Mr. Harry E. McClain  
Department of Insurance  
State of Indiana  
509 State Office Building  
Indianapolis, Indiana

Dear Mr. McClain:

You have requested my Official Opinion on the following question:

"Are there legal shareholders of the surviving life insurance company which would allow it to execute the required procedures to become qualified to do a life insurance business in Indiana and to continue such business or can such a surviving life insurance company without shareholders be admitted to do business and continue in such business in Indiana?"

In order to give meaning to such question, it is necessary to set forth your letter presenting the question:

"A foreign stock life insurance company and non-insurance corporation which owns all of the stock of the life insurance company, both domiciled in the same state, seek to merge the parent non-insurance corporation into the life insurance company. They propose to not issue stock certificates of the surviving life insurance company. Following the completion of the above merger they request that the life insurance company be admitted to do a life and accident and health business in Indiana. If admitted to Indiana, it is proposed that the foreign life insurance company be merged into an Indiana domiciled life insurance company. That stock certificates of the Indiana Company be issued, on a predetermined ratio, to the former shareholders of the foreign non-insurance corporation.

"The office of Attorney General of the State of Domicile of the foreign life insurance company and the non-insurance corporation have advised that the merger as
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originally proposed was unsatisfactory as this proposal left the surviving life insurance company without shareholders. They did indicate they would give approval if Indiana would at the same time of merger of the foreign companies, admit and license the surviving life insurance company and approve an immediate merger of the foreign life insurance company into the Indiana life insurance company.

“When this matter was initially submitted to this Department we were furnished a consolidated pro forma balance sheet of the two foreign companies. This balance sheet indicated that as a result of the proposed merger, the surviving life insurance company would be insolvent with a sizeable negative surplus.

“However, with changes made or to be made in the financial structure, assuming the surviving foreign company is able to meet the minimum financial requirements to be admitted to do business in Indiana * * *.”

Subsequent to receipt of your letter, you advised that you had received information that the merger had been consummated in the foreign state. The statutes of the foreign state would govern the proposed merger and the State of Indiana would only be interested in the insurance corporation which resulted from such merger and not the method by which it came into being. If the merger has been completed in the foreign state and the resulting insurance corporation meets the provisions of the Acts of 1935, Ch. 162, Secs. 226 to 233, as found in Burns’ (1952 Repl.), Sections 39-4701 to 39-4708, then, as an administrative function and subject to the discretionary powers of the Commissioner of Insurance, it may be admitted to do business in Indiana.

Your question is directed towards the admission of the foreign corporation in Indiana, and this Opinion is limited to that question. Another prospective merger with an Indiana insurance corporation is incidentally referred to in your letter, but no questions are asked concerning this merger, and it is not considered, other than the indirect effect this Opinion might have on the right to propose such merger. Further it is not within the province of this office, nor is it intended, to determine any of the personal or individual rights of any of
the stockholders in any of the corporations involved in this transaction.

Your concern arises from the fact that a corporation, which holds all the shares of stock in a second corporation, upon being merged into the second corporation, would cease to exist and having held all shares such merger would result in a corporation with no stockholders or shareholders.

A merger or consolidation is not a sale or liquidation of a corporation nor is it necessary to be possessed of a stock certificate to be a stockholder or shareholder.

In 13 Am. Jur., Corporations, § 1190, is found the following statement:

"On consolidation, each stockholder of the constituent companies becomes entitled to his proper proportion of stock of the new or consolidated company and may by action against the latter compel the issuance of such stock to him * * *.”

Further in the case of Sterling et al. v. Mayflower Hotel Corp. et al. (1952), 33 Del. Ch. 293, 93 Atl. (2d) 107, 112, is found the following description of a merger and its effect:

“A merger may be said to ‘involve’ a sale of assets, in the sense that the title to the assets is by operation of law transferred from the constituent corporation to the surviving corporation but it is not the same thing. It is, as the introductory clause of Chancellor Wollcott’s language affirms, something quite distinct, and the distinction is not merely one of form, as the plaintiffs, say, but one of substance. A merger ordinarily contemplates the continuance of the enterprise and of the stockholder’s investment therein, though in altered form; a sale of all assets (the type of sale referred to in the Cole case) ordinarily contemplates the liquidation of the enterprise. In the first case the stockholder of the merged corporation is entitled to receive directly securities substantially equal in value to those he held before the merger: in the latter case he receives nothing directly, but his corporation is entitled to receive the value of the assets sold.” (Our emphasis)
Also in the Lake Superior Dist. Power Co. v. Public Service Comm. (1947), 250 Wis. 39, 26 N. W. (2d) 278, 281, 282, a similar statement concerning stock certificates reads as follows:

“It is universally recognized that the ‘capital stock’ of a corporation is the amount paid in by stockholders in money, property, or by services, and that a share of stock is an undivided portion of such total capital stock. A stock certificate is merely evidence of the ownership of shares of stock. The certificate is not the stock, and the issuance of a stock certificate is not an essential transaction to create a stockholder.”

See also: Bombal et al. v. Peoples State Bank of Ramsey et al. (1937), 367 Ill. 113, 10 N. E. (2d) 651, 653.

Also in 19 C. J. S. Corporations, § 1627, the following principle is stated:

“The stock issued to the stockholders of the old corporations is issued and received, not by way of payment for something sold to another, but by way of a statement of the interest which those persons who are beneficially interested therein have in the new corporation as the result of the consolidation * * *.”

This principle was applied in the case of Silversmith Co. v. Reed & Barton Corp. (1908), 199 Mass. 371, 85 N. E. 433.

That such authorities above-cited are not repugnant to decisions by Indiana courts on similar matters in this general area, is evident.

In the case of McMahan v. Morrison & Others (1861), 16 Ind. 172, is found the following:

“As the Legislature, by an act, had given its consent to such consolidation, the effect of it, under the act and terms of consolidation, was a dissolution of the three corporations named, and, at the same instant, the creation of a new corporation, with property, liabilities and stockholders derived from those then passing out of existence * * *.”
Also in construing the general corporation statutes of this state, the Supreme Court of Indiana had before it an analogous situation, involving the creation of a corporation.

Section 25-218 referred to in the court's statement is Section 19 of the Acts of 1929, Ch. 215, and found in Burns' (1960 Repl.), Section 25-218. It pertains to the effect of the issuance of a certificate of incorporation by the Secretary of State and is similar to a section in the Indiana Insurance Law pertaining to the effect of the issuance of the permit for completion of organization being the Acts of 1935, Ch. 162, Sec. 72, as found in Burns' (1952 Repl.), Section 39-3612.

In reading this case which is Western Machine Works et al. v. Edwards Machine & Tool Corp. et al. (1945), 223 Ind. 655, 663, 63 N. E. (2d) 535, it must be kept in mind that no stock certificates have been issued, only subscriptions taken. The court stated, in part:

"It will be noted that § 25-218 specifically refers to conditions necessary to be performed in order to constitute a corporation and also conditions precedent to beginning business. Clearly the phrase 'conditions prescribed by this act as precedent to beginning business' is referring to those conditions set out in said § 25-219. Furthermore, § 25-219 also provides that the officers and directors who participate in such business or incur such indebtedness shall be personally liable. This would also indicate that the conditions set out in said section are conditions subsequent to the organization of a corporation and are conditions precedent as to doing business only, for if they were conditions necessary to be performed in order to bring the corporation into existence, then their failure to be so performed would cause said officers and directors to be personally liable without any such express provision. Coleman v. Coleman (1881), 78 Ind. 344. From an examination of the foregoing sections, it is our opinion that by said § 25-218 a de jure corporation comes into existence when the certificate of incorporation has been issued by the Secretary of State * * *"

In answer to your question it is my opinion that as a result of the merger in the foreign state there are shareholders in
existence and that a corporate entity exists in the surviving life insurance company which would legally entitle it to execute and follow procedures necessary to be permitted to do business in Indiana and empower the Commissioner of the Insurance Department to consider such request.

As a result of the answer to your first question, it becomes unnecessary to answer the second part thereof.

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OFFICIAL OPINION NO. 2

January 8, 1964

Hon. Edwin Steers, Sr.
Member, State Election Board
108 E. Washington Street #1108
Indianapolis, Indiana

Dear Mr. Steers:

Your letter of December 17, 1963, has been received requesting an Official Opinion regarding the 1964 election of school board members in The Metropolitan School District of Perry Township, Marion County, Indiana. The facts furnished are that “Prior to the primary election in 1962, a member of the Board of Education of The Metropolitan School District of Perry Township, Marion County, Indiana was appointed to fill a vacancy of a member whose term expired in 1964. At the primary election in 1962, a total of three members were elected, one outside the district of the vacancy and two inside the district and, at the election, neither of the candidates were specifically designated on the ballot as running to fill the unexpired term of an appointed member and were sworn in to serve as Board members without regard to a two or four year term.”

The question is: “Whether or not the term of the two Board members would be for a period of four years or one would be a period of two years and the other a period of four years.”

Your letter directs attention to the provisions of Acts 1949, Ch. 226, Sec. 18, as amended by Acts 1959, Ch. 261, Sec. 5, and as finally amended by Acts 1963, Ch. 327, Sec. 4, same