. 119; Langbehn v. American Ins. Co. of Newark (1919), 41 S. D. 581, 171 N. W. 820.

In view of the foregoing I am of the opinion that a membership certificate issued by this type of a fraternal benefit association is subject, insofar as the same are applicable, to the provisions of the Acts of 1953, Ch. 15, as found in Burns' Indiana Statutes (1952 Repl., 1955 Supp.), Section 39-4251 et seq., and that such standard provisions should be contained in any such membership certificate. In this connection, see Sebasta v. Order of United Commercial Travelers (1952), 117 N. Y. S. (2d) 750, holding that the required standard provisions for insurance policies, under the New York Insurance Law, should become a part of policies and certificates issued by fraternal benefit societies.

Insofar as membership certificates in the Travelers' Protective Association are concerned, I would also call your attention
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to Article VIII, Section 5 of the Constitution of said association which expressly confers authority upon the board of directors thereof to prescribe a form of membership certificate which will conform with the standard provisions required by the laws of any state in which said association is licensed to do business.

With reference to your second question, I would again refer you to the Acts of 1953, Ch. 15, Sec. 169.1, Burns’ Indiana Statutes (1952 Repl., 1955 Supp.), Section 39-4251, which provides in part as follows:

* * *

“No policy of accident and sickness insurance shall be issued or delivered to any person in this state nor shall any application, rider or endorsement be used in connection therewith until a copy of the form thereof and of the classification of risks and the premium rates, or, in the case of assessment companies the estimated cost pertaining thereto, have been filed with the commissioner. This section [§ 39-4251] shall be applicable also to assessment companies and fraternal benefit associations or societies.”

Under this statute I think a fraternal beneficiary association is required to file any changes in its contract or agreement relating to benefits available to its members with the Insurance Commissioner of Indiana for his approval if said changes and benefits are to be made effective in this state.

You also inquire as to whether members of fraternal benefit societies who recommend or solicit, without compensation, new members, would be classed as insurance agents. As previously pointed out, fraternal benefit societies are specifically exempted from the provisions of the insurance laws of Indiana, unless such societies are specifically referred to therein, except for the provisions of Part 1 and Part 2 of the Indiana Insurance Law of 1935. The licensing and other governmental regulation of insurance agents, other than life insurance agents, is found in the Acts of 1935, Ch. 162, Secs. 209 to 216, as found in Burns’ Indiana Statutes (1952 Repl.), Sections 39-4501 to 39-4508. Fraternal benefit societies are not specifically referred to in said sections and I do not think the same are applicable to such societies or associations.
However, I also find that the Acts of 1935, Ch. 162, Sec. 3, as found in Burns' Indiana Statutes (1952 Repl.), Section 39-3203 (i), defines the term "agent" as any person, firm or corporation, not being an officer or salaried home or department office employee of a company for a duly licensed insurance broker, who solicits business in behalf of any company, corporation or association or transmits for a person other than himself an application for a policy of insurance of any kind to or from such company, corporation or association; to act in the negotiation of any such policy or in the negotiation of its continuance or renewal; to write and countersign policies and collect premiums therefor. This definition of the term "agent" is contained in Part 1 of the Indiana Insurance Law, supra, from which fraternal benefit associations are not exempt under Burns' Indiana Statutes (1952 Repl.), Section 39-4428, supra.

It is possible that, technically speaking, a member of a fraternal benefit society who solicits new members therein could be classed, under some circumstances, as an "agent" under this statute. This, however, would depend entirely upon the circumstances of each case and would be somewhat difficult to determine in view of the fact that membership in a fraternal benefit society is concerned with and carries with it features other than insurance; further, some classes of membership in such societies carry with them no insurance or indemnity features whatsoever while in other cases the insurance or indemnity features may be entirely incidental to the other features of the society.

I am, therefore, of the opinion that your third question can be answered only by a specific reference to individual circumstances of each case which arises.

I hope that the foregoing has fully answered your questions.