> "For the purpose of enforcing this article, the local health officers shall be food sanitarians subordinate to the state board."

The inevitable conclusion is that the local boards of health are given no authority to adopt rules and regulations by those provisions of the Public Health Code that pertain especially to the operation of food establishments.

Therefore, in answer to your first question, it is my opinion that local boards of health have no authority to adopt rules and regulations regulating the operation of food establishments within their jurisdiction, and that such authority is vested solely in the State Board of Health.

Since the answer to your first question is in the negative, your second question need not be answered at this time.

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## OFFICIAL OPINION NO. 70

**INDIANA SECURITIES ACT—Exchange of Stock Where Insurance Companies Merge With Non-Insurance Corporations.**

Opinion Requested by Hon. Edgar D. Whitcomb, Secretary of State.

I am in receipt of your recent letter which may be phrased thusly:

> This letter is to request an official opinion of your office as to the applicability of the Indiana Securities Act as it pertains to exchange offerings of Indiana insurance companies under Chapter 61 of the Acts of 1967. This chapter allows Indiana insurance companies to create a holding company which has the powers of a general corporation and at the same time

> owns 100% of the regulated insurance company. Prior to this 1967 enactment such re-organization was not possible because Indiana insurance companies could not merge with non-insurance corporations. Such mergers are still prohibited, but similar results may be achieved by utilizing the exchange method provided by Chapter 61.
>
> Is it necessary for such holding companies to register the issuance of their securities and to offer these through a prospectus?
>
> Has Chapter 61 of the Acts of 1967 preempted the jurisdiction of the Indiana Securities Act in any way?
>
> If these securities would normally be subject to registration, are they exempt or excluded [excepted] from registration by any provision of the Indiana Securities Act of 1961 as amended in 1967?

Chapter 61 of the Acts of 1967, the same being Burns §§ 39-3918—39-3925 is an original act supplementing the Indiana Insurance Law establishing a procedure whereby stockholders of a domestic stock insurance company may exchange their stock in such insurance company for stock, other securities, cash, other consideration or any combination of such, of either another stock insurance company or a general corporation after approval by a majority of the board of directors, approval of the insurance commissioner after a hearing and approval of at least 66 ⅔% of the stockholders. As you stated in your letter this allows Indiana insurance companies to create a new corporation (holding company) under the Indiana General Corporation Act which has the powers of a general corporation and at the same time own 100% of the regulated insurance company.

Section 3 of the Act, Burns § 39-3920 provides that the plan of exchange be submitted to the boards of directors of the insurance company and the new holding company and after approval by a majority of both boards, the plan of exchange must be submitted to the Insurance Commissioner, accompanied by (1) financial statements of the insurance company for its last preceding year prepared pursuant to the Indiana Insurance Law, (2) pro forma financial state-

ments of the insurance company and the new corporation on the assumption that the Plan of Exchange became effective at the end of the last preceding fiscal year of the insurance company (3) an estimate of expenses already incurred and of expenses to be incurred in connection with the Proposed Plan of Exchange, and (4) a written statement which sets forth for the insurance company and the new corporation the proposed changes, if any, in management policy and in the identity of officers and directors of the insurance company and the new corporation which are initially contemplated should the Plan of Exchange be effected as proposed.

Not less than twenty days after the date on which the Plan of Exchange is presented to him, the Insurance Commission must hold a hearing, pursuant to Burns § 39-3920 (b), upon the fairness of (1) the terms, conditions and provisions of the Plan of Exchange and (2) the proposed exchange of stock of the new corporation for the stock of the insurance company. The Insurance Commissioner may require the insurance company and the new corporation to produce such evidence at the hearing as he deems necessary to establish the foregoing, including in any event evidence concerning the valuation of the respective companies and the method utilized by the management of each company to establish such valuation, inclusive of the value established with respect to the common stock of the insurance company which is proposed to be exchanged as well as the value of the stock to be offered by the new corporation in such exchange. Written notice of the hearing must be mailed at least ten (10) days prior to the hearing by the insurance company and by the new corporation to all of their respective shareholders and such shareholders and any other interested party will have the right to appear and become a party to the hearing.

The Insurance Commissioner is required to either approve or disapprove the Plan of Exchange within sixty (60) days after the plan has been submitted to him. The Commissioner may issue an order approving the plan if he finds (1) that the plan, including all modifications approved by the boards of directors of the insurance company and the new corporation,

if effected, will not tend adversely to affect the financial stability or management of the insurance company or the general capacity or intention to continue the safe and prudent transaction of the insurance business, (2) that the interest of the policyholders and shareholders are protected, (3) that the fulfillment of the plan will not affect either the contractual obligations of the insurance company to its policyholders or the ability and tendency of the insurance company to render service to its policyhodlers in the future, and (4) that the terms and conditions of the Plan of Exchange and the proposed issuance and exchange are fair and reasonable. Any party to the hearing aggrieved by the orders of the Insurance Commissioner approving or disapproving the Plan of Exchange is entitled to a judicial review of the order in accordance with the provisions of Chapter 365 of the Acts of 1947, the same being Burns §§ 63-3001—63-3030, known as the Administrative Adjudication and Court Review Act.

If the Plan of Exchange is approved by the Insurance Commissioner, it must then be submitted to a vote of the shareholders at an annual or special meeting of the shareholders. Notice of the submission of the plan to the shareholders will be included in the notice of such annual or special meeting. The plan will be deemed approved by the shareholders upon receiving the affirmative votes representing two-thirds of the outstanding stock. Within ten days after the plan is adopted by the shareholders, a written notice of the adoption of the plan must be mailed or delivered personally to each shareholder of record who was entitled to vote thereon. The insurance company is required to file with the Insurance Department an affidavit that such notice was given.

After the date of the meeting of the shareholders at which the Plan of Exchange was approved, a certificate setting forth the Plan of Exchange, the manner of the approval thereof by the directors of both companies, and the manner and vote by which adopted must be presented to the Insurance Department for filing. The Plan of Exchange then becomes effective.

The answer to your first question "Is it necessary for such holding companies to register the issuance of their securities

and to offer these through a prospectus" must be based on the meaning of section 201 of the 1961 Indiana Securities Act, Burns § 25-856 which reads as follows:

> "It is unlawful for any person to offer or sell any security in this state unless (1) it is registered under this act or (2) the security or transaction is exempted under section 102." [Burns § 25-855]

This section requires that all securities which are *offered* or *sold* in Indiana must be registered under the Indiana Securities Act unless exempted under section 102 [Burns § 25-855]. If registration is required it must either be by coordination [Burns § 25-858] or by qualification [Burns § 25-859]. Registration by notification was repealed by the 1967 Legislature [Burns § 25-857]. Both types of registration require the use of a prospectus.

It must be determined if the exchange of the securities of the insurance company for the securities of the holding company is an offer or sale within the meaning of the Indiana Securities Act. The offer or sale of a security is defined by section 101 (i) (1) and (2) of the Indiana Securities Act [Burns § 25-854] as follows:

> "(1) 'Sale' or 'sell' includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.
>
> "(2) 'Offer' or 'offer to sell' includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value."

The Indiana Securities Act is an adaptation of the Uniform Securities Act drafted by the National Conference of Commissioners on Uniform State Laws. The definitions of offer and sale were taken from the Uniform Act. This phraseology was borrowed substantially from section 2 (3) of the Federal Securities Act of 1933, 15 U.S.C. § 77 (b) (3). The United States Securities and Exchange Commission which administers the federal Act has adopted a rule which sets out what it regards as not being an offer or sale within the meaning of the federal statute. This rule is known as

the "no sale theory." The "no sale theory" according to the draftsmen's commentaries to the Uniform Act as set out on page 347 of Loss and Cowett's *Blue Sky Law,* Little, Brown and Company (Boston 1958) was incorporated into the Uniform Act section 401 (i) (6) (C) which is section 102 (i) (7) (C) of the Indiana Securities Act [Burns § 25-854] and reads that an offer or sale does not include:

> "(C) any act incident to a class vote by stockholders, pursuant to the articles of incorporation or the applicable corporation statute, on a merger, consolidation reclassification of securities or a sale of corporate assets in consideration of the issuance of securities of another corporation;"

The exchange of the securities of the insurance company for the securities of the holding company under Chapter 61 of the Acts of 1967 [Burns (1967 Supp.) § 39-3918—39-3925] is not a merger or a consolidation within the meaning of the Indiana General Corporation Act. In fact the public policy enunciated in the Indiana Insurance Law has been to prevent mergers of insurance companies with non-insurance types of businesses. It is clear that such mergers could be detrimental to the public interest. It is possible that as a result of such a merger the paramount interest of the policyholders and the public could be compromised for the furtherance of the business interests of the noninsurance enterprise.

While Chapter 61 of the Acts of 1967 in part compromises the previously announced public policy of preventing the combining of noninsurance businesses with insurance businesses by permitting a noninsurance enterprise to be a holding company of insurance companies, the Act clearly does not regard this as a merger or consolidation. This is clearly shown by section 8 of the 1967 Act:

> "Domestic company and acquiring corporation separate and distinct entities. The domestic company and the acquiring corporation shall in all respects stand before the law as separate and distinct corporations, with neither of such corporations having any liability to the creditors, policyholders, if any, or

shareholders of the other, any acts or omissions of the officers, directors, or shareholders of either or both of such corporations notwithstanding."

It should be noted that the "no sale theory" of the United States Securities and Exchange Commission is a rule and not a part of the federal law. The Securities and Exchange Commission has on several occasions proposed changing this rule so as to regard mergers and consolidations as offers or sales. It should be further noted that even though a merger or consolidation is not now an offer or sale within the meaning of the registration provisions of the federal law, such mergers and consolidations do fall within the anti-fraud provisions of the federal securities laws. Under Indiana securities law transactions which do not come within the offer or sale provisions are not subject to the anti-fraud provisions.

The exchange is clearly not a reclassification of securities or a sale of corporation assets.

In view of the foregoing, the Indiana Securities Act should be strictly interpreted so as to give full scope to the policy of protecting the public, the shareholder and the policyholder and to give the widest scope to the public policy enunciated in the Indiana insurance law against combining non-insurance enterprises with insurance enterprises. It must be concluded that the exchange is an offer or sale within the meaning of the Indiana Securities Act and therefore not excepted from the Act.

Taking your third question next "If these securities would normally be subject to registration are they exempt or excluded [excepted] from registration by any provision of the Indiana Securities Act of 1961 as amended in 1967." As pointed out above, the securities in question are not excepted from the Indiana Securities Act. It should be noted that there is a distinction between securities which are "excepted" from the Act and those which are "exempted." Securities which are excepted are not within the scope of the Act. They are generally excepted by the definitions in the Act. Securities which are exempted are only exempt from registration. The other provisions of the Securities Act still apply to them. The question then is whether or not the securi-

ties issued in the exchange are exempted. The exemptions are set out in section 201 of the Securities Act [Burns § 25-855]. Exemptions are divided into exempt securities and exempt transactions. The question presented here is restricted to exempt securities.

Without considering section 102 (a) (5) of the Indiana Securities Act [Burns § 25-855] which exempts securities which are listed on certain exchanges (it is presumed that this is not the case as this fact was not set out in your letter), the only exemption under which the securities in question could qualify is section 102 (a) (4) [Burns § 25-855], which reads as follows:

> "(4) any security issued or guaranteed by any railroad, other common carrier, public utility or holding company; provided, that such issuer or guarantor is subject to regulation or supervision as to the issuance of its own securities by a public commission, board or officer of the government of the United States or of any state, territory or insular possession thereof or of any municipality located therein or of the District of Columbia or of the Dominion of Canada or any province thereof;"

This section appears to be a combination of the language of section 402 (a) (7) of the Uniform Securities Act and section 4 (b) of the Indiana Securities Act which preceded the 1961 Act which was Chapter 120 of the Acts of 1937. The problem is the scope of the term "holding company." It appears to be the intent of the prior Indiana Act and the Uniform Act to restrict this section to railroads, common carriers, public utilities and holding companies of railroads, common carriers and public utilities. However, the section as written applies to any type of holding company which meets the other requirements of the section. The words of the statute are clear. They do not restrict the term "holding company" to any particular type of holding company. Therefore, an insurance holding company under Chapter 61 of the Acts of 1967 is a holding company within the meaning of that section.

Before the securities of a holding company can be exempted from registration under section 102 (a) (4) of the Securities Act they must be subject to the "regulation or supervision" of some government agency or officer. The purpose of the Indiana Securities Act is to protect the investing public by requiring that securities be registered and this requires the use of a full disclosure prospectus which must be given to each person to whom an offer or sale is made. The Act exempts from registration those securities which the Legislature felt were subject to other safeguards that protect the investing public. In this case regulation or supervision of the issuance of the securities by a government officer or agency. It should be noted that the word "registration" was not used. It would appear that the Legislature intended something more than mere registration. Since the Act or its exemptions are directed towards protecting the investor it would appear that the Legislature intended that the government agency or officer must pass upon the merits and equity of the issuance of the securities in relation to those who purchase them.

As pointed out earlier in the discussion of the Insurance Company Holding Act, Chapter 61 of the Acts of 1967, the Insurance Commissioner passes upon the effect of the issuance of the holding companies' securities on the financial stability and management of the insurance company, the protection of both the policyholder and the shareholders, and whether the exchange is fair and reasonable. Since the issuance of the holding companies' securities are subject to the regulation or supervision by the Indiana Insurance Commissioner, the securities are therefore exempt under section 102 (a) (4) of the Indiana Securities Act, Burns § 25-855.

Finally, your second question "Has Chapter 61 of the Acts of 1967 preempted the jurisdiction of the Indiana Securities Act in any way." The answer is no, it has not. There is no conflict between the two Acts and the 1967 Act does not take from the 1961 Act any jurisdiction which was delegated under it. It is simply that while the exchange is an offer or sale within the meaning of the Indiana Securities Act, it falls within an exemption provided in that Act.

In summary, the exchange of insurance company securities for holding company securities under Chapter 61 of the Acts of 1967 is an offer or sale within the meaning of the Indiana Securities Act. However, the holding company securities are exempted from registration under the Indiana Securities Act, and, therefore, a full disclosure prospectus cannot be required. The exchange under Chapter 61 of the Acts of 1967 merely brings the transaction within an exemption of the Indiana Securities Act, and does not preempt the Securities Act's jurisdiction. I emphasize that this concerns an exchange of stock only, and only upon the terms of Chapter 61 of the 1967 Acts. Any other security activity by a holding company would have to be viewed by the Secretary of State in the light of that transaction. It is also obvious that the Legislature placed great discretionary power in the hands of the Insurance Commissioner in approving the exchange of stock. A strong caveat should be uttered that insurance companies are unique creatures under our law and the intermingling of an insurance company's activities with another corporation by any device, directly or indirectly, should be viewed by the Insurance Commissioner with a jaundiced eye. The strong public policy underlying this is that more than the stockholders are involved in the efficient management and stability of an insurance company, notably those insured by the company, persons aggrieved by those insured by the company and the public at large.

Nevertheless, the Legislature has made possible this new form of business organization and in so doing has made a change in the public policy of Indiana regarding the combination of insurance and non-insurance enterprises. However, it was made clear that the corporate structure of the insurance company must remain separate and distinct. This is done to protect the integrity of the insurance company so that the application of the assets do not become subservient to other non-related business operations. This is necessary so that the directors of the insurance corporation have always foremost in their minds the maintenance of reserves, the payment of claims, the establishment of insurance rates, etc., before considering dividends for stockholders. The circumlocution concerning the application of this Act to avoid

those paramount duties of directors and officers of insurance companies should be avoided by all public officials dealing with this Act.

This holding company approach is in keeping with the current mode of conglomerate business entities that have arisen because of federal tax exigencies. It is important to note that companies availing themselves of the benefits of this Act should remain aware that the Act does not lessen the impact of the Indiana anti-trust laws which frown upon the lessening of competition in any industry or the unwholesome control of too great a percentage of the market or the industry.