

VIATICAL SETTLEMENTS MODEL ACT

Table of Contents

Section 1.	Short Title
Section 2.	Definitions
Section 3.	License Requirements
Section 4.	License Revocation and Denial
Section 5.	Approval of Viatical Settlement Contracts and Viatical Settlement Disclosure Statements
Section 6.	Reporting Requirements and Privacy
Section 7.	Examination or Investigations
Section 8.	Disclosure
Section 9.	General Rules
Section 10.	Prohibited Practices
Section 11.	Advertising for Viatical Settlements [and Viatical Settlements Purchase Agreements]
Section 12.	Fraud Prevention and Control
Section 13.	Injunctions; Civil Remedies; Cease and Desist
Section 14.	Unfair Trade Practices
Section 15.	Authority to Promulgate Regulations
Section 16.	Severability
Section 17.	Effective Date

Section 1. Short Title

This Act may be cited as the Viatical Settlements Act.

Section 2. Definitions

- A. “Advertising” means any written, electronic or printed communication or any communication by means of recorded telephone messages or transmitted on radio, television, the Internet or similar communications media, including film strips, motion pictures and videos, published, disseminated, circulated or placed before the public, directly or indirectly, for the purpose of creating an interest in or inducing a person to [purchase or] sell a life insurance policy [or an interest in a life insurance policy] pursuant to a viatical settlement contract [or a viatical settlement purchase agreement].

Drafting Note: Throughout this document text related to investments in viatical settlements is in brackets. It should be considered for inclusion in states where securities regulators do not regulate the investment side of the transaction or adapted for inclusion in the securities code.

- B. “Business of viatical settlements” means an activity involved in, but not limited to, the offering, solicitation, negotiation, procurement, effectuation, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring,

assigning, pledging, hypothecating or in any other manner, of viatical settlement contracts or purchase agreements.

C. “Chronically ill” means:

- (1) Being unable to perform at least two (2) activities of daily living (i.e., eating, toileting, transferring, bathing, dressing or continence);
- (2) Requiring substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment; or
- (3) Having a level of disability similar to that described in Paragraph (1) as determined by the Secretary of Health and Human Services;

D. (1) “Financing entity” means an underwriter, placement agent, lender, purchaser of securities, purchaser of a policy or certificate from a viatical settlement provider, credit enhancer, or any entity that has a direct ownership in a policy or certificate that is the subject of a viatical settlement contract, but:

- (a) Whose principal activity related to the transaction is providing funds to effect the viatical settlement or purchase of one or more viaticated policies; and
- (b) Who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of viatical settlement contracts.

- (2) Financing entity does not include a non-accredited investor or viatical settlement purchaser.

F. “Fraudulent viatical settlement act” includes:

- (1) Acts or omissions committed by any person who, knowingly or with intent to defraud, for the purpose of depriving another of property or for pecuniary gain, commits, or permits its employees or its agents to engage in acts including:
 - (a) Presenting, causing to be presented or preparing with knowledge or belief that it will be presented to or by a viatical settlement provider, viatical settlement broker, viatical settlement purchaser, [viatical settlement investment agent,] financing entity, insurer, insurance producer or any other person, false material information, or concealing material information, as part of, in support of or concerning a fact material to one or more of the following:

- (i) An application for the issuance of a viatical settlement contract or insurance policy;
 - (ii) The underwriting of a viatical settlement contract or insurance policy;
 - (iii) A claim for payment or benefit pursuant to a viatical settlement contract or insurance policy;
 - (iv) Premiums paid on an insurance policy[, or as a result of a viatical settlement purchase agreement];
 - (v) Payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract, [viatical settlement purchase agreement] or insurance policy;
 - (vi) The reinstatement or conversion of an insurance policy;
 - (vii) In the solicitation, offer, effectuation or sale of a viatical settlement contract, insurance policy [or viatical settlement purchase agreement];
 - (viii) The issuance of written evidence of viatical settlement contract, [viatical settlement purchase agreement] or insurance; or
 - (ix) A financing transaction;
- (b) Employing any device, scheme, or artifice to defraud related to viaticated policies;
- (2) In the furtherance of a fraud or to prevent the detection of a fraud any person commits or permits its employees or its agents to;
- (a) Remove, conceal, alter, destroy or sequester from the commissioner the assets or records of a licensee or other person engaged in the business of viatical settlements;
 - (b) Misrepresent or conceal the financial condition of a licensee, financing entity, insurer or other person;
 - (c) Transact the business of viatical settlements in violation of laws requiring a license, certificate of authority or other legal authority for the transaction of the business of viatical settlements; or

- (d) File with the commissioner or the chief insurance regulatory official of another jurisdiction a document containing false information or otherwise conceals information about a material fact from the commissioner;
 - (3) Embezzlement, theft, misappropriation or conversion of monies, funds, premiums, credits or other property of a viatical settlement provider, insurer, insured, viator, insurance policyowner or any other person engaged in the business of viatical settlements or insurance; or
 - (4) Recklessly entering into, brokering, otherwise dealing in a viatical settlement contract, the subject of which is a life insurance policy that was obtained by presenting false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where the viator or the viator's agent intended to defraud the policy's issuer. "Recklessly" means engaging in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct;
 - (5) Attempting to commit, assisting, aiding or abetting in the commission of, or conspiracy to commit the acts or omissions specified in this subsection.
- G. "Person" means a natural person or a legal entity, including, but not limited to, an individual, partnership, limited liability company, association, trust, or corporation.
- H. "Policy" means an individual or group policy, group certificate, contract or arrangement of life insurance affecting the rights of a resident of this state or bearing a reasonable relation to this state, regardless of whether delivered or issued for delivery in this state.
- I. "Related provider trust" means a titling trust or other trust established by a licensed viatical settlement provider or a financing entity for the sole purpose of holding the ownership or beneficial interest in purchased policies in connection with a financing transaction. The trust shall have a written agreement with the licensed viatical settlement provider under which the licensed viatical settlement provider is responsible for ensuring compliance with all statutory and regulatory requirements and under which the trust agrees to make all records and files related to viatical settlement transactions available to the commissioner as if those records and files were maintained directly by the licensed viatical settlement provider.
- J. "Special purpose entity" means a corporation, partnership, trust, limited liability company or other similar entity formed solely to provide either directly or

indirectly access to institutional capital markets for a financing entity or licensed viatical settlement provider.

- K. “Terminally ill” means having an illness or sickness that can reasonably be expected to result in death in twenty-four (24) months or less.
- L. “Viatical settlement broker” means a person that on behalf of a viator and for a fee, commission or other valuable consideration offers or attempts to negotiate viatical settlement contracts between a viator and one or more viatical settlement providers. Notwithstanding the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the viator and owes a fiduciary duty to the viator to act according to the viator’s instructions and in the best interest of the viator. The term does not include an attorney, certified public accountant or a financial planner accredited by a nationally recognized accreditation agency, who is retained to represent the viator and whose compensation is not paid directly or indirectly by the viatical settlement provider or purchaser.
- M. “Viatical settlement contract” means a written agreement establishing the terms under which compensation or anything of value will be paid, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator’s assignment, transfer, sale, devise or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance. A viatical settlement contract also includes a contract for a loan or other financing transaction with a viator secured primarily by an individual or group life insurance policy, other than a loan by a life insurance company pursuant to the terms of the life insurance contract, or a loan secured by the cash value of a policy. A viatical settlement contract includes an agreement with a viator to transfer ownership or change the beneficiary designation at a later date regardless of the date that compensation is paid to the viator.
- N. “Viatical settlement provider” means a person, other than a viator, that enters into or effectuates a viatical settlement contract. Viatical settlement provider does not include:
 - (1) A bank, savings bank, savings and loan association, credit union or other licensed lending institution that takes an assignment of a life insurance policy as collateral for a loan;
 - (2) The issuer of a life insurance policy providing accelerated benefits under Section [refer to law or regulation implementing the Accelerated Benefits Model Regulation or similar provision] and pursuant to the contract;
 - (3) An authorized or eligible insurer that provides stop loss coverage to a viatical settlement provider, purchaser, financing entity, special purpose entity or related provider trust;

- (4) A natural person who enters into or effectuates no more than one agreement in a calendar year for the transfer of life insurance policies for any value less than the expected death benefit;
 - (5) A financing entity;
 - (6) A special purpose entity;
 - (7) A related provider trust; or
 - (8) A viatical settlement purchaser.
 - (9) An accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended, and who purchases a viaticated policy from a viatical settlement provider.
- O. “Viator” means the owner of a life insurance policy or a certificate holder under a group policy who enters or seeks to enter into a viatical settlement contract. For the purposes of this Act, a viator shall not be limited to an owner of a life insurance policy or a certificate holder under a group policy insuring the life of an individual with a terminal or chronic illness or condition except where specifically addressed. Viator does not include:
- (1) A licensee under this Act;
 - (2) An accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended;
 - (3) A financing entity;
 - (4) A special purpose entity; or
 - (5) A related provider trust.
- P. “Viaticated policy” means a life insurance policy or certificate that has been acquired by a viatical settlement provider pursuant to a viatical settlement contract.
- Q. “Viatical settlement purchaser” means a person who gives a sum of money as consideration for a life insurance policy or an interest in the death benefits of a life insurance policy, or a person who owns or acquires or is entitled to a beneficial interest in a trust that owns a viatical settlement contract or is the beneficiary of a life insurance policy that has been or will be the subject of a

viatical settlement contract, for the purpose of deriving an economic benefit. Viatical settlement purchaser does not include:

- (1) A licensee under this Act;
- (2) An accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended;
- (3) A financing entity;
- (4) A special purpose entity; or
- (5) A related provider trust.

Drafting Note: States should consider ways to encourage cooperation between the regulators of the sale of the insurance policy and the regulators of the purchase of the interest by an investor if these are regulated by different state agencies. States should also review securities laws as they might apply to transactions governed under this Act.

[R. “Viatical settlement purchase agreement” means a contract or agreement, entered into by a viatical settlement purchaser, to which the viator is not a party, to purchase a life insurance policy or an interest in a life insurance policy, that is entered into for the purpose of deriving an economic benefit.]

[S. “Viatical settlement investment agent” means a person who is an appointed or contracted agent of a licensed viatical settlement provider who solicits or arranges the funding for the purchase of a viatical settlement by a viatical settlement purchaser and who is acting on behalf of a viatical settlement provider.

- (1) A viatical settlement investment agent shall not have any contact directly or indirectly with the viator or have knowledge of the identity of the viator.
- (2) A viatical settlement investment agent is deemed to represent the viatical settlement provider of whom the viatical settlement investment agent is an appointed or contracted agent.]

Section 3. License Requirements

- A. (1) A person shall not operate as a viatical settlement provider or viatical settlement broker without first obtaining a license from the commissioner of the state of residence of the viator. If there is more than one viator on a single policy and the viators are residents of different states, the viatical settlement shall be governed by the law of the state in which the viator having the largest percentage ownership resides or, if the viators hold

equal ownership, the state of residence of one viator agreed upon in writing by all viators.

- [(2) A person shall not operate as a viatical settlement investment agent without first obtaining a license from the commissioner of the state of residence of the viatical settlement purchaser. If there is more than one purchaser of a single policy and the purchasers are residents of different states, the viatical settlement purchase agreement shall be governed by the law of the state in which the purchaser having the largest percentage ownership resides or, if the purchasers hold equal ownership, the state of residence of one purchaser agreed upon in writing by all purchasers.]

Drafting Note: Regulators should be aware of the potential for conflict between the laws governing the sale and purchase of interests in life insurance policies and consider procedures to address any conflicts.

- B. Application for a viatical settlement provider, viatical settlement broker [or viatical settlement investment agent] license shall be made to the commissioner by the applicant on a form prescribed by the commissioner, and these applications shall be accompanied by the fees specified in Section [insert appropriate section].

Drafting Note: Insert the title of the chief insurance regulatory official wherever the term “commissioner” appears.

- C. Licenses may be renewed from year to year on the anniversary date upon payment of the annual renewal fees specified in Section [insert appropriate section]. Failure to pay the fees by the renewal date results in expiration of the license.
- D. The applicant shall provide information on forms required by the commissioner. The commissioner shall have authority, at any time, to require the applicant to fully disclose the identity of all stockholders, partners, officers, members and employees, and the commissioner may, in the exercise of the commissioner’s discretion, refuse to issue a license in the name of a legal entity if not satisfied that any officer, employee, stockholder, partner or member thereof who may materially influence the applicant’s conduct meets the standards of this Act.
- E. A license issued to a legal entity authorizes all partners, officers, members and designated employees to act as viatical settlement providers, viatical settlement brokers [or viatical settlement investment agents,] as applicable, under the license, and all those persons shall be named in the application and any supplements to the application.
- F. Upon the filing of an application and the payment of the license fee, the commissioner shall make an investigation of each applicant and issue a license if the commissioner finds that the applicant:

- (1) If a viatical settlement provider, has provided a detailed plan of operation;
 - (2) Is competent and trustworthy and intends to act in good faith in the capacity involved by the license applied for;
 - (3) Has a good business reputation and has had experience, training or education so as to be qualified in the business for which the license is applied for;
 - (4) If a legal entity, provides a certificate of good standing from the state of its domicile; and
 - (5) If a viatical settlement provider or viatical settlement broker, has provided an anti-fraud plan that meets the requirements of Section 12G.
- G. The commissioner shall not issue a license to a nonresident applicant, unless a written designation of an agent for service of process is filed and maintained with the commissioner or the applicant has filed with the commissioner, the applicant's written irrevocable consent that any action against the applicant may be commenced against the applicant by service of process on the commissioner.
- H. A viatical settlement provider, viatical settlement broker or viatical settlement investment agent shall provide to the commissioner new or revised information about officers, ten percent (10%) or more stockholders, partners, directors, members or designated employees within thirty (30) days of the change.

Section 4. License Revocation and Denial

- A. The commissioner may refuse to issue, suspend, revoke or refuse to renew the license of a viatical settlement provider, viatical settlement broker [or viatical settlement investment agent] if the commissioner finds that:
- (1) There was any material misrepresentation in the application for the license;
 - (2) The licensee or any officer, partner, member or key management personnel has been convicted of fraudulent or dishonest practices, is subject to a final administrative action or is otherwise shown to be untrustworthy or incompetent;
 - (3) The viatical settlement provider demonstrates a pattern of unreasonable payments to viators;
 - (4) The licensee or any officer, partner, member or key management personnel has been found guilty of, or has pleaded guilty or *nolo contendere* to, any felony, or to a misdemeanor involving fraud or moral

turpitude, regardless of whether a judgment of conviction has been entered by the court;

- (5) The viatical settlement provider has entered into any viatical settlement contract that has not been approved pursuant to this Act;
- (6) The viatical settlement provider has failed to honor contractual obligations set out in a viatical settlement contract [or a viatical settlement purchase agreement];
- (7) The licensee no longer meets the requirements for initial licensure;
- (8) The viatical settlement provider has assigned, transferred or pledged a viaticated policy to a person other than a viatical settlement provider licensed in this state, viatical settlement purchaser, an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended, financing entity, special purpose entity, or related provider trust; or
- (9) The licensee or any officer, partner, member or key management personnel has violated any provision of this Act.

- B. If the commissioner denies a license application or suspends, revokes or refuses to renew the license of a viatical settlement provider, viatical settlement broker [or viatical settlement investment agent,] the commissioner shall conduct a hearing in accordance with [cite the state's administrative procedure act].

Section 5. Approval of Viatical Settlement Contracts and Disclosure Statements

A person shall not use a viatical settlement contract or provide to a viator a disclosure statement form in this state unless filed with and approved by the commissioner. The commissioner shall disapprove a viatical settlement contract form or disclosure statement form if, in the commissioner's opinion, the contract or provisions contained therein are unreasonable, contrary to the interests of the public, or otherwise misleading or unfair to the viator. At the commissioner's discretion, the commissioner may require the submission of advertising material.

Section 6. Reporting Requirements and Privacy

- A. Each licensee shall file with the commissioner on or before March 1 of each year an annual statement containing such information as the commissioner may prescribe by regulation.
- B. Except as otherwise allowed or required by law, a viatical settlement provider, viatical settlement broker, [viatical settlement investment agent,] insurance company, insuranceproducer, information bureau, rating agency or company, or any other person with actual knowledge of an insured's identity, shall not disclose

that identity as an insured, or the insured's financial or medical information to any other person unless the disclosure:

- (1) Is necessary to effect a viatical settlement between the viator and a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;
- [(2) Is necessary to effect a viatical settlement purchase agreement between the viatical settlement purchaser and a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;]
- (3) Is provided in response to an investigation or examination by the commissioner or any other governmental officer or agency or pursuant to the requirements of Section 12C;
- (4) Is a term of or condition to the transfer of a policy by one viatical settlement provider to another viatical settlement provider;
- (5) Is necessary to permit a financing entity, related provider trust or special purpose entity to finance the purchase of policies by a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;
- (6) Is necessary to allow the viatical settlement provider or viatical settlement broker or their authorized representatives to make contacts for the purpose of determining health status; or
- (7) Is required to purchase stop loss coverage.

Drafting Note: In implementing this section, states should keep in mind privacy considerations of insureds. However, the language needs to be broad enough to allow licensed entities to notify commissioners of unlicensed activity and for insurers to make necessary disclosures to insurers and in similar situations.

Section 7. Examination or Investigations

A. Authority, Scope and Scheduling of Examinations

- (1) The commissioner may conduct an examination under this Act of a licensee as often as the commissioner in his or her sole discretion deems appropriate.
- (2) For purposes of completing an examination of a licensee under this Act, the commissioner may examine or investigate any person, or the business of any person, in so far as the examination or investigation is, in the sole

discretion of the commissioner, necessary or material to the examination of the licensee.

- (3) In lieu of an examination under this Act of any foreign or alien licensee licensed in this state, the commissioner may, at the commissioner's discretion, accept an examination report on the licensee as prepared by the commissioner for the licensee's state of domicile or port-of-entry state.

B. Record Retention Requirements

- (1) A person required to be licensed by this Act shall for five (5) years retain copies of all;
 - (a) Proposed, offered or executed contracts, purchase agreements, underwriting documents, policy forms, and applications from the date of the proposal, offer or execution of the contract or purchase agreement, whichever is later;
 - (b) All checks, drafts or other evidence and documentation related to the payment, transfer, deposit or release of funds from the date the transaction; and
 - (c) All other records and documents related to the requirements of this Act.
- (2) This section does not relieve a person of the obligation to produce these documents to the commissioner after the retention period has expired if the person has retained the documents.
- (3) Records required to be retained by this section must be legible and complete and may be retained in paper, photograph, microprocess, magnetic, mechanical, or electronic media, or by any process that accurately reproduces or forms a durable medium for the reproduction of a record.

C. Conduct of Examinations

- (1) Upon determining that an examination should be conducted, the commissioner shall issue an examination warrant appointing one or more examiners to perform the examination and instructing them as to the scope of the examination. In conducting the examination, the examiner shall observe those guidelines and procedures set forth in the *Examiners' Handbook* adopted by the National Association of Insurance Commissioners (NAIC). The commissioner may also employ such other guidelines or procedures as the commissioner may deem appropriate.

- (2) Every licensee or person from whom information is sought, its officers, directors and agents shall provide to the examiners timely, convenient and free access at all reasonable hours at its offices to all books, records, accounts, papers, documents, assets and computer or other recordings relating to the property, assets, business and affairs of the licensee being examined. The officers, directors, employees and agents of the licensee or person shall facilitate the examination and aid in the examination so far as it is in their power to do so. The refusal of a licensee, by its officers, directors, employees or agents, to submit to examination or to comply with any reasonable written request of the commissioner shall be grounds for suspension or refusal of, or nonrenewal of any license or authority held by the licensee to engage in the viatical settlement business or other business subject to the commissioner's jurisdiction. Any proceedings for suspension, revocation or refusal of any license or authority shall be conducted pursuant to Section [insert reference to cease and desist statute or other law having a post-order hearing mechanism].
- (3) The commissioner shall have the power to issue subpoenas, to administer oaths and to examine under oath any person as to any matter pertinent to the examination. Upon the failure or refusal of a person to obey a subpoena, the commissioner may petition a court of competent jurisdiction, and upon proper showing, the Court may enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the court order shall be punishable as contempt of court.
- (4) When making an examination under this Act, the commissioner may retain attorneys, appraisers, independent actuaries, independent certified public accountants or other professionals and specialists as examiners, the reasonable cost of which shall be borne by the licensee that is the subject of the examination.
- (5) Nothing contained in this Act shall be construed to limit the commissioner's authority to terminate or suspend an examination in order to pursue other legal or regulatory action pursuant to the insurance laws of this state. Findings of fact and conclusions made pursuant to any examination shall be *prima facie* evidence in any legal or regulatory action.
- (6) Nothing contained in this Act shall be construed to limit the commissioner's authority to use and, if appropriate, to make public any final or preliminary examination report, any examiner or licensee workpapers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner may, in his or her sole discretion, deem appropriate.

Drafting Note: In many states examination work papers remain confidential. The previous paragraph should be adjusted to conform to state statute and practice.

D. Examination Reports

- (1) Examination reports shall be comprised of only facts appearing upon the books, records or other documents of the licensee, its agents or other persons examined, or as ascertained from the testimony of its officers or agents or other persons examined concerning its affairs, and such conclusions and recommendations as the examiners find reasonably warranted from the facts.
- (2) No later than sixty (60) days following completion of the examination, the examiner in charge shall file with the commissioner a verified written report of examination under oath. Upon receipt of the verified report, the commissioner shall transmit the report to the licensee examined, together with a notice that shall afford the licensee examined a reasonable opportunity of not more than thirty (30) days to make a written submission or rebuttal with respect to any matters contained in the examination report.
- (3) In the event the commissioner determines that regulatory action is appropriate as a result of an examination, the commissioner may initiate any proceedings or actions provided by law.

E. Confidentiality of Examination Information

- (1) Names and individual identification data for all viators shall be considered private and confidential information and shall not be disclosed by the commissioner, unless required by law.
- (2) Except as otherwise provided in this Act, all examination reports, working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination made under this Act, or in the course of analysis or investigation by the commissioner of the financial condition or market conduct of a licensee shall be confidential by law and privileged, shall not be subject to [insert open records, freedom of information, sunshine or other appropriate phrase], shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. The commissioner is authorized to use the documents, materials or other information in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties.

- (3) Documents, materials or other information, including, but not limited to, all working papers, and copies thereof, in the possession or control of the NAIC and its affiliates and subsidiaries shall be confidential by law and privileged, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action if they are:
 - (a) Created, produced or obtained by or disclosed to the NAIC and its affiliates and subsidiaries in the course of assisting an examination made under this Act, or assisting a commissioner in the analysis or investigation of the financial condition or market conduct of a licensee; or
 - (b) Disclosed to the NAIC and its affiliates and subsidiaries under Subsection E(4) by a commissioner.
 - (c) For the purposes of Subsection E(2), “Act” includes the law of another state or jurisdiction that is substantially similar to this Act.
- (4) Neither the commissioner nor any person that received the documents, material or other information while acting under the authority of the commissioner, including the NAIC and its affiliates and subsidiaries, shall be permitted to testify in any private civil action concerning any confidential documents, materials or information subject to Subsection E(1).
- (5) In order to assist in the performance of the commissioner’s duties, the commissioner:
 - (a) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to Subsection E(1), with other state, federal and international regulatory agencies, with the NAIC and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, communication or other information;
 - (b) May receive documents, materials, communications or information, including otherwise confidential and privileged documents, materials or information, from the NAIC and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the

jurisdiction that is the source of the document, material or information; and

- (c) [Optional provision] May enter into agreements governing sharing and use of information consistent with this subsection.
- (6) No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in Subsection E(4).
- (7) A privilege established under the law of any state or jurisdiction that is substantially similar to the privilege established under this subsection shall be available and enforced in any proceeding in, and in any court of, this state.
- (8) Nothing contained in this Act shall prevent or be construed as prohibiting the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the commissioner of any other state or country, or to law enforcement officials of this or any other state or agency of the federal government at any time or to the NAIC, so long as such agency or office receiving the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this Act.

F. Conflict of Interest

- (1) An examiner may not be appointed by the commissioner if the examiner, either directly or indirectly, has a conflict of interest or is affiliated with the management of or owns a pecuniary interest in any person subject to examination under this Act. This section shall not be construed to automatically preclude an examiner from being:
 - (a) A viator;
 - (b) An insured in a viaticated insurance policy; or
 - (c) A beneficiary in an insurance policy that is proposed to be viaticated.
- (2) Notwithstanding the requirements of this clause, the commissioner may retain from time to time, on an individual basis, qualified actuaries, certified public accountants, or other similar individuals who are independently practicing their professions, even though these persons may from time to time be similarly employed or retained by persons subject to examination under this Act.

G. Cost of Examinations

Drafting Note: The NAIC Model State Insurance Department Funding Bill or such funding mechanism as may be currently authorized by law should be incorporated here by reference. Any funding mechanism should assure that the manner in which examinations are funded does not influence the scheduling, scope or conduct of examination.

H. Immunity from Liability

- (1) No cause of action shall arise nor shall any liability be imposed against the commissioner, the commissioner's authorized representatives or any examiner appointed by the commissioner for any statements made or conduct performed in good faith while carrying out the provisions of this Act.
- (2) No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the commissioner or the commissioner's authorized representative or examiner pursuant to an examination made under this Act, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive. This paragraph does not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified in Paragraph (1).
- (3) A person identified in Paragraph (1) or (2) shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this Act and the party bringing the action was not substantially justified in doing so. For purposes of this section a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.

- I. Investigative Authority of the Commissioner. The commissioner may investigate suspected fraudulent viatical settlement acts and persons engaged in the business of viatical settlements.

Section 8. Disclosure

- A. With each application for a viatical settlement, a viatical settlement provider or viatical settlement broker shall provide the viator with at least the following disclosures no later than the time the application for the viatical settlement contract is signed by all parties. The disclosures shall be provided in a separate document that is signed by the viator and the viatical settlement provider or viatical settlement broker, and shall provide the following information:

- (1) There are possible alternatives to viatical settlement contracts including any accelerated death benefits or policy loans offered under the viator's life insurance policy.
- (2) Some or all of the proceeds of the viatical settlement may be taxable under federal income tax and state franchise and income taxes, and assistance should be sought from a professional tax advisor.
- (3) Proceeds of the viatical settlement could be subject to the claims of creditors.
- (4) Receipt of the proceeds of a viatical settlement may adversely affect the viator's eligibility for Medicaid or other government benefits or entitlements, and advice should be obtained from the appropriate government agencies.
- (5) The viator has the right to rescind a viatical settlement contract for fifteen (15) calendar days after the receipt of the viatical settlement proceeds by the viator, as provided in Section 9C. If the insured dies during the rescission period, the settlement contract shall be deemed to have been rescinded, subject to repayment of all viatical settlement proceeds and any premiums, loans and loan interest to the viatical settlement provider or purchaser.
- (6) Funds will be sent to the viator within three (3) business days after the viatical settlement provider has received the insurer or group administrator's acknowledgment that ownership of the policy or interest in the certificate has been transferred and the beneficiary has been designated.
- (7) Entering into a viatical settlement contract may cause other rights or benefits, including conversion rights and waiver of premium benefits that may exist under the policy or certificate, to be forfeited by the viator. Assistance should be sought from a financial adviser.
- (8) Disclosure to a viator shall include distribution of a brochure describing the process of viatical settlements. The NAIC's form for the brochure shall be used unless one is developed by the commissioner.
- (9) The disclosure document shall contain the following language: "All medical, financial or personal information solicited or obtained by a viatical settlement provider or viatical settlement broker about an insured, including the insured's identity or the identity of family members, a spouse or a significant other may be disclosed as necessary to effect the viatical settlement between the viator and the viatical settlement provider. If you are asked to provide this information, you will be asked to consent

to the disclosure. The information may be provided to someone who buys the policy or provides funds for the purchase. You may be asked to renew your permission to share information every two years.”

- (10) The insured may be contacted by either the viatical settlement provider or broker or its authorized representative for the purpose of determining the insured’s health status. This contact is limited to once every three (3) months if the insured has a life expectancy of more than one year, and no more than once per month if the insured has a life expectancy of one year or less.

B. A viatical settlement provider shall provide the viator with at least the following disclosures no later than the date the viatical settlement contract is signed by all parties. The disclosures shall be conspicuously displayed in the viatical settlement contract or in a separate document signed by the viator and the viatical settlement provider or viatical settlement broker, and provide the following information:

- (1) State the affiliation, if any, between the viatical settlement provider and the issuer of the insurance policy to be viaticated.
- (2) The document shall include the name, address and telephone number of the viatical settlement provider.
- (3) A viatical settlement broker shall disclose to a prospective viator the amount and method of calculating the broker’s compensation. The term “compensation” includes anything of value paid or given to a viatical settlement broker for the placement of a policy.
- (4) If an insurance policy to be viaticated has been issued as a joint policy or involves family riders or any coverage of a life other than the insured under the policy to be viaticated, the viator shall be informed of the possible loss of coverage on the other lives under the policy and shall be advised to consult with his or her insurance producer or the insurer issuing the policy for advice on the proposed viatical settlement.
- (5) State the dollar amount of the current death benefit payable to the viatical settlement provider under the policy or certificate. If known, the viatical settlement provider shall also disclose the availability of any additional guaranteed insurance benefits, the dollar amount of any accidental death and dismemberment benefits under the policy or certificate and the viatical settlement provider’s interest in those benefits.
- (6) State the name, business address, and telephone number of the independent third party escrow agent, and the fact that the viator or owner may inspect or receive copies of the relevant escrow or trust agreements or documents.

- C. If the provider transfers ownership or changes the beneficiary of the insurance policy, the provider shall communicate the change in ownership or beneficiary to the insured within twenty (20) days after the change.
- [D. A viatical settlement provider or its viatical settlement investment agent shall provide the viatical settlement purchaser with at least the following disclosures prior to the date the viatical settlement purchase agreement is signed by all parties. The disclosures shall be conspicuously displayed in any viatical purchase contract or in a separate document signed by the viatical settlement purchaser and viatical settlement provider or viatical settlement investment agent, and shall make the following disclosure to the viatical settlement purchaser:
- (1) The purchaser will receive no returns (i.e., dividends and interest) until the insured dies.
 - (2) The actual annual rate of return on a viatical settlement contract is dependent upon an accurate projection of the insured's life expectancy, and the actual date of the insured's death. An annual "guaranteed" rate of return is not determinable.
 - (3) The viaticated life insurance contract should not be considered a liquid purchase since it is impossible to predict the exact timing of its maturity and the funds probably are not available until the death of the insured. There is no established secondary market for resale of these products by the purchaser.
 - (4) The purchaser may lose all benefits or may receive substantially reduced benefits if the insurer goes out of business during the term of the viatical investment.
 - (5) The purchaser is responsible for payment of the insurance premium or other costs related to the policy, if required by the terms of the viatical purchase agreement. These payments may reduce the purchaser's return. If a party other than the purchaser is responsible for the payment, the name and address of that party also shall be disclosed.
 - (6) The purchaser is responsible for payment of the insurance premiums or other costs related to the policy if the insured returns to health. Disclose the amount of such premiums, if applicable.
 - (7) State the name and address of any person providing escrow services and the relationship to the broker.
 - (8) The amount of any trust fees or other expenses to be charged to the viatical settlement purchaser shall be disclosed.

- (9) State whether the purchaser is entitled to a refund of all or part of his or her investment under the settlement contract if the policy is later determined to be null and void.
- (10) Disclose that group policies may contain limitations or caps in the conversion rights, additional premiums may have to be paid if the policy is converted, name the party responsible for the payment of the additional premiums and, if a group policy is terminated and replaced by another group policy, state that there may be no right to convert the original coverage.
- (11) Disclose the risks associated with policy contestability including, but not limited to, the risk that the purchaser will have no claim or only a partial claim to death benefits should the insurer rescind the policy within the contestability period.
- (12) Disclose whether the purchaser will be the owner of the policy in addition to being the beneficiary, and if the purchaser is the beneficiary only and not also the owner, the special risks associated with that status, including, but not limited to, the risk that the beneficiary may be changed or the premium may not be paid.
- (13) Describe the experience and qualifications of the person who determines the life expectancy of the insured, i.e., in-house staff, independent physicians and specialty firms that weigh medical and actuarial data; the information this projection is based on; and the relationship of the projection maker to the viatical settlement provider, if any.
- (14) Disclosure to an investor shall include distribution of a brochure describing the process of investment in viatical settlements. The NAIC's form for the brochure shall be used unless one is developed by the commissioner.]

[E. A viatical settlement provider or its viatical settlement investment agent shall provide the viatical settlement purchaser with at least the following disclosures no later than at the time of the assignment, transfer or sale of all or a portion of an insurance policy. The disclosures shall be contained in a document signed by the viatical settlement purchaser and viatical settlement provider or viatical settlement investment agent, and shall make the following disclosures to the viatical settlement purchaser:

- (1) Disclose all the life expectancy certifications obtained by the provider in the process of determining the price paid to the viator.

- (2) State whether premium payments or other costs related to the policy have been escrowed. If escrowed, state the date upon which the escrowed funds will be depleted and whether the purchaser will be responsible for payment of premiums thereafter and, if so, the amount of the premiums.
- (3) State whether premium payments or other costs related to the policy have been waived. If waived, disclose whether the investor will be responsible for payment of the premiums if the insurer that wrote the policy terminates the waiver after purchase and the amount of those premiums.
- (4) Disclose the type of policy offered or sold, i.e., whole life, term life, universal life or a group policy certificate, any additional benefits contained in the policy, and the current status of the policy.
- (5) If the policy is term insurance, disclose the special risks associated with term insurance including, but not limited to, the purchaser's responsibility for additional premiums if the viator continues the term policy at the end of the current term.
- (6) State whether the policy is contestable.
- (7) State whether the insurer that wrote the policy has any additional rights that could negatively affect or extinguish the purchaser's rights under the viatical settlement contract, what these rights are, and under what conditions these rights are activated.
- (8) State the name and address of the person responsible for monitoring the insured's condition. Describe how often the monitoring of the insured's condition is done, how the date of death is determined, and how and when this information will be transmitted to the purchaser.]

[F. The viatical settlement purchase agreement is voidable by the purchaser at any time within three (3) days after the disclosures mandated by Subsections D and E of this section are received by the purchaser.]

Section 9. General Rules

- A. (1) A viatical settlement provider entering into a viatical settlement contract shall first obtain:
 - (a) If the viator is the insured, a written statement from a licensed attending physician that the viator is of sound mind and under no constraint or undue influence to enter into a viatical settlement contract; and

- (b) A document in which the insured consents to the release of his or her medical records to a viatical settlement provider, viatical settlement broker and the insurance company that issued the life insurance policy covering the life of the insured.
- (2) Within twenty (20) days after a viator executes documents necessary to transfer any rights under an insurance policy or within twenty (20) days of entering any agreement, option, promise or any other form of understanding, expressed or implied, to viaticate the policy, the viatical settlement provider shall give written notice to the insurer that issued that insurance policy that the policy has or will become a viaticated policy. The notice shall be accompanied by the documents required by Paragraph (3).
- (3) The viatical provider shall deliver a copy of the medical release required under Paragraph (1)(b), a copy of the viator's application for the viatical settlement contract, the notice required under Paragraph (2) and a request for verification of coverage to the insurer that issued the life policy that is the subject of the viatical transaction. The NAIC's form for verification shall be used unless standards for verification are developed by the commissioner.

Drafting Note: The NAIC's forms are Appendices B and C of the Viatical Settlements Model Regulation.

- (4) The insurer shall respond to a request for verification of coverage submitted on an approved form by a viatical settlement provider within thirty (30) calendar days of the date the request is received and shall indicate whether, based on the medical evidence and documents provided, the insurer intends to pursue an investigation at this time regarding the validity of the insurance contract.
- (5) Prior to or at the time of execution of the viatical settlement contract, the viatical settlement provider shall obtain a witnessed document in which the viator consents to the viatical settlement contract, represents that the viator has a full and complete understanding of the viatical settlement contract, that he or she has a full and complete understanding of the benefits of the life insurance policy, acknowledges that he or she is entering into the viatical settlement contract freely and voluntarily and, for persons with a terminal or chronic illness or condition, acknowledges that the insured has a terminal or chronic illness and that the terminal or chronic illness or condition was diagnosed after the life insurance policy was issued.

- (6) If a viatical settlement broker performs any of these activities required of the viatical settlement provider, the provider is deemed to have fulfilled the requirements of this section.
- B. All medical information solicited or obtained by any licensee shall be subject to the applicable provisions of state law relating to confidentiality of medical information.

Drafting Note: A state may wish to make specific reference to the privacy provisions adopted in response to the requirements of the Gramm-Leach-Bliley Act, such as the state equivalent to the NAIC's Privacy of Consumer Financial and Health Information Regulation. Consider whether the state's privacy provision allows continual sharing of medical information or whether permission must be renewed.

- C. All viatical settlement contracts entered into in this state shall provide the viator with an unconditional right to rescind the contract for at least fifteen (15) calendar days from the receipt of the viatical settlement proceeds. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment to the viatical settlement provider or purchaser of all viatical settlement proceeds, and any premiums, loans, and loan interest that have been paid by the viatical settlement provider or purchaser.
- [D. The purchaser shall have the right to rescind a viatical settlement contract within three (3) days after the disclosures mandated by Section 8D and 8E are received by the purchaser.]
- E. The viatical settlement provider shall instruct the viator to send the executed documents required to effect the change in ownership, assignment or change in beneficiary directly to the independent escrow agent. Within three (3) business days after the date the escrow agent receives the document (or from the date the viatical settlement provider receives the documents, if the viator erroneously provides the documents directly to the provider), the provider shall pay or transfer the proceeds of the viatical settlement into an escrow or trust account maintained in a state or federally-chartered financial institution whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC). Upon payment of the settlement proceeds into the escrow account, the escrow agent shall deliver the original change in ownership, assignment or change in beneficiary forms to the viatical settlement provider or related provider trust. Upon the escrow agent's receipt of the acknowledgment of the properly completed transfer of ownership, assignment or designation of beneficiary from the insurance company, the escrow agent shall pay the settlement proceeds to the viator.
- F. Failure to tender consideration to the viator for the viatical settlement contract within the time disclosed pursuant to Section 8A(6) renders the viatical settlement contract voidable by the viator for lack of consideration until the time consideration is tendered to and accepted by the viator.

- G. Contacts with the insured for the purpose of determining the health status of the insured by the viatical settlement provider or viatical settlement broker after the viatical settlement has occurred shall only be made by the viatical settlement provider or broker licensed in this state or its authorized representatives and shall be limited to once every three (3) months for insureds with a life expectancy of more than one year, and to no more than once per month for insureds with a life expectancy of one year or less. The provider or broker shall explain the procedure for these contacts at the time the viatical settlement contract is entered into. The limitations set forth in this subsection shall not apply to any contacts with an insured for reasons other than determining the insured's health status. Viatical settlement providers and viatical settlement brokers shall be responsible for the actions of their authorized representatives.

Section 10. Prohibited Practices

It is a violation of this Act for any person to enter into a viatical settlement contract within a two-year period commencing with the date of issuance of the insurance policy or certificate unless the viator certifies to the viatical settlement provider that one or more of the following conditions have been met within the two-year period:

- A. The policy was issued upon the viator's exercise of conversion rights arising out of a group or individual policy, provided the total of the time covered under the conversion policy plus the time covered under the prior policy is at least twenty-four (24) months. The time covered under a group policy shall be calculated without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship;
- B. The viator is a charitable organization exempt from taxation under 26 U.S.C. § 501 (c)(3);
- C. The viator is not a natural person (e.g., the owner is a corporation, limited liability company, partnership, etc.);
- D. (1) The viator submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within the two-year period:
- (a) The viator or insured is terminally or chronically ill;
 - (b) The viator's spouse dies;
 - (c) The viator divorces his or her spouse;
 - (d) The viator retires from full-time employment;

- (e) The viator becomes physically or mentally disabled and a physician determines that the disability prevents the viator from maintaining full-time employment;
 - (f) The viator was the insured's employer at the time the policy or certificate was issued and the employment relationship terminated;
 - (g) A final order, judgment or decree is entered by a court of competent jurisdiction, on the application of a creditor of the viator, adjudicating the viator bankrupt or insolvent, or approving a petition seeking reorganization of the viator or appointing a receiver, trustee or liquidator to all or a substantial part of the viator's assets;
 - (h) The viator experiences a significant decrease in income that is unexpected and that impairs the viator's reasonable ability to pay the policy premium; or
 - (i) The viator or insured disposes of his or her ownership interests in a closely held corporation.
- (2) Copies of the independent evidence described in Paragraph (1) of this subsection and documents required by Section 9A shall be submitted to the insurer when the viatical settlement provider submits a request to the insurer for verification of coverage. The copies shall be accompanied by a letter of attestation from the viatical settlement provider that the copies are true and correct copies of the documents received by the viatical settlement provider.

E. If the viatical settlement provider submits to the insurer a copy of the owner or insured's certification described in Subsection D when the provider submits a request to the insurer to effect the transfer of the policy or certificate to the viatical settlement provider, the copy shall be deemed to conclusively establish that the viatical settlement contract satisfies the requirements of this section and the insurer shall timely respond to the request.

Section 11. Advertising for Viatical Settlements [and Viatical Settlements Purchase Agreements]

The purpose of this section is to provide prospective viators [and viatical settlement purchasers] with clear and unambiguous statements in the advertisement of viatical settlements and to assure the clear, truthful and adequate disclosure of the benefits, risks, limitations and exclusions of any viatical settlement contract [or viatical settlement purchase agreement bought or sold]. This purpose is intended to be accomplished by the establishment of guidelines and standards of permissible and impermissible conduct in the advertising of viatical settlements to assure that product descriptions are presented in a manner that prevents unfair, deceptive or misleading

advertising and is conducive to accurate presentation and description of viatical settlements through the advertising media and material used by viatical settlement licensees.

- A. This section shall apply to any advertising of viatical settlement contracts, [viatical purchase agreements] or related products or services intended for dissemination in this state, including Internet advertising viewed by persons located in this state. Where disclosure requirements are established pursuant to federal regulation, this section shall be interpreted so as to minimize or eliminate conflict with federal regulation wherever possible.
- B. Every viatical settlement licensee shall establish and at all times maintain a system of control over the content, form and method of dissemination of all advertisements of its contracts, products and services. All advertisements, regardless of by whom written, created, designed or presented, shall be the responsibility of the viatical settlement licensee, as well as the individual who created or presented the advertisement. A system of control shall include regular routine notification, at least once a year, to agents and others authorized by the viatical settlement licensee who disseminate advertisements of the requirements and procedures for approval prior to the use of any advertisements not furnished by the viatical settlement licensee.
- C. Advertisements shall be truthful and not misleading in fact or by implication. The form and content of an advertisement of a viatical settlement contract [or viatical settlement purchase agreement, product or service] shall be sufficiently complete and clear so as to avoid deception. It shall not have the capacity or tendency to mislead or deceive. Whether an advertisement has the capacity or tendency to mislead or deceive shall be determined by the commissioner from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence within the segment of the public to which it is directed.
- [D. Certain viatical settlement advertisements are deemed false and misleading on their face and are prohibited. False and misleading viatical settlement advertisements include, but are not limited to, the following representations:
 - (1) “Guaranteed,” “fully secured,” “100 percent secured,” “fully insured,” “secure,” “safe,” “backed by rated insurance companies,” “backed by federal law,” “backed by state law,” or “state guaranty funds,” or similar representations;
 - (2) “No risk,” “minimal risk,” “low risk,” “no speculation,” “no fluctuation,” or similar representations;
 - (3) “Qualified or approved for individual retirement accounts (IRAs), Roth IRAs, 401(k) plans, simplified employee pensions (SEP), 403(b), Keogh

plans, TSA, other retirement account rollovers,” “tax deferred,” or similar representations;

- (4) Utilization of the word “guaranteed” to describe the fixed return, annual return, principal, earnings, profits, investment, or similar representations;
- (5) “No sales charges or fees” or similar representations;
- (6) “High yield,” “superior return,” “excellent return,” “high return,” “quick profit,” or similar representations;
- (7) Purported favorable representations or testimonials about the benefits of viatical settlement contracts or viatical settlement purchase agreements as an investment, taken out of context from newspapers, trade papers, journals, radio and television programs, and all other forms of print and electronic media.]

E. The information required to be disclosed under this section shall not be minimized, rendered obscure, or presented in an ambiguous fashion or intermingled with the text of the advertisement so as to be confusing or misleading.

- (1) An advertisement shall not omit material information or use words, phrases, statements, references or illustrations if the omission or use has the capacity, tendency or effect of misleading or deceiving viators, [purchasers or prospective purchasers] as to the nature or extent of any benefit, loss covered, premium payable, or state or federal tax consequence. The fact that the viatical settlement contract [or viatical settlement purchase agreement] offered is made available for inspection prior to consummation of the sale, or an offer is made to refund the payment if the viator is not satisfied or that the viatical settlement contract [or viatical settlement purchase agreement] includes a “free look” period that satisfies or exceeds legal requirements, does not remedy misleading statements.
- (2) An advertisement shall not use the name or title of a life insurance company or a life insurance policy unless the advertisement has been approved by the insurer.
- [(3) An advertisement shall not represent that premium payments will not be required to be paid on the life insurance policy that is the subject of a viatical settlement contract or viatical settlement purchase agreement in order to maintain that policy, unless that is the fact.]

- (4) An advertisement shall not state or imply that interest charged on an accelerated death benefit or a policy loan is unfair, inequitable or in any manner an incorrect or improper practice.
- (5) The words “free,” “no cost,” “without cost,” “no additional cost,” at no extra cost,” or words of similar import shall not be used with respect to any benefit or service unless true. An advertisement may specify the charge for a benefit or a service or may state that a charge is included in the payment or use other appropriate language.
- (6) Testimonials, appraisals or analysis used in advertisements must be genuine; represent the current opinion of the author; be applicable to the viatical settlement contract [or viatical settlement purchase agreement,] product or service advertised, if any; and be accurately reproduced with sufficient completeness to avoid misleading or deceiving prospective viators [or purchasers] as to the nature or scope of the testimonials, appraisal, analysis or endorsement. In using testimonials, appraisals or analysis, the viatical settlement licensee makes as its own all the statements contained therein, and the statements are subject to all the provisions of this section.
 - (a) If the individual making a testimonial, appraisal, analysis or an endorsement has a financial interest in the viatical settlement provider or related entity as a stockholder, director, officer, employee or otherwise, or receives any benefit directly or indirectly other than required union scale wages, that fact shall be prominently disclosed in the advertisement.
 - (b) An advertisement shall not state or imply that a viatical settlement contract [or viatical settlement purchase agreement,] benefit or service has been approved or endorsed by a group of individuals, society, association or other organization unless that is the fact and unless any relationship between an organization and the viatical settlement licensee is disclosed. If the entity making the endorsement or testimonial is owned, controlled or managed by the viatical settlement licensee, or receives any payment or other consideration from the viatical settlement licensee for making an endorsement or testimonial, that fact shall be disclosed in the advertisement.
 - (c) When an endorsement refers to benefits received under a viatical settlement contract [or viatical settlement purchase agreement] all pertinent information shall be retained for a period of five (5) years after its use.

- F. An advertisement shall not contain statistical information unless it accurately reflects recent and relevant facts. The source of all statistics used in an advertisement shall be identified.
- G. An advertisement shall not disparage insurers, viatical settlement providers, viatical settlement brokers, viatical settlement investment agents, insurance producers, policies, services or methods of marketing.
- H. The name of the viatical settlement licensee shall be clearly identified in all advertisements about the licensee or its viatical settlement contract [or viatical settlement purchase agreements], products or services, and if any specific viatical settlement contract [or viatical settlement purchase agreement] is advertised, the viatical settlement contract [or viatical settlement purchase agreement] shall be identified either by form number or some other appropriate description. If an application is part of the advertisement, the name of the viatical settlement provider shall be shown on the application.
- I. An advertisement shall not use a trade name, group designation, name of the parent company of a viatical settlement licensee, name of a particular division of the viatical settlement licensee, service mark, slogan, symbol or other device or reference without disclosing the name of the viatical settlement licensee, if the advertisement would have the capacity or tendency to mislead or deceive as to the true identity of the viatical settlement licensee, or to create the impression that a company other than the viatical settlement licensee would have any responsibility for the financial obligation under a viatical settlement contract [or viatical settlement purchase agreement].
- J. An advertisement shall not use any combination of words, symbols or physical materials that by their content, phraseology, shape, color or other characteristics are so similar to a combination of words, symbols or physical materials used by a government program or agency or otherwise appear to be of such a nature that they tend to mislead prospective viators [or purchasers] into believing that the solicitation is in some manner connected with a government program or agency.
- K. An advertisement may state that a viatical settlement licensee is licensed in the state where the advertisement appears, provided it does not exaggerate that fact or suggest or imply that competing viatical settlement licensee may not be so licensed. The advertisement may ask the audience to consult the licensee's web site or contact the department of insurance to find out if the state requires licensing and, if so, whether the viatical settlement provider, viatical settlement broker [or viatical settlement investment agent] is licensed.
- L. An advertisement shall not create the impression that the viatical settlement provider, its financial condition or status, the payment of its claims or the merits, desirability, or advisability of its viatical settlement contracts [or viatical

settlement purchase agreement forms] are recommended or endorsed by any government entity.

- M. The name of the actual licensee shall be stated in all of its advertisements. An advertisement shall not use a trade name, any group designation, name of any affiliate or controlling entity of the licensee, service mark, slogan, symbol or other device in a manner that would have the capacity or tendency to mislead or deceive as to the true identity of the actual licensee or create the false impression that an affiliate or controlling entity would have any responsibility for the financial obligation of the licensee.
- N. An advertisement shall not directly or indirectly create the impression that any division or agency of the state or of the U. S. government endorses, approves or favors:
 - (1) Any viatical settlement licensee or its business practices or methods of operation;
 - (2) The merits, desirability or advisability of any viatical settlement contract or [viatical settlement purchase agreement];
 - (3) Any viatical settlement contract or [viatical settlement purchase agreement]; or
 - (4) Any life insurance policy or life insurance company.
- O. If the advertiser emphasizes the speed with which the viatication will occur, the advertising must disclose the average time frame from completed application to the date of offer and from acceptance of the offer to receipt of the funds by the viator.
- P. If the advertising emphasizes the dollar amounts available to viators, the advertising shall disclose the average purchase price as a percent of face value obtained by viators contracting with the licensee during the past six (6) months.

Section 12. Fraud Prevention and Control

- A. Fraudulent Viatical Settlement Acts, Interference and Participation of Convicted Felons Prohibited
 - (1) A person shall not commit a fraudulent viatical settlement act.
 - (2) A person shall not knowingly or intentionally interfere with the enforcement of the provisions of this Act or investigations of suspected or actual violations of this Act.

- (3) A person in the business of viatical settlements shall not knowingly or intentionally permit any person convicted of a felony involving dishonesty or breach of trust to participate in the business of viatical settlements.

B. Fraud Warning Required

- (1) Viatical settlements contracts [and purchase agreement forms] and applications for viatical settlements, regardless of the form of transmission, shall contain the following statement or a substantially similar statement:

“Any person who knowingly presents false information in [an application for insurance or viatical settlement contract][a viatical settlement purchase agreement] is guilty of a crime and may be subject to fines and confinement in prison.”

Drafting Note: The preceding will be tailored to whether the form is related to a viatical settlement contract or purchase agreement.

- (2) The lack of a statement as required in Paragraph (1) of this subsection does not constitute a defense in any prosecution for a fraudulent viatical settlement act.

C. Mandatory Reporting of Fraudulent Viatical Settlement Acts

- (1) Any person engaged in the business of viatical settlements having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be or has been committed shall provide to the commissioner the information required by, and in a manner prescribed by, the commissioner.
- (2) Any other person having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be or has been committed may provide to the commissioner the information required by, and in a manner prescribed by, the commissioner.

D. Immunity from Liability

- (1) No civil liability shall be imposed on and no cause of action shall arise from a person’s furnishing information concerning suspected, anticipated or completed fraudulent viatical settlement acts or suspected or completed fraudulent insurance acts, if the information is provided to or received from:
 - (a) The commissioner or the commissioner’s employees, agents or representatives;

- (b) Federal, state or local law enforcement or regulatory officials or their employees, agents or representatives;
 - (c) A person involved in the prevention and detection of fraudulent viatical settlement acts or that person's agents, employees or representatives;
 - (d) The National Association of Insurance Commissioners (NAIC), National Association of Securities Dealers (NASD), the North American Securities Administrators Association (NASAA), or their employees, agents or representatives, or other regulatory body overseeing life insurance, viatical settlements, securities or investment fraud; or
 - (e) The life insurer that issued the life insurance policy covering the life of the insured.
- (2) Paragraph (1) of this subsection shall not apply to statements made with actual malice. In an action brought against a person for filing a report or furnishing other information concerning a fraudulent viatical settlement act or a fraudulent insurance act, the party bringing the action shall plead specifically any allegation that Paragraph (1) does not apply because the person filing the report or furnishing the information did so with actual malice.
- (3) A person identified in Paragraph (1) shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this Act and the party bringing the action was not substantially justified in doing so. For purposes of this section a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.
- (4) This section does not abrogate or modify common law or statutory privileges or immunities enjoyed by a person described in Paragraph (1).

E. Confidentiality

- (1) The documents and evidence provided pursuant to Subsection D of this section or obtained by the commissioner in an investigation of suspected or actual fraudulent viatical settlement acts shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a civil or criminal action.

- (2) Paragraph (1) of this subsection does not prohibit release by the commissioner of documents and evidence obtained in an investigation of suspected or actual fraudulent viatical settlement acts:
 - (a) In administrative or judicial proceedings to enforce laws administered by the commissioner;
 - (b) To federal, state or local law enforcement or regulatory agencies, to an organization established for the purpose of detecting and preventing fraudulent viatical settlement acts or to the NAIC; or
 - (c) At the discretion of the commissioner, to a person in the business of viatical settlements that is aggrieved by a fraudulent viatical settlement act.
- (3) Release of documents and evidence under Paragraph (2) of this subsection does not abrogate or modify the privilege granted in Paragraph (1).

F. Other Law Enforcement or Regulatory Authority. This Act shall not:

- (1) Preempt the authority or relieve the duty of other law enforcement or regulatory agencies to investigate, examine and prosecute suspected violations of law;
- (2) Prevent or prohibit a person from disclosing voluntarily information concerning viatical settlement fraud to a law enforcement or regulatory agency other than the insurance department; or
- (3) Limit the powers granted elsewhere by the laws of this state to the commissioner or an insurance fraud unit to investigate and examine possible violations of law and to take appropriate action against wrongdoers.

G. Viatical Settlement Antifraud Initiatives. Viatical settlement providers and viatical settlement brokers shall have in place antifraud initiatives reasonably calculated to detect, prosecute and prevent fraudulent viatical settlement acts. At the discretion of the commissioner, the commissioner may order, or a licensee may request and the commissioner may grant, such modifications of the following required initiatives as necessary to ensure an effective antifraud program. The modifications may be more or less restrictive than the required initiatives so long as the modifications may reasonably be expected to accomplish the purpose of this section. Antifraud initiatives shall include:

- (1) Fraud investigators, who may be viatical settlement provider or viatical settlement broker employees or independent contractors; and

- (2) An antifraud plan, which shall be submitted to the commissioner. The antifraud plan shall include, but not be limited to:
 - (a) A description of the procedures for detecting and investigating possible fraudulent viatical settlement acts and procedures for resolving material inconsistencies between medical records and insurance applications;
 - (b) A description of the procedures for reporting possible fraudulent viatical settlement acts to the commissioner;
 - (c) A description of the plan for antifraud education and training of underwriters and other personnel; and
 - (d) A description or chart outlining the organizational arrangement of the antifraud personnel who are responsible for the investigation and reporting of possible fraudulent viatical settlement acts and investigating unresolved material inconsistencies between medical records and insurance applications.
- (3) Antifraud plans submitted to the commissioner shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a civil or criminal action.

Section 13. Injunctions; Civil Remedies; Cease and Desist

- A. In addition to the penalties and other enforcement provisions of this Act, if any person violates this Act or any regulation implementing this Act, the commissioner may seek an injunction in a court of competent jurisdiction and may apply for temporary and permanent orders that the commissioner determines are necessary to restrain the person from committing the violation.
- B. Any person damaged by the acts of a person in violation of this Act may bring a civil action against the person committing the violation in a court of competent jurisdiction.
- [C. A violation of this Act attendant to the execution of a viatical settlement purchase agreement renders the viatical settlement purchase agreement voidable and subject to rescission by the viatical settlement purchaser, upon return of the policy received to the viatical settlement provider. Suit for rescission may be brought in a court of competent jurisdiction or where the alleged violator resides or has a principal place of business or where the alleged violation occurred.]
- D. The commissioner may issue, in accordance with [cite the state administrative procedure act], a cease and desist order upon a person that violates any provision

of this Act, any regulation or order adopted by the commissioner, or any written agreement entered into with the commissioner.

- E. When the commissioner finds that an activity in violation of this Act presents an immediate danger to the public that requires an immediate final order, the commissioner may issue an emergency cease and desist order reciting with particularity the facts underlying the findings. The emergency cease and desist order is effective immediately upon service of a copy of the order on the respondent and remains effective for ninety (90) days. If the commissioner begins non-emergency cease and desist proceedings, the emergency cease and desist order remains effective, absent an order by a court of competent jurisdiction pursuant to [cite the state administrative procedure act].

Drafting Note: States should review their laws to see if the provisions of Subsections D and E are already in state law.

- F. In addition to the penalties and other enforcement provisions of this Act, any person who violates this Act is subject to civil penalties of up to \$[insert amount] per violation. Imposition of civil penalties shall be pursuant to an order of the commissioner issued under [insert reference to statutes relating to hearings conducted by the commissioner]. The commissioner's order may require a person found to be in violation of this Act to make restitution to persons aggrieved by violations of this Act.
- G. A person convicted of a violation of this Act by a court of competent jurisdiction [insert classifications for misdemeanor and felony penalties that match provisions in state's penal codes for theft offenses]. A person convicted of a violation of this Act shall be ordered to pay restitution to persons aggrieved by the violation of this Act. Restitution shall be ordered in addition to a fine or imprisonment, but not in lieu of a fine or imprisonment.

Drafting Note: The following is an example of a graded sentencing requirement and a stay of the statute of limitations.

A person convicted of a violation of this Act by a court of competent jurisdiction may be sentenced in accordance with Paragraphs (1), (2), (3) or (4) based on the greater of (i) the value of property, services, or other benefit wrongfully obtained or attempted to obtain, or (ii) the aggregate economic loss suffered by any person as a result of the violation. A person convicted of a fraudulent viatical settlement act must be ordered to pay restitution to persons aggrieved by the fraudulent viatical settlement act. Restitution must be ordered in addition to a fine or imprisonment but not in lieu of a fine or imprisonment.

(1) to imprisonment for not more than 20 years or to payment of a fine of not more than \$100,000, or both, if the value of viatical settlement contract is more than \$35,000;

(2) to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both, if the value of viatical settlement contract is more than \$2,500 but not more than \$35,000;

(3) to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both, if the value of viatical settlement contract is more than \$500 but not more than \$2,500; or

(4) to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both, if the value of viatical settlement contract is \$500 or less.

In any prosecution under this section under Paragraphs (1), (2), (3) and (4) the value of the viatical settlement contracts within any six-month period may be aggregated and the defendant charged accordingly in applying the provisions of this section; provided that when two or more offenses are committed by the same person in two or more counties, the accused may be prosecuted in any county in which one of the offenses was committed for all of the offenses aggregated under this section. The applicable statute of limitations provision under [states should insert here the applicable statute of limitations provision cite] shall not begin to run until the insurance company or law enforcement agency is aware of the fraud, but in no event may the prosecution be commenced later than seven years after the act has occurred.

Section 14. Unfair Trade Practices

A violation of this Act shall be considered an unfair trade practice under Sections [insert reference to state's Unfair Trade Practices Act] subject to the penalties contained in that Act.

Section 15. Authority to Promulgate Regulations

The commissioner shall have the authority to:

- A. Promulgate regulations implementing this Act;
- B. Establish standards for evaluating reasonableness of payments under viatical settlement contracts for persons who are terminally or chronically ill. This authority includes, but is not limited to, regulation of discount rates used to determine the amount paid in exchange for assignment, transfer, sale, devise or bequest of a benefit under a life insurance policy;
- C. Establish appropriate licensing requirements, fees and standards for continued licensure for viatical settlement providers, brokers [and investment agents];

Drafting Note: Fees need not be mentioned if the fee is set by statute.

- D. Require a bond or other mechanism for financial accountability for viatical settlement providers and brokers; and

- E. Adopt rules governing the relationship and responsibilities of both insurers and viatical settlement providers, viatical settlement brokers [and viatical settlement investment agents] during the viatication of a life insurance policy or certificate.

Section 16. Severability

If any portion of this Act or any amendments thereto, or its applicability to any person or circumstance is held invalid by a court, the remainder of this Act or its applicability to other persons or circumstances shall not be affected.

Section 17. Effective Date

This Act shall take effect on [insert date]. A viatical settlement provider, viatical settlement broker [or viatical settlement investment agent] transacting business in this state may continue to do so pending approval or disapproval of the provider, broker [or investment agent's] application for a license as long as the application is filed with the commissioner by [insert date].