

## VIATICAL SETTLEMENTS MODEL ACT

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**Drafting Note:** In implementing this model act, states may elect to use terminology referring to life settlements rather than viatical settlements.

### 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 directly before the public, in this state, for the purpose of creating an interest in or inducing a person to [purchase or] sell, assign, devise, bequest or transfer the death benefit or ownership of a life insurance policy purs to [purchase or] sell, assign, devise, bequest or transfer the death benefit or ownership of a life insurance policy pursuant to a viatical settlement contract.

**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, soliciting, negotiating, procuring, effectuating, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, hypothecating or in any other manner, acquiring an interest in a life insurance policy by means of a viatical settlement contract.
- 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. “Commissioner” means the insurance commissioner of this state.

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

E. (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 a 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; and
- (b) Employing any plan, financial structure, 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 equivalent 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;
  - (4) Recklessly entering into, negotiating, 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 person or the persons intended to defraud the policy's issuer, the viatical settlement provider or the viator. "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) Facilitating the change of state of ownership of a policy or certificate or the state of residency of a viator to a state or jurisdiction that does not have a law similar to this Act for the express purposes of evading or avoiding the provisions of this Act; or
  - (6) Attempting to commit, assisting, aiding or abetting in the commission of, or conspiracy to commit the acts or omissions specified in this subsection.
- G. "Life insurance producer" means any person licensed in this state as a resident or nonresident insurance producer who has received qualification or authority for life insurance coverage or a life line of coverage pursuant to [insert reference to applicable producer licensing statute, with specific reference to a life insurance or equivalent line of authority].
- H. "Person" means a natural person or a legal entity, including, without limitation, an individual, partnership, limited liability company, association, trust, or corporation.
- I. "Policy" means an individual or group policy, group certificate, contract or arrangement of life insurance owned by a resident of this state, regardless of whether delivered or issued for delivery in this state.
- J. "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.

- K. “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:
- (1) For a financing entity or licensed viatical settlement provider; or
  - (2)
    - (i) In connection with a transaction in which the securities in the special purposes entity are acquired by the viator or by “qualified institutional buyers” as defined in Rule 144 promulgated under the Securities Act of 1933, as amended; or
    - (ii) The securities pay a fixed rate of return commensurate with established asset-backed institutional capital markets.
- L. “Terminally ill” means having an illness or sickness that can reasonably be expected to result in death in twenty-four (24) months or less.
- M. “Viatical settlement broker” means a person, including a life insurance producer as provided for in Section 3 of this Act, who working exclusively 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 or one or more viatical settlement brokers. Notwithstanding the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the viator, and not the insurer or the viatical settlement provider, 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.
- N. (1) “Viatical settlement contract” means a written agreement between a viator and a viatical settlement provider or any affiliate of the viatical settlement provider establishing the terms under which compensation or anything of value is or will be paid, which compensation or value is less than the expected death benefits of the policy , in return for the viator’s present or future assignment, transfer, sale, devise or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance.
- (2) “Viatical settlement contract” includes a premium finance loan made for a life insurance policy by a lender to viator on, before or after the date of issuance of the policy where:
- (a) The viator or the insured receives on the date of the premium finance loan a guarantee of a future viatical settlement value of the policy; or
  - (b) The viator or the insured agrees on the date of the premium finance loan to sell the policy or any portion of its death benefit on any date following the issuance of the policy.
- (3) “Viatical settlement contract” does not include:
- (a) A policy loan or accelerated death benefit made by the insurer pursuant to the policy’s terms;
  - (b) Loan proceeds that are used solely to pay:
    - (i) Premiums for the policy;
    - (ii) The costs of the loan, including, without limitation, interest, arrangement fees, utilization fees and similar fees, closing costs, legal fees and expenses, trustee fees and expenses, and third party collateral provider fees and expenses, including fees payable to letter of credit issuers;

- (c) A loan made by a bank or other licensed financial institution in which the lender takes an interest in a life insurance policy solely to secure repayment of a loan or, if there is a default on the loan and the policy is transferred, the transfer of such a policy by the lender, provided that the default itself is not pursuant to an agreement or understanding with any other person for the purpose of evading regulation under this Act;
  - (d) A loan made by a lender that does not violate [insert reference to state's insurance premium finance law], provided that the premium finance loan is not described in Paragraph (2) of this subsection;
  - (e) An agreement where all the parties (x) are closely related to the insured by blood or law or (y) have a lawful substantial economic interest in the continued life, health and bodily safety of the person insured, or are trusts established primarily for the benefit of such parties;
  - (f) Any designation, consent or agreement by an insured who is an employee of an employer in connection with the purchase by the employer, or trust established by the employer, of life insurance on the life of the employee;
  - (g) A bona fide business succession planning arrangement:
    - (i) Between one or more shareholders in a corporation or between a corporation and one or more of its shareholders or one or more trust established by its shareholders;
    - (ii) Between one or more partners in a partnership or between a partnership and one or more of its partners or one or more trust established by its partners; or
    - (iii) Between one or more members in a limited liability company or between a limited liability company and one or more of its members or one or more trust established by its members;
  - (h) An agreement entered into by a service recipient, or a trust established by the service recipient, and a service provider, or a trust established by the service provider, who performs significant services for the service recipient's trade or business; or
  - (i) Any other contract, transaction or arrangement exempted from the definition of viatical settlement contract by the commissioner based on a determination that the contract, transaction or arrangement is not of the type intended to be regulated by this Act.
- [O. "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 insured or have knowledge of the identity of the viator or insured.
  - (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.]
- P. (1) "Viatical settlement provider" means a person, other than a viator, that enters into or effectuates a viatical settlement contract with a viator resident in this state.
- (2) "Viatical settlement provider" does not include:
    - (a) A bank, savings bank, savings and loan association, credit union or other licensed lending institution that takes an assignment of a life insurance policy solely as collateral for a loan;

- (b) A premium finance company making premium finance loans and exempted by the commissioner from the licensing requirement under the premium finance laws that takes an assignment of a life insurance policy solely as collateral for a loan;
- (c) The issuer of the life insurance policy;
- (d) An authorized or eligible insurer that provides stop loss coverage or financial guaranty insurance to a viatical settlement provider, purchaser, financing entity, special purpose entity or related provider trust;
- (e) 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;
- (f) A financing entity;
- (g) A special purpose entity;
- (h) A related provider trust;
- (i) A viatical settlement purchaser; or
- (j) Any other person that the commissioner determines is not the type of person intended to be covered by the definition of viatical settlement provider.

[Q. “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.]

- R.
- (1) “Viatical settlement purchaser” means a person who provides 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.
  - (2) “Viatical settlement purchaser” does not include:
    - (a) A licensee under this Act;
    - (b) An accredited investor or qualified institutional buyer as defined, respectively, in Rule 501(a) or Rule 144A promulgated under the Federal Securities Act of 1933, as amended;
    - (c) A financing entity;
    - (d) A special purpose entity; or
    - (e) 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.

S. “Viaticated policy” means a life insurance policy or certificate that has been acquired by a viatical settlement provider pursuant to a viatical settlement contract.

- T. (1) “Viator” means the owner of a life insurance policy or a certificate holder under a group policy who resides in this state and 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. If there is more than one viator on a single policy and the viators are residents of different states, the transaction 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 the viators.
- (2) “Viator” does not include:
- (a) A licensee under this Act, including a life insurance producer acting as a viatical settlement broker pursuant to this Act;
  - (b) Qualified institutional buyer as defined, respectively, in Rule 144A promulgated under the Federal Securities Act of 1933, as amended;
  - (c) A financing entity;
  - (d) A special purpose entity; or
  - (e) A related provider trust.

**Section 3. License and Bond 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.
- [(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.

- (3) (a) A life insurance producer who has been duly licensed as a resident insurance producer with a life line of authority in this state or his or her home state for at least one year and is licensed as a nonresident producer in this state shall be deemed to meet the licensing requirements of this section and shall be permitted to operate as a viatical settlement broker.
- (b) Not later than thirty (30) days from the first day of operating as a viatical settlement broker, the life insurance producer shall notify the commissioner that he or she is acting as a viatical settlement broker on a form prescribed by the commissioner, and shall pay any applicable fee to be determined by the commissioner. Notification shall include an acknowledgement by the life insurance producer that he or she will operate as a viatical settlement broker in accordance with this Act.
- (c) The insurer that issued the policy being viaticated shall not be responsible for any act or omission of a viatical settlement broker or viatical settlement provider arising out of or in connection with the viatical settlement transaction, unless the insurer receives compensation for the placement of a viatical settlement contract from the viatical settlement provider or viatical settlement broker in connection with the viatical settlement contract.

**Drafting Note:** Section 3A(3)(a) and (b) would only apply to states that do not require the viatical settlement broker to obtain a separate license or registration. A life insurance producer operating in a state that requires a separate viatical settlement broker license or registration may be required to obtain such license or registration prior to operating as a viatical settlement broker in that state.

- (4) A person licensed as an attorney, certified public accountant or financial planner accredited by a nationally recognized accreditation agency, who is retained to represent the viator, whose compensation is not paid directly or indirectly by the viatical settlement provider, may negotiate viatical settlement contracts on behalf of the viator without having to obtain a license as a viatical settlement broker.
- 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].
- 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)
    - (a) If a viatical settlement provider, has demonstrated evidence of financial responsibility in a format prescribed by the commissioner through either a surety bond executed and issued by an insurer authorized to issue surety bonds in this state or a deposit of cash, certificates of deposit or securities or any combination thereof in the amount of \$250,000.
    - (b) If a viatical settlement broker, has demonstrated evidence of financial responsibility in a format prescribed by the commissioner through either a surety bond executed and issued by an insurer authorized to issue surety bonds in this state or a deposit of cash, certificates of deposit or securities or any combination thereof in the amount of \$250,000.
    - (c) The commissioner may ask for evidence of financial responsibility at any time the commissioner deems necessary.



- (d) Any surety bond issued pursuant to Paragraph (4) shall be in the favor of this state and shall specifically authorize recovery by the commissioner on behalf of any person in this state who sustained damages as the result of erroneous acts, failure to act, conviction of fraud or conviction of unfair practices by the viatical settlement provider or viatical settlement broker.
- (e) Notwithstanding any provision of this section to contrary, the commissioner shall accept, as evidence of financial responsibility, proof that financial instruments in accordance with the requirements in this paragraph have been filed with one state where the applicant is licensed as a viatical settlement provider or viatical settlement broker.
- (5) If a legal entity, provides a certificate of good standing from the state of its domicile; and
- (6) If a viatical settlement provider or viatical settlement broker, has provided an anti-fraud plan that meets the requirements of Section 14G of this Act.
- 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.
- I. An individual licensed as a viatical settlement broker shall complete on a biennial basis fifteen (15) hours of training related to viatical settlements and viatical settlement transactions, as required by the commissioner; provided, however, that a life insurance producer who is operating as a viatical settlement broker pursuant to Subsection A(3) shall not be subject to the requirements of this subsection. Any person failing to meet the requirements of this subsection shall be subject to the penalties imposed by the commissioner.

#### **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 Rule 501(a) or Rule 144A promulgated under 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. The commissioner may suspend, revoke or refuse to renew the license of a viatical settlement broker or a life insurance producer operating as a viatical settlement broker pursuant to this Act if the commissioner finds that the viatical settlement broker or life insurance producer has violated the provisions of this Act or has otherwise engaged in of bad faith conduct with one or more viators.
  - C. 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,] or suspends, revokes, or refuses to renew a license of a life insurance producer operating as a viatical settlement broker pursuant to this Act the commissioner shall conduct a hearing in accordance with [insert reference to state's administrative procedure act].

**Section 5. Approval of Viatical Settlement Contracts and Disclosure Statements**

A person shall not use a viatical settlement contract form or provide to a viator a disclosure statement form in this state unless first 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 fail to meet the requirements of Sections 8, 10, 13 and 14B of this Act or 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 viatical settlement provider 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. Such information shall be limited to only those transactions where the viator is a resident of this state. Individual transaction data regarding the business of viatical settlements or data that could compromise the privacy of personal, financial and health information of the viator or insured shall be filed with the commissioner on a confidential basis.
- B. Except as otherwise allowed or required by law, a viatical settlement provider, viatical settlement broker, [viatical settlement investment agent,] insurance company, insurance producer, 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 14C;
  - (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 or financial guaranty insurance.

**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) (a) The commissioner may conduct an examination under this Act of a licensee as often as the commissioner in his or her discretion deems appropriate after considering the factors set forth in this paragraph.
- (b) In scheduling and determining the nature, scope, and frequency of the examinations, the commissioner shall consider such matters as the consumer complaints, results of financial statement analyses and ratios, changes in management or ownership, actuarial opinions, report of independent certified public accountants, and other relevant criteria as determined by the commissioner.
- (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.
- (4) As far as practical, the examination of a foreign or alien licensee shall be made in cooperation with the insurance supervisory officials of other states in which the licensee transacts business.

### **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 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 to Viator**

- 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) That a viatical settlement broker represents exclusively the viator, and not the insurer or the viatical settlement provider, and owes a fiduciary duty to the viator, including a duty to act according to the viator's instructions and in the best interest of the viator.
  - (3) 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.
  - (4) Proceeds of the viatical settlement could be subject to the claims of creditors.
  - (5) 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.
  - (6) The viator has the right to rescind a viatical settlement contract before the earlier of sixty (60) calendar days after the date upon which the viatical settlement contract is executed by all parties or thirty (30) calendar days after the viatical settlement proceeds have been paid to the viator, as provided in Section 10F. Rescission, if exercised by the viator, is effective only if both notice of the rescission is given, and the viator repays all proceeds and any premiums, loans and loan interest paid on account of the viatical settlement within the rescission period. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment by the viator or the viator's estate of all viatical settlement proceeds and any premiums, loans and loan interest the viatical settlement within sixty (60) days of the insured's death.
  - (7) 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 written acknowledgment that ownership of the policy or interest in the certificate has been transferred and the beneficiary has been designated.

- (8) 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.
  - (9) 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 another form is developed or approved by the commissioner.
  - (10) 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."
  - (11) Following execution of a viatical contract, the insured may be contacted for the purpose of determining the insured's health status and to confirm the insured's residential or business street address and telephone number, or as otherwise provided in this Act. This contact shall be 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. All such contracts shall be made only by a viatical settlement provider licensed in the state in which the viator resided at the time of the viatical settlement, or by the authorized representative of a duly licensed viatical settlement provider.
- 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 provide the following information:
- (1) 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, business address and telephone number of the viatical settlement provider;
  - (3) Any affiliations or contractual arrangements between the viatical settlement provider and the viatical settlement purchaser.
  - (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 extent to which the viator's interest in those benefits will be transferred as a result of the viatical settlement contract; and
  - (6) State whether the funds will be escrowed with an independent third party during the transfer process, and if so, provide 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. A viatical settlement broker 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 provide the following information:
- (1) The name, business address and telephone number of the viatical settlement broker;
  - (2) A full, complete and accurate description of all offers, counter-offers, acceptances and rejections relating to the proposed viatical settlement contract;
  - (3) A written disclosure of any affiliations or contractual arrangements between the viatical settlement broker and any person making an offer in connection with the proposed viatical settlement contracts;
  - (4) The amount and method of calculating the broker's compensation, which term "compensation" includes anything of value paid or given to a viatical settlement broker for the placement of a policy; and
  - (5) Where any portion of the viatical settlement broker's compensation, as defined in Paragraph (3) of this subsection, is taken from a proposed viatical settlement offer, the broker shall disclose the total amount of the viatical settlement offer and the percentage of the viatical settlement offer comprised by the viatical settlement broker's compensation.
- D. If the viatical settlement provider transfers ownership or changes the beneficiary of the insurance policy, the provider shall communicate in writing the change in ownership or beneficiary to the insured within twenty (20) days after the change.
- E. 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 and a death claim payment is made.
  - (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, business address and telephone number of the independent third party 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.]

F. 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.]

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

## **Section 9. Disclosure to Insurer**

Prior to the initiation of a plan, transaction or series of transactions, a viatical settlement broker or viatical settlement provider shall fully disclose to an insurer a plan, transaction or series of transactions, to which the viatical settlement broker or viatical settlement provider is a party, to originate, renew, continue or finance a life insurance policy with the insurer for the purpose of engaging in the business of viatical settlements at anytime prior to, or during the first five (5) years after, issuance of the policy.

## **Section 10. 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 licensed 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 of coverage shall be used unless another form is developed and approved 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 or viatical settlement broker 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 or possible fraud. The insurer shall accept a request for verification of coverage made on an NAIC form or any other form approved by the commissioner. The insurer shall accept an original or facsimile or electronic copy of such request and any accompanying authorization signed by the viator. Failure by the insurer to meet its obligations under this subsection shall be a violation of Section 11C and Section 16 of this Act.

- (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 absolute right to rescind the contract before the earlier of sixty (60) calendar days after the date upon which the viatical settlement contract is executed by all parties or thirty (30) calendar days after the viatical settlement proceeds have been sent to the viator as provided in Section 10F. Rescission by the viator may be conditioned upon the viator both giving notice and repaying to the viatical settlement provider within the rescission period all proceeds of the settlement and any premiums, loans and loan interest paid by or on behalf of the viatical settlement provider in connection with or as a consequence of the viatical settlement. 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, which shall be paid within sixty (60) calendar days of the death of the insured. In the event of any rescission, if the viatical settlement provider has paid commissions or other compensation to a viatical settlement broker in connection with the rescinded transaction, the viatical settlement broker shall refund all such commissions and compensation to the viatical settlement provider within five business days following receipt of written demand from the viatical settlement provider, which demand shall be accompanied by either the viator's notice of rescission if rescinded at the election of the viator, or notice of the death of the insured if rescinded by reason of the death of the insured within the applicable rescission period.
- [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 or other designated representative of the viatical settlement provider. 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 set forth in the disclosure pursuant to Section 8A(7) 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. Funds shall be deemed sent by a viatical settlement provider to a viator as of the date that the escrow agent either releases funds for wire transfer to the viator or places a check for delivery to the viator via United States Postal Service or other nationally recognized delivery service.
- 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 11. Prohibited Practices**

- A. It is a violation of this Act for any person to enter into a viatical settlement contract at any time prior to the application or issuance of a policy which is the subject of viatical settlement contract or within a five-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 five-year period:
  - (1) 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 sixty (60) 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;
  - (2) The viator submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within the five-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; or
    - (f) 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; or
  - (3) The viator enters into a viatical settlement contract more than two (2) years after the date of issuance of a policy and, with respect to the policy, at all times prior to the date that is two (2) years after policy issuance, the following conditions are met:
    - (a) Policy premiums have been funded exclusively with unencumbered assets, including an interest in the life insurance policy being financed only to the extent of its net cash surrender value, provided by, or fully recourse liability incurred by, the insured or a person described in Section 2N(3)(e);

- (b) There is no agreement or understanding with any other person to guarantee any such liability or to purchase, or stand ready to purchase, the policy, including through an assumption or forgiveness of the loan; and
  - (c) Neither the insured nor the policy has been evaluated for settlement.
- B. Copies of the independent evidence described in Subsection A(2) and documents required by Section 10A shall be submitted to the insurer when the viatical settlement provider or other party entering into a viatical settlement contract with a viator 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.
- C. If the viatical settlement provider submits to the insurer a copy of the owner or insured's certification described in and the independent evidence required by Subsection A(2) 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.
- D. No insurer may, as a condition of responding to a request for verification of coverage or effecting the transfer of a policy pursuant to a viatical settlement contract, require that the viator, insured, viatical settlement provider or viatical settlement broker sign any forms, disclosures, consent or waiver form that has not been expressly approved by the commissioner for use in connection with viatical settlement contracts in this state.
- E. Upon receipt of a properly completed request for change of ownership or beneficiary of a policy, the insurer shall respond in writing within thirty (30) calendar days with written acknowledgement confirming that the change has been effected or specifying the reasons why the requested change cannot be processed. The insurer shall not unreasonably delay effecting change of ownership or beneficiary and shall not otherwise seek to interfere with any viatical settlement contract lawfully entered into in this state.

**Section 12. Prohibited Practices and Conflicts of Interest**

- A. With respect to any viatical settlement contract or insurance policy, no viatical settlement broker knowingly shall solicit an offer from, effectuate a viatical settlement with or make a sale to any viatical settlement provider, viatical settlement purchaser, [viatical settlement investment agent], financing entity or related provider trust that is controlling, controlled by, or under common control with such viatical settlement broker.
- B. With respect to any viatical settlement contract or insurance policy, no viatical settlement provider knowingly may enter into a viatical settlement contract with a viator, if, in connection with such viatical settlement contract, anything of value will be paid to a viatical settlement broker that is controlling, controlled by, or under common control with such viatical settlement provider or the viatical settlement purchaser, [viatical settlement investment agent], financing entity or related provider trust that is involved in such viatical settlement contract.
- C. A violation of Subsection A or Subsection B shall be deemed a fraudulent viatical settlement act.
- D. No viatical settlement provider shall enter into a viatical settlement contract unless the viatical settlement promotional, advertising and marketing materials, as may be prescribed by regulation, have been filed with the commissioner. In no event shall any marketing materials expressly reference that the insurance is "free" for any period of time. The inclusion of any reference in the marketing materials that would cause a viator to reasonably believe that the insurance is free for any period of time shall be considered a violation of this Act.
- E. No life insurance producer, insurance company, viatical settlement broker, viatical settlement provider or viatical settlement investment agent shall make any statement or representation to the applicant or policyholder in connection with the sale or financing of a life insurance policy to the effect that the insurance is free or without cost to the policyholder for any period of time unless provided in the policy.

### **Section 13. 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 licensees, 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; and

- (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, a licensee under this Act 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 party making use of the testimonial, appraisal, analysis or endorsement, either directly or through a 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 14. 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 suspicion that a fraudulent viatical settlement act is being, will be or has been committed shall provide to the commissioner such information as 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, 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 furnishing information as 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. However, such an award does not apply to any person furnishing information concerning his or her own fraudulent viatical settlement acts.
- (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 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) 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) 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.

- (1) 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.
- (2) Antifraud initiatives shall include:
  - (a) Fraud investigators, who may be viatical settlement provider or viatical settlement broker employees or independent contractors; and
  - (b) An antifraud plan, which shall be submitted to the commissioner. The antifraud plan shall include, but not be limited to:
    - (i) 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;
    - (ii) A description of the procedures for reporting possible fraudulent viatical settlement acts to the commissioner;
    - (iii) A description of the plan for antifraud education and training of underwriters and other personnel; and
    - (iv) 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 15. 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.
- H. Except for a fraudulent viatical settlement act committed by a viator, the enforcement provisions and penalties of this section shall not apply to a viator.

**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 16. Unfair Trade Practices**

A violation of this Act, including the commission of a fraudulent viatical settlement 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 17. 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 insuring the life of a person that is chronically or terminally ill;
- C. Establish appropriate licensing requirements, fees and standards for continued licensure for viatical settlement providers, brokers [and viatical settlement 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 18. 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 19. 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].

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*Chronological Summary of Actions (all references are to the Proceedings of the NAIC).*

1993 Proc. 3<sup>rd</sup> Quarter 7, 30, 427-428, 435-439 (adopted).  
1998 Proc. 1<sup>st</sup> Quarter 14, 17, 678, 701-706 (amended and reprinted).  
2000 Proc. 4<sup>th</sup> Quarter 16, 17, 103-104, 107-126 (amended and reprinted).  
2007 Proc. 2<sup>nd</sup> Quarter 50-105, 184-185, 240-273 (amended).

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## VIATICAL SETTLEMENTS MODEL ACT

**This chart is intended to provide readers with additional information to more easily access state statutes, regulations, bulletins or administrative rulings related to the NAIC model. Such guidance provides readers with a starting point from which they may review how each state has addressed the model and the topic being covered. The NAIC Legal Division has reviewed each state’s activity in this area and has determined whether the citation most appropriately fits in the Model Adoption column or Related State Activity column based on the definitions listed below. The NAIC’s interpretation may or may not be shared by the individual states or by interested readers.**

**This chart does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Nor does this state page reflect a determination as to whether a state meets any applicable accreditation standards. Every effort has been made to provide correct and accurate summaries to assist readers in locating useful information. Readers should consult state law for further details and for the most current information.**

**VIATICAL SETTLEMENTS MODEL ACT**

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**VIATICAL SETTLEMENTS MODEL ACT**

**KEY:**

**MODEL ADOPTION:** States that have citations identified in this column adopted the most recent version of the NAIC model in a **substantially similar manner**. This requires states to adopt the model in its entirety but does allow for variations in style and format. States that have adopted portions of the current NAIC model will be included in this column with an explanatory note.

**RELATED STATE ACTIVITY:** Examples of Related State Activity include but are not limited to: older versions of the NAIC model, statutes or regulations addressing the same subject matter, or other administrative guidance such as bulletins and notices. States that have citations identified in this column **only** (and nothing listed in the Model Adoption column) have **not** adopted the most recent version of the NAIC model in a **substantially similar manner**.

**NO CURRENT ACTIVITY:** No state activity on the topic as of the date of the most recent update. This includes states that have repealed legislation as well as states that have never adopted legislation.

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Alabama	NO CURRENT ACTIVITY	
Alaska		ALASKA STAT. § 21.96.110 (2000); ALASKA ADMIN. CODE tit. 3, §§ 31.300 to 31.449 (2002/2011).
American Samoa	NO CURRENT ACTIVITY	
Arizona		ARIZ. REV. STAT. ANN. § 20-443.02 (2008).
Arkansas		ARK. CODE ANN. §§ 23-81-801 to 23-81-818 (2009/2013); BULLETIN 13-97 (1997); Directive 1-2009 (2009).
California		CAL. INS. CODE §§ 10113.1 to 10113.35 (1990/2011); BULLETIN 2012-2 (2012).
Colorado		COLO. REV. STAT. §§ 10-7-601 to 10-7-620 (2006); § 11-51-201 (1990/2006) (Investments).
Connecticut		CONN. GEN. STAT. §§ 38a-465 to 38a-465m (1998/2013).
Delaware	DEL. CODE ANN. tit. 18, §§ 7501 to 7520 (2017).	
District of Columbia	NO CURRENT ACTIVITY	
Florida	FLA. STAT. §§ 626.991 to 626.99295 (2017); § 517.021 (1978/2005) (Investments); Memorandum 2010-007 (2010).	

**VIATICAL SETTLEMENTS MODEL ACT**

<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Georgia		GA. CODE ANN. §§ 33-59-1 to 33-59-18 (2005/2009); § 10-5-2; § 10-5-12 (1973/2002) (Investments).
Guam	NO CURRENT ACTIVITY	
Hawaii		HAW. REV. STAT. §§ 431C-31 to 34 (2012).
Idaho	IDAHO CODE ANN. §§ 41-1950 to 41-1965 (2009) (portions of model).	IDAHO ADMIN. CODE r. 18.01.13.000 to 18.01.13.16 (2009); BULLETIN 2007-3 (2007); BULLETIN 2009-6 (2009).
Illinois	215 ILL. COMP. STAT. 159/1 to 159/999 (2010).	
Indiana		IND. CODE §§ 27-8-19.8-1 to 27-8-19.8-26 (1994/2003); § 27-1-12-44 (2008).
Iowa	IOWA CODE §§ 508E.1 to 508E.20 (2008/2009) (portions of model).	IOWA ADMIN. CODE r. 191-48.1 to 191-48.14 (2002/2009); BULLETIN 2008-10 (2008); BULLETIN 2011-5 (2011).
Kansas		KAN. STAT. ANN. §§ 40-5001 to 40-5016 (2002/2009).
Kentucky	KY. REV. STAT. ANN. § 304.15-020 (2008) (portions of model).	KY. REV. STAT. ANN. §§ 304.15-700 to 304.15-725 (1998/2010).
Louisiana		LA. REV. STAT. ANN. §§ 22:1791 to 22:1805 (2003/2010).
Maine		ME. REV. STAT. ANN. tit. 24-A, §§ 6801 to 6819 (1997/2009) (portions of previous version of model); ME. REV. STAT. ANN. tit. 32, § 16102 to 16105 (1985/1999); § 16511 (1999/2005) (Related to viatical investments).
Maryland		MD. CODE ANN., INS. §§ 8-601 to 8-611 (2004/2010).
Massachusetts		MASS. GEN. LAWS ch. 175, §§ 212 to 223 (2001/2013); 940 CODE MASS. REGS. §§ 18:01 to 18:08 (1997).
Michigan		MICH. COMP. LAWS §§ 550.521 to 550.528 (1997/1999).
Minnesota	MINN. STAT. §§ 60A.957 to 60A.9585 (2009) (portions of model).	

**VIATICAL SETTLEMENTS MODEL ACT**

<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Mississippi		MISS. CODE ANN. §§ 83-7-201 to 83-7-223 (2000).
Missouri	NO CURRENT ACTIVITY	
Montana		MONT. CODE ANN. §§ 33-20-1301 to 33-20-1317 (1997/2009).
Nebraska	NEB. REV. STAT. §§ 44-1101 to 44-1116 (2001/2008).	
Nevada	NEV. REV. STAT. §§ 688C.010 to 688C.510 (2001/2011) (portions of model).	BULLETIN 2006-007 (2006); BULLETIN 2011-012 (2011).
New Hampshire		N.H. REV. STAT. ANN. §§ 408-D:1 to 408-D:19 (2010).
New Jersey		N.J. STAT. ANN. §§ 17B:30B-1 to 17B:30B-17 (2005); BULLETIN 2006-07 (2006); BULLETIN 2010-14 (2010).
New Mexico		N.M. STAT. ANN. §§ 59A-20A-1 to 59A-20A-11 (2000).
New York		N.Y. INS. LAW § 3220(6)(A); §§ 7810 to 7815 (2009); N.Y. COMP. CODES R. & REGS. tit. 11, § 308; §§ 380.1 to 380.10 (Reg. No. 148) (1994); §§ 381.1 to 381.3 (2010/2012); Off. Gen. Counsel 11-6-2006 (2006).
North Carolina		N.C. GEN. STAT. §§ 58-58-200 to 58-58-310 (2002/2007) (Insurance law); § 78A-2 (1925/2002); §§ 78A-13 to 78A-14 (2002) (Securities law); §78A-17; § 78A-27; § 78A-49; § 78A-56 (1925/2002) (Investments).
North Dakota	N.D. CENT. CODE §§ 26.1-33.3-01 to 26.1-33.3-17 (2007/2009).	
Northern Marianas	NO CURRENT ACTIVITY	
Ohio	OHIO REV. CODE ANN. §§ 3916.01 to 3916.2 (2000/2013) (portions of model).	
Oklahoma	OKLA. STAT. tit. 36, §§ 4055.1 to 4055.17 (2008) (portions of model).	BULLETIN 3-6-2009 (2009); BULLETIN 4-9-2009 (2009).
Oregon	OR. REV. STAT. §§ 744.321 to 744.358 (1995/2009).	

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<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Pennsylvania		40 PA. CONS. STAT. §§ 38-201 to 38-214 (2002).
Puerto Rico	Rule 85 (2008).	
Rhode Island		R.I. GEN. LAWS §§ 27-72-1 to 27-72-18 (2009).
South Carolina	NO CURRENT ACTIVITY	
South Dakota		S.D. CODIFIED LAWS §§ 47-31A-401 to 47-31A-402 (1988/2000) (Regulated as a security).
Tennessee	TENN. CODE ANN. §§ 56-50-101 to 56-50-111 (2001/2009) (portions of model).	
Texas		TEX. INS. CODE ANN. §§ 1111.001 to 1111.006 (2003); BULLETIN B-0026-07 (2007); BULLETIN B-0028-08 (2008); BULLETIN B-0036-11 (2011).
Utah		UTAH CODE ANN. §§ 31A-36-101 to 31A-36-119 (2003/2009); § 31A-21-104 (1985/2003) (Insurable interest); § 31A-23-221 (2003) (Licensing requirement).
Vermont	VT. STAT. ANN. tit. 8, §§ 3826 to 3835 (1994/2014).	
Virgin Islands	NO CURRENT ACTIVITY	
Virginia		VA. CODE ANN. §§ 38.2-6000 to 38.2-6016 (2003); § 38.2-1865.1 (2001/2003) (Licensing of brokers).
Washington	WASH. REV. CODE ANN. §§ 48.102.005 to 48.102.901 (1995/2009) (portions of model).	WASH. ADMIN. CODE § 284-97-020 (2011).
West Virginia	W. VA. CODE §§ 33-13C-1 to 33-13C-18 (2008).	
Wisconsin	WIS. STAT. § 632.69 (2019/2013).	
Wyoming	NO CURRENT ACTIVITY	

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In 1992 the Life Insurance Committee was charged with the task of developing a model law on living benefit companies. **1992 Proc. IIB 670.**

Several states were appointed to a committee to develop the initial draft for discussion at the fall meeting. **1992 Proc. IIB 667.** The draft they prepared was based on the existing California law. **1993 Proc. 2<sup>nd</sup> Quarter 730.**

Concern was voiced that a broad spectrum of interested parties should be allowed to develop a proposal that would have consensual support. The chair of a viatical settlement association indicated he was not opposed to the regulation of viatical settlement companies, but that input from a broader group of interested and affected parties was needed. **1993 Proc. IB 782.**

The chair of the working group noted there was no intent to preclude anyone from participating in the work of the drafters. The working group first had to identify who the various interested parties were. He stated that he wanted to make the option to viaticate policies as accessible as possible and encouraged those interested in serving in an advisory capacity to send a letter expressing interest. **1993 Proc. IB 782.**

A spokesperson for an association of people with AIDS emphasized his association's desire to preserve the right of the terminally ill to sell their life insurance policies for cash to the company that will pay the highest amount for their policies. **1993 Proc. IB 786.**

As the NAIC considered adoption of the model, it was clear that not all regulators favored the development of a model act. One regulator said he would like to eliminate the market altogether. The chair of the Life Insurance Committee said the model was being prepared for two groups of states: (1) those that wanted to ban the viatical settlement industry but could not get it done, and want to protect consumers, and (2) the states that choose not to limit any financial activity. Another commissioner suggested that, in addition to the model, insurers be encouraged to offer accelerated benefits. **1993 Proc. 3<sup>rd</sup> Quarter 439.**

Before adoption of the model by the Executive Committee, additional discussion was held on whether adoption of a model was appropriate. One regulator said viatical settlements were prohibited in his state, and the Life Insurance Committee chair responded that it was not the intent of the committee to recommend it to states that were otherwise inclined to prohibit viatical settlements. **1993 Proc. 3<sup>rd</sup> Quarter 30.**

By the end of 1996 the working group had decided it was appropriate to amend the NAIC model to incorporate new experience. The group asked for a charge to work on amendments in 1997. **1996 Proc. 4<sup>th</sup> Quarter 1040.**

Because there was significant growth in the viatical settlement industry over the past few years and more than 20 states adopted laws regulating viatical settlements, there was more experience to draw on. There was significant input from the viatical settlement industry, which was very helpful to the working group. **1997 Proc. 4<sup>th</sup> Quarter 763-764.**

The Life Insurance and Annuities (A) Committee held a public hearing on "Premium Financing of Life Insurance, Life Settlements, and the Relationship with State Insurable Interest Laws" to hear testimony from industry representatives on the issues. The hearing consisted of six panels of speakers representing life insurers, life insurance agents and advisors, life settlement companies and premium financing companies. **2006 Proc. 2<sup>nd</sup> Quarter 290-294.**

The Life Insurance and Annuities (A) Committee formed a subgroup to work on revising this model. **2006 Proc. 2<sup>nd</sup> Quarter 289.**

A Commissioner presented a proposal (Poolman Proposal) that included some interested party suggestions as well as some original suggestions. The Life Insurance and Annuities (A) Committee discussed this proposal, in particular the five-year ban. Interested parties were concerned that this ban did not protect the consumer, it did not protect Stranger Originated Life Insurance (STOLI) arrangements and it deprived consumers of a legal property right. After a lengthy discussion, the Committee decided to prepare an official draft of the model including the Poolman Proposal revisions. **2006 Proc. 3<sup>rd</sup> Quarter 215-216.**

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The Life Insurance and Annuities (A) Committee held a conference call to review the comments received on the draft of proposed revisions to this model. After lengthy discussion, the Committee decided to create a new draft of the model. **2006 Proc. 4<sup>th</sup> Quarter 636-638.**

The Executive Committee referred this model back to the Life Insurance and Annuities (A) Committee for reconsideration. **2007 Proc. 1<sup>st</sup> Quarter 55.**

#### Section 1. Short Title

Originally the model was entitled “Living Benefits Model Act.” The working group decided to change the title to “Viatical Settlements Model Act” to reflect the commonly accepted term for the industry. Some of the working group members agreed with a comment that the original title could be confused with accelerated benefits. **1993 Proc. 2<sup>nd</sup> Quarter 728.**

#### Section 2. Definitions

A. A regulator suggested adding a drafting note stating that the solicitation for investors was not a traditional activity and suggesting that the insurance department check with securities regulators to see if they would be willing to regulate that activity. **2000 Proc. 1<sup>st</sup> Quarter 77.**

A state securities regulator reported that 30 states have taken the position that a viatical settlement investment is a security and are prepared to regulate the transaction. A regulator responded that the securities regulators should then dictate the standards because they knew more about investments than insurance regulators did. **2000 Proc. 1<sup>st</sup> Quarter 77.**

C. The working group considered a comment that the definition of chronically ill moved from the regulation was no longer needed with the single treatment of traditional viatical settlements and life settlements. The working group decided there could be differences in treatment, particularly in the regulation, that would require the definition. **2000 Proc. 3<sup>rd</sup> Quarter 115.**

D. Early in the process of developing amendments to the model, the working group talked about investments in viatical settlements. A representative of one viatical settlement provider said her company agreed there was a need to use institutional funds rather than soliciting funds from individuals. She thought it would be a great step forward for the working group to write the model in such a way that it stopped other types of arrangements. One regulator said his state law had a provision that a viatical settlement provider could only assign a policy to another licensed viaticalsettlement provider. He suggested that the working group seriously consider a provision that would eliminate assignment to other than licensed entities. A viatical industry representative said that, if the industry got large enough, it would offer securities through investment bankers and that would appeal to institutional investors. **1997 Proc. 1<sup>st</sup> Quarter 683.**

The definition included in the first draft of revisions referred to a “participant” in the financing transaction. The chair said this subsection was added to address concerns over entities soliciting investments. A viatical association representative said the association was concerned that large investment companies would quit lending money to the viatical industry because the draft required them to get licensed as a provider. He suggested the draft could be narrowed to address only problems with individual investors. The chair agreed the entire financing issue needed to be addressed further. **1997 Proc. 2<sup>nd</sup> Quarter 607.**

After the definitions of financing entity and financing transaction (which was deleted in the 2000 amendments) were added to the model, there was considerable comment from regulators suggesting that this left investments in viatical settlements unregulated. Three regular participants in the meeting told of abuses or concerns that were not being addressed by other agencies in their states.

An interested party responded that the definition was very important because the viatical market was now tapping into institutional capital. Another interested party noted that the definition they were suggesting would raise the comfort level of banks and large institutional investors who feared they might be required to get a license in each state. He pointed out that a financing entity must deal with a licensed viatical settlement provider to qualify as a financing entity. **1997 Proc. 3<sup>rd</sup> Quarter 1211, 1219.**



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#### Section 2D (cont.)

At the next working group meeting regulators continued to express misgivings about financing entities and their role in the viatical settlement industry. A viatical trade association representative reemphasized the need to bring institutional capital into the marketplace. A regulator responded that he was not concerned about large institutional investors, but rather individuals. He asked how to make the narrow distinction between types of financing entities. He said he would like to see the licensed company culpable for any actions of the financing entity relative to the financing transaction. **1997 Proc. 3<sup>rd</sup> Quarter 1211.**

Periodically during the amendment process, the discussion turned to the definition of financing entity. One suggestion was to add a sentence that said a financing entity did not include a non-accredited investor. A regulator asked what that was and an interested party responded that an accredited investor can be certified under federal law and is required to make certain disclosures. He said interested parties participating in the meeting generally were not accredited investors. **2000 Proc. 2<sup>nd</sup> Quarter 89-90.**

A regulator expressed concern that the provision was too broad as redrafted. He said he was particularly concerned about the scenario where a financing entity decided it might be profitable to become a provider and still serve as a financing entity for other transactions. An interested party noted the exemption only applied if financing was the “sole activity” of the entity. (This was later changed to principal activity.) **2000 Proc. 2<sup>nd</sup> Quarter 90.**

An interested party opined that one of the goals of the working group should be to set up a structure that would work to attract institutional funding without creating loopholes in the disclosures to individual investors. She said the recommendation that the financing entity must have a contract with a licensed provider would address regulators’ concerns. **2000 Proc. 3<sup>rd</sup> Quarter 114.**

A regulator asked about the purpose of a financing entity. An interested party responded that it should not be necessary for a bank that wanted to provide funds for viatical settlement purchases to get licensed as a provider. They did nothing more than provide dollars. They did not require regulatory protection because they could get the information they needed to determine whether the viatical settlement was a good investment. **2000 Proc. 3<sup>rd</sup> Quarter 114.**

An interested party explained that a financing entity served as a warehouse to hold the life insurance policies up to the credit limits of the facility. Then they were sold to a special purpose entity to allow it to issue notes to institutional investors. **2000 Proc. 3<sup>rd</sup> Quarter 89.**

A regulator asked who tracked the viatical settlement once the financing entity owned it. An interested party responded that generally the provider will because the financing entity contracts with a provider or third party to do so. **2000 Proc. 3<sup>rd</sup> Quarter 89.**

E. As regulators considered adding a new section on fraud, one regulator recommended adding a definition of fraudulent viatical settlement act. An interested party opined that the opening paragraph set two levels of standards that made it more difficult to meet the requirements for a fraudulent viatical settlement act. He noted that some of the defined fraudulent viatical settlement acts are also fraudulent insurance acts, and he asked if this meant the perpetrator of the fraud faced a double set of penalties. **2000 Proc. 2<sup>nd</sup> Quarter 69.**

In order to narrow the opening text, regulators considered deleting “knowingly and” with intent to defraud, because if someone had the intent to defraud, they have to know what they are doing. **2000 Proc. 3<sup>rd</sup> Quarter 111.**

An interested party asked the working group to reconsider the definition of fraudulent insurance act. He suggested the phrase should be “...knowingly *and* with intent to defraud...” rather than “...*or* with intent to defraud....” A regulator responded that the group had chosen to use the word “or” because it was difficult to prove intent. The interested party also asked what it meant if a viatical settlement provider “permitted” an activity. A regulator responded that if a provider knew something was happening and allowed it to continue, it knowingly permitted the activity. An interested party opined that few people would participate in the viatical settlement business because of the stringent requirements. The chair responded that, if someone intends to act lawfully, the provisions will not create problems. **2000 Proc. 4<sup>th</sup> Quarter 132.**

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#### Section 2E (cont.)

A state's legal division reviewed the model and opined that the definition of fraudulent viatical settlement act needed to be revised slightly to be sure it applied to providers. An interested party objected to inclusion of the term "reckless," which is defined differently in the states. **2000 Proc. 4<sup>th</sup> Quarter 105.**

A regulator opined that "reckless" was a good addition because it gave viatical settlement providers an affirmative duty to look for fraudulently issued policies. It would be a lower standard than "knowingly," but higher than "negligently." She said regulators could not turn a blind eye to what they saw was not covered by the model. The regulators agreed to the revised language and decided to add one state's definition of "reckless" to Paragraph (4). **2000 Proc. 4<sup>th</sup> Quarter 105**

F. One regulator questioned the use of the word "person" when it might be a corporation acting. Another regulator suggested adding a definition of person to the model to clarify it. It was decided to use the definition from the Unfair Trade Practices Act. **1993 Proc. 3<sup>rd</sup> Quarter 438.**

I. A proposal from the viatical industry for amendments included reference to a "special purpose entity." An industry representative explained that this was a trust created to hold insurance policies, such as where a viatical settlement provider declares bankruptcy. A regulator pointed out that the term was not defined, thus making the provision too broad. **2000 Proc. 1<sup>st</sup> Quarter 76.**

A regulator questioned the need for a special purpose entity. An interested party explained that it was further down the chain and did not have a contract with a provider. Every investment bank that a provider talks to has a different idea of how to set up a transaction to be bankruptcy proof. The industry would like enough flexibility in the regulatory standards to accommodate them. **2000 Proc. 3<sup>rd</sup> Quarter 114.**

An interested party opined that individual investor should also be protected from the provider's bankruptcy. A regulator said that nothing prevented a provider from setting up a special purpose entity to protect individual investors. **2000 Proc. 3<sup>rd</sup> Quarter 114.**

J. The working group considered a comment that the definition of terminally ill moved from the regulation was no longer needed with the single treatment of traditional viatical settlements and life settlements. The working group decided there could be differences in treatment, particularly in the regulation, that would require the definition. **2000 Proc. 3<sup>rd</sup> Quarter 115.**

K. In deciding the appropriate place for brokers in the regulatory scheme, one drafter spoke in favor of including brokers within the model because she saw a potential for abuse in the fees they collected. The working group agreed to add a definition similar to that in a bill pending in one state and to consider other issues related to brokers at the next NAIC meeting. **1993 Proc. 2<sup>nd</sup> Quarter 728.**

Comments received from an industry spokesperson at the next NAIC meeting included a recommendation to include brokers in the model and require them to disclose the source of the funds. He encouraged the same standards for brokers and companies. **1993 Proc. 2<sup>nd</sup> Quarter 723.**

An interested party applauded the working group's decision to add to the definition of viatical settlement broker a sentence saying that the broker represents the viator and owes a fiduciary duty to the viator. **1997 Proc. 3<sup>rd</sup> Quarter 1220.**

Discussion took place on whether it was necessary or desirable to be licensed as an insurance agent and a viatical settlements representative. One interested party opined that there was a potential conflict of interest for a life insurance agent to sell a policy and make a commission and then buy it back as a viatical settlement representative and make another commission. He noted that one state recently passed a bill that set a time period during which it was a conflict of interest to both sell and buy back a policy. The working group did not include a similar provision in the model. **1997 Proc. 3<sup>rd</sup> Quarter 1220.**

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#### Section 2K (cont.)

The working group discussed the difference between the definition of a broker and a sales agent (later called investment agent). An industry representative clarified that the broker represented the viator. An investment agent raised money for purchases of life insurance policies. Another industry representative emphasized that his language was suggested for states that want to regulate the investment side within the insurance department. A regulator suggested the need to clearly distinguish between the two sides of the transaction. **2000 Proc. 1<sup>st</sup> Quarter 76.**

The chair asked if the list of licenses in the first redraft in 2000 was too long and the working group agreed it was. A regulator asked if a broker was the same as a representative (as defined in the 1998 model) except it had a “sponsor.” Another regulator questioned why a representative license was needed. He opined it was just another layer that was not needed. **2000 Proc. 1<sup>st</sup> Quarter 61.**

At its next meeting the working group again discussed the number of licenses being issued. First was consideration of whether to delete the representative license included in the 1998 model. The chair asked what this person did. A viatical industry representative explained that this person was not an employee of a provider or broker, but found business for those entities. He opined that this was a low-level license for someone who generated leads. The purpose of licensing was so the commissioner could come to the provider and say its appointed representative was acting in an unauthorized fashion. Another interested party opined that the representative was not an agent of the provider or broker because there was no contractual relationship. **2000 Proc. 2<sup>nd</sup> Quarter 95.**

A regulator urged the working group to delete the representative license. Another regulator agreed, comparing it to the insurance producer license, which may be given to a broker, an independent agent or a captive agent. A viatical representative pointed out that brokers have a fiduciary duty and, if regulators do not differentiate, it will not be clear who the person has a duty to. Several other regulators spoke in favor of one license. **2000 Proc. 2<sup>nd</sup> Quarter 95.**

A representative from an insurance agents’ trade association asked what a life insurance agent needed to do to act as a viatical broker. The chair responded that he needed a viatical broker’s license. The agents’ representative said life insurance agents sometimes help clients who no longer need policies and should not be required to be licensed for that activity. He said that when a life insurance agent helped his client and happened to get compensated for it there was no conflict. He urged regulators not to require a license for this person. **2000 Proc. 2<sup>nd</sup> Quarter 95.**

The working group considered a suggestion to leave out the reference to financial planner, certified public accountant or attorney. An interested party suggested limiting the definition of broker to someone who was compensated by the viator. A regulator pointed out it would be very easy to structure the commission so that the provider paid it on behalf of the viator. He opined that the specific exemption was because a CPA or attorney could be disciplined by its own regulating agency. The interested party asked if a person who had a designation as a chartered financial consultant would be covered by the exemption. There was a difference of opinion on this issue. **2000 Proc. 2<sup>nd</sup> Quarter 95.**

The working group did agree that the only persons not required to get a license were those paid an amount not based on the policies sold. **2000 Proc. 2<sup>nd</sup> Quarter 95.**

The working group again looked at the definition of broker as it discussed amendments to the model. A regulator suggested adding “certified public” before accountant and “certified” before planner. He said these individuals could be exempted because they reported to another board. An agent representative asked if certified planner meant an individual with a CFP designation. He pointed out that there is also a ChFC designation for chartered financial consultants. The working group decided to simply refer to an accrediting group to cover both. **2000 Proc. 3<sup>rd</sup> Quarter 110.**

A viatical broker asked the working group to change the definition of broker to say the individual negotiated contracts between a viator and “more than one” viatical settlement provider, rather than “one or more.” He said if a broker is only providing policies to one provider, he isn’t really a broker. Another interested party opined that a relationship with only one provider contradicts concept of fiduciary duty. A regulator responded that the working group draft appears to expect an independent broker. The working group agreed to leave the draft as written. **2000 Proc. 3<sup>rd</sup> Quarter 110.**

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#### Section 2 (cont.)

L. A comment was received suggesting that the language of Subsection L needed to be changed so that it no longer referred to the person *owning* the policy, because this prevented persons with group policies from taking advantage of the model's protection. Members of the working group discussed the advantages and disadvantages of including group contracts in the definition and decided to seek further input. **1993 Proc. 2<sup>nd</sup> Quarter 728.**

One representative from an association of viatical settlement companies said the majority of the policies purchased by the company with which he was affiliated were group policies, so he encouraged inclusion of group policies in the model. The regulators voted to include group policies. **1993 Proc. 2<sup>nd</sup> Quarter 723.**

The working group chair asked if there was a confidentiality problem with a person going to his employer to get a release for a group certificate. An industry spokesperson responded that the greatest problem with group certificates was inconsistency. Some policies did not allow a certificate holder to assign the policy irrevocably. It was also important to have a conversion policy; otherwise the policy could be canceled at the whim of the employer. He agreed that the insured lost his right to confidentiality, but he didn't know of an alternative. A consumer representative reminded the group of the protections afforded by the Americans with Disabilities Act. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

A regulator asked why group policies should be so important when so many of the viators had probably already terminated employment by the time they sold their policies. The industry spokesperson responded that many were on long-term disability so maintained the benefits accorded to employees. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

The working group agreed to add a sentence to the definition of viatical settlement contract to make clear that this also included a loan secured by an individual's life insurance policy. An interested party opined that this closed a potential loophole. **1997 Proc. 3<sup>rd</sup> Quarter 1220.**

When the model was being redrafted in 2000, a viatical trade association suggested deleting "...or anything of value, which compensation or value is..." from the definition of contract. A regulator spoke in support of the language, which he found helpful in market conduct examinations. **2000 Proc. 1<sup>st</sup> Quarter 62.**

Interested parties stated that their proposed revisions centered around the definition of "viatical settlement contract." The interested parties suggested including every imaginable transfer as a type of viatical settlement within the definition and then exclude all legitimate transactions and transfers from the requirements of the model. **2006 Proc. 2<sup>nd</sup> Quarter 288.**

M. Discussion of the 1998 revision focused on the definition of a viatical settlement agent. A viatical settlement company representative said she believed it was important to reference agents in the model act, but did not think it was appropriate to refer to an agent soliciting funds. Another industry representative agreed that referencing an agent on the funding side opened a whole new area of less appropriate behavior. **1997 Proc. 2<sup>nd</sup> Quarter 607.**

A regulator asked whether the duties of the investment agent could be incorporated into the provider duties; otherwise there was another entity to license. A securities regulator pointed out that the investment agent may be independent rather than an employee of a provider. **2000 Proc. 1<sup>st</sup> Quarter 76.**

The working group talked about a separate license for a viatical settlement sales agent (later called investment agent). One state law required that a sale agent already have a license as an insurance agent. Many have a securities license so they can sell variable products. A state securities regulator said his quick poll of states indicated 44 will deal with the viatical sale side of the transaction as a security. The problem is that securities regulators do not yet know how they will regulate the transaction. He said the National Association of Securities Dealers (NASD) has taken a hands-off approach because of a court decision in the DC circuit. He said his goal was that there would be adequate consumer protection no matter who regulated, and that the treatment would be similar to discourage forum shopping. The chair asked if the securities regulators would likely advocate a separate license. The securities regulator responded that the focus so far was on fraud enforcement activity. **2000 Proc. 2<sup>nd</sup> Quarter 97.**

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#### Section 2M (cont.)

Some regulators expressed discomfort that one individual might be working on both sides of the transaction. A regulator opined that a person should not be soliciting viators and financing for the same sales transaction. He suggested adding language to the model to that effect. **2000 Proc. 2<sup>nd</sup> Quarter 88.**

N. One suggestion was that Subsection N(2) refer to the Accelerated Benefits Model Regulation instead of describing the methods of payment of accelerated benefits. The working group agreed this would be clearer so changed the draft. **1993 Proc. 2<sup>nd</sup> Quarter 728.**

An interested party suggested it was inappropriate for an insurer that did not have an accelerated death benefit provision in the contract to suddenly offer a settlement when the insurer finds the individual intends to viaticate the policy. He opined this was discriminatory because the insurer did not offer the benefit to all of its policyholders. He suggested adding language that allowed this action by the insurer only when it was in the contract. A representative of a life insurance trade association said she agreed wholeheartedly with this recommendation and expressed concern that to do otherwise could result in serious tax ramifications for the insured. The working group agreed to add the phrase “and pursuant to the contract” to Subsection N to address these concerns. **1997 Proc. 3<sup>rd</sup> Quarter 1220.**

Just before adoption of the model, the working group decided to include the exception found in Paragraph (4). The intent of the working group was to exclude from the Act a friend or family member of the policyholder who wanted to enter into an agreement with a viator. One commissioner asked whether “friend” was a defined term, and the chair replied it was not. He said the proposed language had been lifted from a recently adopted law. The working group found it difficult to word the exemption clearly, but did want to include a provision because it would create a hardship to subject family and friends to the model act. The working group agreed to limit the transactions to one instead of three per year, as had originally been drafted and refer to a “natural person” rather than a friend or family member. **1993 Proc. 3<sup>rd</sup> Quarter 439.**

When the model was being revised in 1997, discussion again arose about exempting immediate family or other close personal relationship to the insured. The chair expressed concern about the difficulty in the interpretation of the term “close personal friend.” The working group discussed whether the language in the original model was still appropriate. **1997 Proc. 3<sup>rd</sup> Quarter 1220.**

A viatical trade association suggested adding reinsurers to the list of financing entities included in Subsection D. An industry spokesperson said reinsurers are becoming players in financing transactions. Another interested party explained that this is really stop loss coverage, which some providers use to protect the funding source by procuring insurance to pay off the investor if the viator lives past his life expectancy. The working group agreed that the proper term for this was stop loss coverage rather than reinsurance. The working group also agreed the proper place to address this issue was in the definition of viatical settlement provider. **2000 Proc. 1<sup>st</sup> Quarter 62.**

An industry trade association recommended changing the definition of provider to include anyone who “effectuates” a contract, rather than who “enters into” a contract. An interested party said the change was more substantive than it might appear. Some entities argued that even though they arranged a viatical settlement, they did not sign it, so they were not providers because they did not enter into the contract. One regulator said his state was using the term “effectuate” because regulators thought it was a better choice of words. **2000 Proc. 1<sup>st</sup> Quarter 62.**

Several regulators expressed concern with the suggestions to broaden the definition of viatical settlement provider. An interested party explained that the industry’s concern is that sophisticated entities are not pulled into the law and required to get a license as a provider. She said these entities are governed by securities law. She emphasized that going this direction alleviates problems regulators face because of individual investors. **2000 Proc. 2<sup>nd</sup> Quarter 90.**

An interested party suggested deleting the language referring to financing entities in the body of the definition of provider. He said adding the term effectuate removed the need for the whole sentence and the working group agreed. **2000 Proc. 3<sup>rd</sup> Quarter 112.**

## VIATICAL SETTLEMENTS MODEL ACT

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#### Section 2N (cont.)

An interested party discussed revising the definition of “viatical settlement contract.” **2006 Proc. 4<sup>th</sup> Quarter 581.**

O. A regulator asked why the draft called those entering into a purchase agreement “purchasers” instead of investors. An industry representative said they could be called investors if that was clearer. A state securities regulator said that securities regulators look at the sale from the viatical settlement provider to the first purchaser. He opined that eventually regulators would have to address the secondary market to provide an orderly body of regulation. **2000 Proc. 1<sup>st</sup> Quarter 76.**

P. The viatical settlement industry suggested defining “viatical settlement purchaser.” A regulator asked how this was different than the definition of financing entity. An industry representative explained that the purchaser provided the money and became the new owner. The regulator responded by asking if these could be combined so that there was one term for an investor. **2000 Proc. 1<sup>st</sup> Quarter 76.**

At the next meeting another regulator asked about the difference between a purchaser and a financing entity. An interested party responded that one is an individual and one is an institutional investor. The chair asked if a purchaser also could be someone who bought the policy on the secondary market and the response was in the affirmative. **2000 Proc. 1<sup>st</sup> Quarter 62.**

A regulator expressed concern that a person not licensed as a provider would say he was a purchaser. An interested party responded that someone who enters into a contract with a viator is defined as a provider. Another regulator suggested rearranging the definition to first state what was included and then state exceptions. **2000 Proc. 1<sup>st</sup> Quarter 62.**

Q. The definition was added as part of the 1997 amendments. **1998 Proc. 1<sup>st</sup> Quarter 702.**

R. Late in 1998 a hearing was held on the viatical settlement industry and the appropriate direction for regulation. The president of the NAIC emphasized that there was a role for viatical settlements until all insurers offer accelerated death benefits, to meet the needs of people who were in desperate need of cash. He asked if it was appropriate to have life insurance turned into an investment contract— “death futures,” investing in a person’s death. He asked regulators to consider whether there were insurable interest concerns and to deal with the public policy questions. A member of his staff described four categories of viatical settlements that needed to be considered: 1) people with a life expectancy of no greater than two years; 2) the chronically ill, who do not have a normal life expectancy, but were expected to live more than two years; 3) persons with a normal life expectancy; and 4) people who do not now own life insurance. He said there was activity in all four of these categories that needed to be considered by the regulators. **1998 Proc. 4<sup>th</sup> Quarter II 609-610.**

The state regulator described a letter that he had recently received that was addressed to agents encouraging them to look at life insurance policies they had written to identify those who might be approached to viaticate the policies. He noted advertisements that encouraged people to buy life insurance and immediately viaticate the policies. He pointed out a newspaper article that said billions of dollars of insurance were being viaticated. It concluded that “homicide becomes more than a remote possibility.” He said that inaction on the part of the NAIC would endorse the direction of the market. **1998 Proc. 4<sup>th</sup> Quarter II 610.**

A representative from the viatical settlement industry noted that life insurance was a form of property and the owner had discretion about what to do with that property. He opined that there was a broad consumer need for viatical settlements or the industry would not have grown to the extent that it has. Another said his company would not buy policies that had just been issued and did not condone that practice. He said he believed it was being done by a few agents to generate commissions and it was not clear that many, if any, would actually be purchased by viatical settlement providers, because the viatical settlement provider would be betting against the underwriting of the insurer. He opined that this policy would have been taken out in bad faith as a wagering contract. **1998 Proc. 4<sup>th</sup> Quarter II 610-611.**

A regulator expressed concern that merely because an individual is healthy, the viatical laws would not protect him. The chair of the parent committee confirmed that the viatical settlement industry and insurance regulators agreed that the model, as currently drafted, covered only the terminally ill. Attendees discussed how the model might be extended. **1998 Proc. 4<sup>th</sup> Quarter II 611.**

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#### Section 2R (cont.)

At a later meeting the working group again discussed whether the sales of policies of healthy individuals should be regulated. Some suggested that the products should be banned or regulated. A viatical industry representative cautioned against just changing the definition in the act. **1999 Proc. 3<sup>rd</sup> Quarter II 749.**

In late 1999 the working group began discussing the need to amend the model to address new developments in the industry. One important issue was the sale of policies by individuals who were not terminally or chronically ill. One regulator asked if this type of arrangement should even be allowed in the marketplace. Some regulators spoke in favor of developing separate standards; some spoke in favor of combining so-called “life settlements” with viatical settlements. Representatives from the viatical settlement industry submitted a draft proposal with separate provisions because some states might not wish to regulate life settlements. **1999 Proc. 4<sup>th</sup> Quarter 848.**

A regulator questioned why a state would choose not to regulate life settlements. An industry representative responded that some states see a need for viator protection because the individuals selling their policies are ill, but may not be as interested in protecting other sellers of policies. **1999 Proc. 4<sup>th</sup> Quarter 848.**

A working group member asked if regulators had done any surveys to see how large a share of the market was in life settlements. He said it was his understanding that this was not a very large percentage of the market. Another regulator responded that it was his impression companies were moving away from traditional viatical settlements into life settlements. **1999 Proc. 4<sup>th</sup> Quarter 844.**

As the drafting progressed, the chair again asked the working group to discuss whether life settlements and traditional viatical settlements should be treated separately or whether the definition should be broad enough to encompass life settlements. A regulator opined that merging the two would make it easier to approach the legislatures. An interested party pointed out that this direction had the advantage of no longer having to determine whether the individual was terminally ill. Another person noted that the tax treatment would be different, and another interested party responded that this was already true in the viatical settlement market, depending on life expectancy. **2000 Proc. 2<sup>nd</sup> Quarter 90.**

A representative of the viatical settlement industry spoke in opposition to this approach. He opined that terminally ill needed more protection because of a greater concern that they were being taken advantage of. A regulator offered to redraft the model to allow different treatment where appropriate. Others agreed it would be helpful to get rid of all the “viatical settlement or life settlement” verbiage. **2000 Proc. 2<sup>nd</sup> Quarter 91.**

One state provided recommendations for including life settlements within the definition of viatical settlement. An industry representative suggested that using the term life settlement was better because the term viatical settlement had a specialized meaning. Staff asked what affect changing the term would have on the provisions of the Health Insurance Portability and Accountability Act (HIPAA), which refers to special tax treatment for viatical settlements. The working group agreed to hear comments on the appropriate term to use. **2000 Proc. 2<sup>nd</sup> Quarter 89.**The redraft of the definition included a recommendation to move the reference to the health status of the viator to later in the definition. **2000 Proc. 2<sup>nd</sup> Quarter 89.**

Representatives from the viatical industry suggested adding the phrase “original owner of subsequent transferee” and adding “who has a bona fide insurable interest in the life insurance policy.” A spokesperson said these changes expanded the provision to cover more consumers. An interested party said the amendments reduced the number of people with protection. **2000 Proc. 1<sup>st</sup> Quarter 62.**

#### Section 3. License Requirements

A spokesperson for an association of people with AIDS endorsed the concept of registration of all companies purchasing life insurance policies from the terminally ill. He endorsed background checks of all companies and their officers to prevent those who have been convicted of violations such as securities or insurance fraud from conducting business in the viatical settlement industry. However, he cautioned that this should not be a burdensome process. He opined that an overly-burdensome process would only serve as a disincentive for companies to provide this option to the terminally ill. **1993 Proc. IB 787.**

## VIATICAL SETTLEMENTS MODEL ACT

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#### Section 3 (cont.)

A. When regulators considered a viatical industry suggestion that licensed life insurance agents be allowed to transact viatical settlement business without further licensing required, an insurance industry representative expressed concern that licensed agents could mine their policy information to generate viatical sales. One regulator said the bill before his state's legislature required a person to have a life insurance agent license and to pass a securities Series 6 and Series 63 test before being licensed as a viatical settlement broker. **2000 Proc. 1<sup>st</sup> Quarter 76.**

Early in the process of developing amendments during 2000, an interested party from the viatical industry suggested adding a new subsection saying that a viatical investment agent should maintain a license as a life insurance agent. A representative from the insurance industry said this would mean every licensed life insurance agent would be a sales agent for viatical settlements and opined that these individuals were not necessarily qualified to suggest investments. Another pointed out that these individuals would not necessarily have a securities Series 6 or Series 7 license and said recommending investments in viatical settlements is much more like selling stocks than selling insurance. **2000 Proc. 1<sup>st</sup> Quarter 76.**

A regulator opined that securities regulators should be the ones to license the investment agent. On that side of the transaction there are suitability requirements to meet and the agent needs education on the investment transaction. He opined that it might even be appropriate to prohibit this person from being a life insurance agent. Another regulator said the draft pending in his state prohibited an agent from selling a policy and serving as a viatical broker for that same policy. **2000 Proc. 1<sup>st</sup> Quarter 76.**

An interested party asked what law to apply if the viator lived in one state, the escrow agent was in another, and the viatical settlement provider in another. The working group decided to add a phrase at the end of Subsection A to clarify that the law to apply would be that of the residence of the viator. **2000 Proc. 2<sup>nd</sup> Quarter 96.**

At a June 2000 meeting of the working group, extensive discussion took place regarding the number of licenses that should be included in the model. Some spoke in favor of including sales agent activities within the license for representative, while others thought licensing the broker should be adequate. Some regulators expressed discomfort that one individual might be working on both sides of the transaction. A regulator opined that a person should not be soliciting viators and financing for the same sales transaction. He suggested adding language to the model to that effect. **2000 Proc. 2<sup>nd</sup> Quarter 88.**

A representative from the viatical industry said that most of the providers' leads for life settlements come from life insurance agents. He asked if the life insurance license was all that was needed, and a regulator responded that she saw this as a conflict of interest. The interested party responded that the responsibility of a life insurance agent is not so different when he encourages someone to purchase a policy or sell it. One regulator noted that in his state's law, it is against the law to assist in the viatication of a policy where he was the agent that sold it in the first place. **2000 Proc. 2<sup>nd</sup> Quarter 88.**

Discussion continued on the number of licenses to include in the model. A small group assigned to focus on this issue recommended three licenses: viatical settlement provider, viatical settlement broker, and viatical settlement investment agent. The broker definition would make clear the allegiance to the viator. The investment agent would be someone who works for investors on the financing side. The investment agent would work strictly on the funding side and would have no contact with the viator. A viatical broker said he understood the need to reduce the number of licenses, but felt it was important to have someone who could make contacts for the brokers. Another interested party said this arrangement was a serious disservice to customers because it made it impossible for insurance agents to do the right thing for their customers. A regulator responded that insurance agents can do the right thing, but if they were able to make a financial gain, their advice would be colored by that fact. **2000 Proc. 2<sup>nd</sup> Quarter 70.**

B. It was suggested that the application for a license be on a uniform application attached as an appendix to the draft. The chair of the working group said he thought that suggestion was more appropriate for a regulation and recommended the working group consider that issue after the model act was completed. **1993 Proc. 2<sup>nd</sup> Quarter 728.**



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#### Section 3 (cont.)

C. The first draft had all licenses renewable on May 1. A suggestion was made that the license be renewable a year from the date of application. The procedures followed in the states represented on the working group varied, so the members of the working group decided to change the draft to make the license renewable on the anniversary date, with the understanding that states would probably change the provision to be the same as the practice for other types of licenses. **1993 Proc. 2<sup>nd</sup> Quarter 728.**

D. One writer suggested that employees be exempted from Section 3D. The working group members could not see any reason to do this, so left the provision in the draft. **1993 Proc. 2<sup>nd</sup> Quarter 728.** Another comment received suggested that the authority of the commissioner to investigate stockholders, officers, employees, etc. was too broad and encouraged “fishing expeditions.” The working group members thought the commissioner needed broad authority to investigate and did not foresee the commissioner having time for “fishing.” **1993 Proc. 2<sup>nd</sup> Quarter 729.**

E. The working group reviewed the list of parties who could operate under a provider or broker’s license. An interested party suggested adding employees or agents to the list. A regulator expressed concern about adding agents, who could be hundreds of people with temporary status. Another expressed concern that this left a hole for individuals the insurance department would not know about. Another regulator responded that these individuals would be licensed as brokers; regulators want anyone acting as a broker to be licensed as a broker. The entities covered under Subsection E should be limited carefully to those with a close relationship to a provider or broker. The working group agreed that was the correct interpretation. **2000 Proc. 3<sup>rd</sup> Quarter 110.**

F. It was suggested by an interested party that Subsection F was too broad and allowed the commissioner to make moral judgments. The working group decided to leave the language, which was generally found in state licensing statutes. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

The working group discussed whether it was appropriate to say the commissioner *shall* make an investigation and one regulator suggested he would be more comfortable if it said the commissioner *may* make an investigation. Another regulator responded that, if he were an applicant, he would want to be sure that everyone was treated the same. He also suggested the commissioner should be required to issue a license if there were no deficiencies. The working group decided to leave the first “shall” as a requirement to make an investigation but to delete the “may” in the second part of the phrase. **1997 Proc. 3<sup>rd</sup> Quarter 1212.**

After hearing comments on the draft the working group decided to add Paragraph (1) requiring a detailed plan of operation so the commissioner was aware of the type of operations being conducted. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

At the suggestion of an interested party, the working group agreed to add a phrase at the beginning of Paragraph (1) to clarify that only a provider has an obligation to provide a plan of operation. **2000 Proc. 2<sup>nd</sup> Quarter 96.**

An interested party suggested adding a new paragraph with a requirement to demonstrate competency. This would allow training to be required. A regulator pointed out this was already covered by Paragraph (3). **2000 Proc. 1<sup>st</sup> Quarter 77.**

One commenter suggested that Paragraph (4) required a viatical company to form a separate corporation for each state in which it operated. A regulator spoke against modifying the paragraph so that corporations licensed by another state agency could avoid the licensing requirements of the insurance department. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

The working group reviewed a suggestion from an interested party to add an additional Paragraph (5) regarding an antifraud plan. The working group decided to insert the paragraph here and decide later if it would fit better in the fraud section. **2000 Proc. 2<sup>nd</sup> Quarter 96.** An interested party suggested adding a phrase to Paragraph (5) that allowed a license to be revoked or denied if activity took place with a viator who was a resident of the state and the contract had not been approved. The working group decided it did not want to limit the revocation only to activities involving residents. They could decide to revoke a license for a bad act in another state. **2000 Proc. 2<sup>nd</sup> Quarter 96.**

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#### Section 3 (cont.)

G. Regulators considered the impact of the Gramm-Leach-Bliley Act on limited licenses, such as those granted to a viatical settlement broker or a sales agent. Staff noted the trend toward limiting the number of license categories in insurance licensing was contrary to the trend in this group to create more. A regulator noted that if one state licensed them as producers and another as viatical settlement producers, those states may be required to give non-resident licenses. There was general agreement on the need to streamline the licensing categories. **2000 Proc. 1<sup>st</sup> Quarter 61.**

#### Section 4. License Revocation and Denial

A. The comments received focused on the term “unreasonable payments” used in Paragraph (3). One writer opined the term was too vague and suggested the language be changed to “payments to policyholders not consistent with viatical settlement industry standards.” The working group members were interested in discovering what those standards were. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

One regulator suggested that Section 4 would be improved by adding a provision allowing revocation if an action had been taken in another state. The working group decided to add a phrase broad enough to cover action by another state or by a federal agency. **1993 Proc. 3<sup>rd</sup> Quarter 439.**

The chair pointed out that the revised model contained several new grounds for revocation taken from states’ laws. A representative from a viatical trade association said his organization supported the changes except for the reference in Paragraph (4) to misdemeanors involving moral turpitude. **1997 Proc. 2<sup>nd</sup> Quarter 608.**

A regulator asked if the phrase in Subsection A(4) meant that the moral turpitude provision only applied to a misdemeanor. The working group agreed that was so. **1997 Proc. 3<sup>rd</sup> Quarter 1212.**

Representatives of the viatical settlement industry suggested that Subsection A(8) be deleted because the viatical providers wanted the ability to assign a policy to anyone. A regulator expressed concern about the potential problem of having a non-licensed entity owning a policy. A viatical association representative said this created a problem because, if they could only sell to licensed providers, there would be no liquidity in a state where few providers were licensed. The regulators decided not to take out Paragraph (8). **1997 Proc. 3<sup>rd</sup> Quarter 1220.**

The major issue remaining before adoption of the revised model was to consider issues related to the secondary market. Representatives from the viatical industry expressed concern about the proposal of the working group to limit the secondary market to only licensed viatical settlement providers. They suggested the return to a viator would be much reduced if collateral could not be provided. **1997 Proc. 4<sup>th</sup> Quarter 767.**

The working group voted to adopt the model with language allowing assignment to a viatical settlement provider licensed in the state, or to a financing entity. The vote to adopt the model with this provision was 8–5. **1997 Proc. 4<sup>th</sup> Quarter 768.**

An interested party asked that Paragraph (8) be deleted from the model. He said it was not realistic because, in the subsequent sale of a policy, a provider may transfer the policy to someone other than a provider that is licensed. A regulator expressed concern because, without some restriction, the

#### Section 4A (cont.)

provider could sell the policy to someone who would do bad things to the person that was insured. The interested party responded that that was a privacy issue and the revocation section was not the proper place to deal with the issue. **2000 Proc. 1<sup>st</sup> Quarter 77.**

B. The original draft contained more detailed penalty provisions. After hearing comments, the working group decided to refer to the administrations procedures act and add a section referencing the state unfair trade practice law for penalties. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

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#### Section 4 (cont.)

A viatical trade association suggested adding a phrase at the end of Subsection B to require a hearing by the applicant within 30 days of the commissioner's action. The working group decided not to add that provision because the administrative procedure act in the state will have a requirement for a specific number of days and such a provision might conflict with that. **2000 Proc. 2<sup>nd</sup> Quarter 96.**

#### Section 5. Approval of Viatical Settlement Contracts and Disclosure Statements

One of the comments received on the draft of this section said that it was a waste of time for insurance departments to review contract forms. The working group members thought it served as a valuable consumer protection, and that it was also useful to have this information available to the public. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

When drafting revisions to the model act, this section was revised to include a requirement to file the disclosure statements. A viatical company representative suggested the language could be broadened to apply to forms that might be used by brokers. **1997 Proc. 2<sup>nd</sup> Quarter 608.**

Several regulators expressed concern about language in the original model that provided for a 60-day deemer provision. They agreed to delete that language. A viatical company representative said she felt more comfortable having a form affirmatively approved. **1997 Proc. 3<sup>rd</sup> Quarter 1220.**

An interested party suggested changing the first phrase so that instead of saying a person could not "use" a contract, it said a person could not "enter into" a contract that had not been approved. A regulator pointed out that without the word "use," a viatical settlement provider could use the contract in negotiations without actually entering into a viatical settlement using the unapproved form. The group decided to retain the word "use." **1997 Proc. 3<sup>rd</sup> Quarter 1212.**

An interested party suggested adding purchase agreements to the list of approvals that were required. A regulator expressed concern that this would put a burden on the regulator that should be on the investor. **2000 Proc. 1<sup>st</sup> Quarter 77.**

The group later discussed the issue again and agreed that the correct philosophy was not to include purchaser disclosures in Section 5. One regulator suggested drafting a sample disclosure as an appendix for the model regulation. **2000 Proc. 2<sup>nd</sup> Quarter 91.**

A regulator said she would like the opportunity to review the advertising for investors because she had seen many problems in this area. Another regulator responded that his department did not have time to review advertising. A securities regulator said that on the securities side this would probably be part of the commissioner's discretion and he suggested that alternative for the sake of consistency. **2000 Proc. 1<sup>st</sup> Quarter 77.**

The working group discussed whether the contracts and disclosure statements should be approved or simply filed with the department. Some regulators spoke in favor of each approach. One suggested drafting the model with two alternatives, one with prior approval and one for file and use. Another said a state will follow its own philosophy and urged the working group not to spend time debating the issue. The working group decided to leave the current prior approval language in the model. A commissioner asked the group to add a sentence that allowed the commissioner to require, as part of the application process, the submission of advertising material. **2000 Proc. 2<sup>nd</sup> Quarter 96.**

An interested party suggested that Section 5 be revised to include a deemer provision for approvals. A regulator responded that these were often used for life insurance, where regulators have dealt with the issues for years. He opined that there were many new issues in viatical settlements that may need more extensive review by regulators. Other regulators agreed that many of the issues were new and they were not comfortable with a deemer. **2000 Proc. 3<sup>rd</sup> Quarter 115.**

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#### Section 6. Reporting Requirements and Confidentiality

In response to a suggestion that a uniform reporting form be devised, the working group members agreed the concept was good. However, they did not think it appropriate to delay development of the model while a reporting blank was developed. They chose to ignore a comment that financial reporting was an invasion of privacy. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

A. The working group discussed the report that should be filed annually. A regulator noted that each licensee is required to file a report and asked if that meant the broker filed a report also. The working group decided to leave the provision so a state could decide what kind of report it wanted from a broker. One regulator said his state would ask the broker to tell who it had transactions with over the past year so the state can check to see if any unlicensed providers had been acting in the state. **2000 Proc. 2<sup>nd</sup> Quarter 96.**

B. When revisions to the model were considered in 1997, an interested party commented that Subsection B would not allow viatical settlement companies to report unlicensed activity to the commissioner. The working group agreed to revise Subsection B and to add a drafting note to point out this problem to states. **1997 Proc. 3<sup>rd</sup> Quarter 1221.**

The chair asked if it was appropriate for Subsection B to refer to insurance companies, insurance brokers, etc. and regulate their behavior in the Viatical Settlements Act. A regulator responded that even though the act wasn't drafted to regulate insurers, it did not mean they could not be subjected to the same confidentiality requirement. Two regulators expressed reservations about including the language in their laws. The working group decided to leave the provision in the draft. **1997 Proc. 3<sup>rd</sup> Quarter 1212-1213.**

One regulator asked who would be aware of the identity of the person viaticating the policy. The response was that in all cases the provider and broker would know. After that the answer varied, depending on how the financing was obtained. In some cases a third party held all the policies and that entity would know the identity of the policyholders. In some cases, individuals purchased the policies and would be aware of the information. The regulator responded that the fact other individuals knew the identity of the viator concerned him greatly. **1997 Proc. 4<sup>th</sup> Quarter 767.**

A regulator from another state said his state's law distinguished between institutional investors and other financing entities. Individual identities of viators could only be revealed to an institutional investor. An interested party responded that his company used private financing, so it would be out of business if the model used that concept. He noted that today more than half of the money in the viatical settlement marketplace comes from individual investors. **1997 Proc. 4<sup>th</sup> Quarter 767.**

The chair said he researched state laws and saw only one state that addressed the issue of disclosure of viators' names to investors. He suggested that, if there was really a problem, it would have become obvious before now because so few states prohibit disclosure of the information. An interested party noted that for the most part investors do not have access to the information, but some investors feel a need to have the information. He suggested a further discussion of the issue could take place during development of the regulation. **1998 Proc. 1<sup>st</sup> Quarter 700.**

When the parent committee considered adoption of the model, one of its members questioned the need to disclose the name of the insured. She said it served no purpose and opined that the working group should take a closer look at this issue during development of the regulation. **1998 Proc. 1<sup>st</sup> Quarter 700.**

The motion to adopt the model was amended to include a commitment to address the issue of confidentiality further in the regulation. **1998 Proc. 1<sup>st</sup> Quarter 704.**

While revisions to the model were being discussed in 2000, a viatical industry representative suggested adding a new Paragraph (2) and a new Paragraph (5) to permit the financing entity to finance the purchase of policies by a viatical settlement provider. An insurance industry representative suggested adding a provision requiring the notification of the insurer upon any change of ownership. **2000 Proc. 1<sup>st</sup> Quarter 78.**

When discussing the NAIC privacy rules and their applicability to viatical settlements, the chair noted the Subsection B set forth the situations where disclosure was allowed. He opined that it protected insureds from unnecessary disclosure and balanced the viator's privacy with the provider's need to do business. **2000 Proc. 4<sup>th</sup> Quarter 130.**

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#### Section 6B (cont.)

The working group agreed to add a Paragraph (6) to allow disclosure with regard to servicing of policies and Paragraph (7) to cover the situation where an insurer writing stop loss coverage asked to see all the files. **2000 Proc. 4<sup>th</sup> Quarter 130.**

#### Section 7. Examination

One commenter on the original draft of this section suggested that an examination could be incriminating and therefore a Fifth Amendment violation. Another suggested a licensee be required to pay for an examination only if a violation of the public trust was found. Both comments were considered and rejected. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

A requirement was included in the original Section 7 for the viatical settlement provider to maintain records of the viatical settlement transactions. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

B. A sentence was added to require maintenance of records for five years. An interested party suggested that this language be restricted to providers because agents and brokers may not be aware of the time of death of the viator. He also suggested three years was a more appropriate time limit. **1997 Proc. 2<sup>nd</sup> Quarter 608.**

Interested parties asked whether the requirement to maintain records included keeping records of transactions not consummated. The working group members agreed that was not the intent. **1997 Proc. 3<sup>rd</sup> Quarter 1221.**

A viatical trade association requested that the period of maintenance of records be changed from five years to three years. Because the *Market Conduct Examiners Handbook* section on viatical settlements uses five years, regulators decided to leave that requirement. **2000 Proc. 1<sup>st</sup> Quarter 78.**

A regulator opined that from the standpoint of market conduct examinations, the section as drafted was very difficult. It did not provide an opportunity to share examination data with other states. He offered to draft a provision similar to the confidentiality and sharing provisions added to a number of NAIC models in January 2000. **2000 Proc. 2<sup>nd</sup> Quarter 96.**

The regulator took the examination law already adopted for insurers and adopted it for inclusion in the Viatical Settlement Model Act. Another person asked if it would be better to refer to the general examination statute. The drafter responded that it may not be clear whether a particular part applied because it talked about insurers. **2000 Proc. 3<sup>rd</sup> Quarter 114.**

#### Section 8. Disclosure

A spokesperson for an association representing those with AIDS endorsed the requirement for full disclosure to the prospective seller of all the ramifications of the sale of one's life insurance. **1993 Proc. IB 787.**

A comment received on this section pointed out that the draft didn't say who should receive disclosure of the information. The working group added that for clarity. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

Just before adoption of the model act, the working group changed the first paragraph. The original language had referred to the time the contract was "entered into" and it was agreed that this was not clear. **1993 Proc. 3<sup>rd</sup> Quarter 438.**

A spokesperson for a viatical settlement association spoke favorably of the model and its development. He said it was an important effort because not everyone respected the fragile nature of those who are stricken with a life-threatening disease. **1993 Proc. 3<sup>rd</sup> Quarter 438-439.**

A. An interested party recommended deletion of the reference to catastrophic illness in Paragraph (1) at the time the model was expanded to include all sales of policies. **2000 Proc. 1<sup>st</sup> Quarter 78.**

A regulator was asked to redraft provisions to include life settlements in the definition of viatical settlement. He also recommended deletion of the reference to illness in Subsection A. **2000 Proc. 2<sup>nd</sup> Quarter 89.**

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#### Section 8A (cont.)

The original draft required the viatical settlement provider to disclose the tax consequences of a viatical settlement. It was suggested that the provider was not necessarily qualified to give advice in this area. One regulator suggested changing Paragraph (2) to something similar to that used in the Accelerated Benefits Model Regulation where the viator would be urged to seek professional advice. The working group agreed this was a good approach. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

In response to a suggestion from a regulator, a new Paragraph (3) was added to Section 8 to require disclosure that the proceeds could be subject to the claims of creditors. One viatical company representative said his company disclosed that a viatical settlement was not a good idea for an individual who had filed or was contemplating filing bankruptcy. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

It was suggested that viatical settlement providers are not necessarily qualified to give advice on the impact a settlement will have on government benefits and entitlements. The first draft required the provider to explain the consequences of interruption of assistance, but Paragraph (4) was changed to a provision recommending that advice be obtained from the appropriate agencies. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

Two comments were received expressing opposition to the 30-day rescission period contained in the original draft. The working group thought there was some merit to this argument, and concluded the amount paid to the viator might actually be lower because the transaction would not be final for that period of time. The working group voted to include a two-part requirement with the alternative of 30 days from the date of the contract or 15 days from the date of payment. The working group decided to make the requirement for the lesser of those two time periods, which would encourage quicker payment of the proceeds. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

Later a suggestion was made that the provision of the *earlier* of the two dates didn't give as much protection. The working group initially agreed but later reverted to the earlier date because this would encourage payment of the proceeds earlier to start the "free-look" period running. **1993 Proc. 3<sup>rd</sup> Quarter 427, 437.**

When the model was being revised, an interested party suggested changing the language of Paragraph (5) to provide a 15-day rescission period for simplicity. **1997 Proc. 2<sup>nd</sup> Quarter 608.**

When drafting the 2000 amendments, regulators again heard a request from a viatical industry representative to reduce the rescission period from 15 days to five days. He said this created a better balance between the rights of viators and investors. In the past the working group had only considered viator's rights, and this provision left the investor in limbo for 15 days. A regulator responded that this may be the only policy a viator has, but an investor will be able to find other investments. As an alternative, the industry representative suggested starting the time period from the date the contract was signed. Regulators decided they did not have enough experience with the provision to consider changing it. **2000 Proc. 1<sup>st</sup> Quarter 78.**

An interested party asked what would happen to the proceeds of the policy if the insured died during the rescission period. The insurer would pay the beneficiaries who might be investors, but the viator's estate would want the money too. An insurer representative responded that both sets of beneficiaries would file claims with the insurer and the insurer would file an interpleader action to clarify who was entitled to the benefits. An interested party suggested that the provider could be required to be the beneficiary to keep track of the money, providing for one beneficiary instead of 50 investor beneficiaries. **2000 Proc. 3<sup>rd</sup> Quarter 111.**

It was suggested that a provision be added to the draft to require the purchaser to either have the money in hand or to disclose to the viator the outside date by which funds would be available. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

Representatives from the viatical settlement industry recommended deletion of the provision requiring disclosure of the date by which funds would be available to the viator. They suggested it was not possible to know the date, because they did not know when the insurance company would provide the information needed to complete the transaction. **1997 Proc. 3<sup>rd</sup> Quarter 1221.**

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#### Section 8A (cont.)

A viatical trade association suggested new language to replace disclosure of the date funds would be available. The viatical settlement provider could say the funds will be available after the occurrence of specified events. The working group agreed to insert the language suggested as Paragraph (6). The group also agreed to an additional Paragraph (7), saying it strengthened the disclosure. **1997 Proc. 3<sup>rd</sup> Quarter 1213.**

A viatical industry representative requested that the working group change the requirement in Paragraph (6) to deliver funds within three business days rather than two. He said compliance with the two-day rule was difficult. A regulator pointed out that the provision required delivery two days *after* acknowledgment, so they already had three days. The working group acknowledged that the provision was not written very clearly and agreed that three days total was not unreasonable. **2000 Proc. 1<sup>st</sup> Quarter 78.**

A new Paragraph (8) was added to require delivery of an informational guide. A regulator pointed out that the informational guide was attached to the regulation. The working group agreed to add the requirement in the Act so that it was not lost. **2000 Proc. 1<sup>st</sup> Quarter 78.**

Staff noted that the brochures packet included a separate life settlement and viatical settlement brochure. If the working group decided to combine those terms, the brochures may need to be combined. One regulator said they had already done so in his state. **2000 Proc. 2<sup>nd</sup> Quarter 91.**

Before the development of Paragraph (9), the working group struggled with the issue of what information should be disclosed and to whom. One option considered was to give full disclosure of what privacy rights viators were giving up so they could sign off on only the ones with which they were comfortable. They also would be aware that the price would fall with less disclosure. A regulator pointed out that the investor needs protection too, so should have information about the policy being purchased. Other regulators spoke in favor of tipping the balance to consider the risk to the life of the viator. **2000 Proc. 2<sup>nd</sup> Quarter 92.**

A representative from the viatical industry said the reality is that the viator will have to waive all privacy rights or the policy will not sell. The name and address of the viator are needed in order to identify which person's policy is being purchased. A securities regulator said that the securities regulators' association discussed this very issue and came down on the side of protecting the identify of the viator. He opined that it is inevitable that someone will take advantage of this information and kill the insured. He did not want to see securities regulators drafting something that would put people at risk. **2000 Proc. 2<sup>nd</sup> Quarter 92.**

The securities regulator opined that there was a serious need for a trustee, a disinterested party who could protect both sides of the transaction. It could be a commercial entity or a nonprofit entity set up by the viatical settlement industry; the important issue was that this entity had no stake in the life of the viator. A representative from the life insurance industry likened it to the Medical Information Bureau, which was funded by the insurance industry for a similar antifraud purpose. **2000 Proc. 2<sup>nd</sup> Quarter 92.**

A regulator suggested the draft include a provision for informed consent. An interested party pointed out that if the investor is assigned the policy, he will still have the information, even if there was no consent. Another regulator suggested drafting the model with a disclosure that investors in his policy will know the insured's name, address, health status, and all policy information. Others agreed that the viator should know up front that all information would be provided to the investor when he became the owner. **2000 Proc. 2<sup>nd</sup> Quarter 92.**

A regulator said he found it troubling that once an individual gave up his right to privacy, the information would go the purchasers, resellers, etc. Another regulator suggested studying this issue in light of the privacy regulations currently under development in response to the Gramm-Leach-Bliley Act and then discussing the issue again. **2000 Proc. 2<sup>nd</sup> Quarter 92-93.**

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#### Section 8A (cont.)

By the fall 2000 meeting, the NAIC had completed work on its privacy regulation in response to the Gramm-Leach-Bliley Act, and the working group considered its impact on the Viatical Settlements Model Act. NAIC staff reported that the model was divided into two areas: financial provisions, which track closely the federal rules that apply to banks; and secondly, privacy of health information. For financial information the licensee must give notice and an opportunity to “opt-out”—to say no to disclosure to non-affiliated parties. On the health side, the licensee must get the permission of the customer—an “opt-in”—for disclosure to affiliates and non-affiliates. The model included exceptions for legitimate business reasons, such as fraud investigation and claims settlement. **2000 Proc. 4<sup>th</sup> Quarter 129.**

Staff said that if viatical settlement providers were licensees under state insurance law, they would be covered. Once information was given to a financing entity or other related party to the transaction, redisclosure by that third party was restricted to the same extent as it was to the licensee. The opt-in permission for health information would only apply for 24 months. At the end of that time, the viator would have another opportunity to opt-in. An interested party cautioned that it would be very difficult to re-sell the policy if the individual said no after two years. **2000 Proc. 4<sup>th</sup> Quarter 129.**

Regulators considered the issue of whether viatical settlement licensees were covered by the law. Several attendees at the meeting commented that they believed the law covered anyone licensed under the insurance code. Staff noted that Title V of the Gramm-Leach-Bliley Act did not talk about the “business of insurance” but about an activity “under insurance law.” **2000 Proc. 4<sup>th</sup> Quarter 129.**

An interested party suggested including language in the Viatical Settlement Model Act that it applies instead of the privacy law. According to the Gramm-Leach-Bliley Act, insurance departments must establish minimum standards for all financing institutions. Viatical settlement providers are financing institutions, so even without the insurance law, they would be required to meet the federal rules. An interested party said the NAIC’s model includes an opt-in requirement, so it should not be difficult for viatical settlement providers to comply with the model. One regulator said she had been a member of the group that drafted the privacy model and she specifically asked if that rule would cover viatical settlements. The group responded in the affirmative. **2000 Proc. 4<sup>th</sup> Quarter 129-130.**

An NAIC staffer who was a principle drafter of the regulation said he was comfortable that there was no conflict between the privacy rule and the viatical model. Regulators agreed to make two changes to the model in response to the privacy issue. First was to add a sentence at the end of Section 8A(9) to disclose the fact that the permission to share needed to be renewed every two years. **2000 Proc. 4<sup>th</sup> Quarter 127.**

A representative from the viatical industry said the working group needed to address this issue because if permission was not given, the policy no longer had resale value. He viewed the provision as a “time bomb” for purchaser protection. A securities regulator agreed, stating that this needed to be disclosed to investors. The chair of the working group said he agreed this was a problem, but the issue could not be addressed by this group. **2000 Proc. 4<sup>th</sup> Quarter 127.**

A regulator asked why additional information would be needed except in the case of the secondary market. The interested party responded that tracking the health of the insured would not be possible if the release was no longer good. Staff pointed out that the release was necessary only for providing information to third parties and would not affect the relationship between the viatical settlement provider and the viator. **2000 Proc. 4<sup>th</sup> Quarter 127.**

An interested party was concerned that the required disclosure language in Subsection 8(A) was written at too high of a level and that the specific disclosure language was left in the discretion of the insurer. Several other interested parties agreed that they were concerned about the amount of disclosure required. **2006 Proc. 4<sup>th</sup> Quarter 581-583.**

B. Subsection B was added with the revisions discussed in 1997. Representatives from the viatical settlement industry suggested deletion of some of the descriptive areas in Paragraph (3). They said this meant each contract would have to be policy specific. A regulator said the transaction *should* be specific to the benefits available to each individual. An interested party responded that the industry was looking for more standardization and these provisions prevented that. **1997 Proc. 3<sup>rd</sup> Quarter 1221.**



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#### Section 8B (cont.)

A viatical industry representative suggested adding “if known” to Paragraph (5) because the provider may not know if those items are included. A regulator opined that the original intent was to tell the policyowner that those things might exist, rather than to specifically give details about the policy. Another regulator disagreed, saying the information was meant to be disclosed about this particular policy. Viatical industry representatives said it was often hard to get the information, but a regulator said that was part of the measure of the value of the policy that a provider needed in determining the price to pay. **2000 Proc. 1<sup>st</sup> Quarter 78.**

As the disclosures were being redrafted in 2000, the regulators decided to place all the disclosures that could be made early in Subsection A and place the disclosures that could not take place until policy delivery in Subsection B. The introductory language to Subsections A and B was rewritten to clarify this and to indicate that the disclosures needed to be in writing. **2000 Proc. 2<sup>nd</sup> Quarter 91.**

A regulator asked if it was appropriate to disclose the name and address of the insurer and the policy number so the investor would know the policy existed. An insurer representative said that if a potential investor called his company and asked about a particular policy, the insurer would not give out that information. **2000 Proc. 2<sup>nd</sup> Quarter 92.**

C. A new Subsection C was developed with the other 2000 amendments. An insurer trade association recommended including a time requirement in the subsection. A viatical industry representative said the provider would not be aware of further transfers. A regulator said that regulators are telling the viatical settlement industry to set up a mechanism to track purchasers. **2000 Proc. 3<sup>rd</sup> Quarter 111-112.**

D. A viatical trade association suggested adding a new subsection with investor disclosures. The working group compared it with disclosures already required in one state and decided they were better written and should be used to the extent possible. A regulator asked if the rate of return should be disclosed. Regulators agreed an annual rate of return should be quoted rather than the total return on the investment. **2000 Proc. 1<sup>st</sup> Quarter 79.**

The first draft from the viatical industry trade association had included a recommendation for purchaser disclosures, but the group now suggested that the disclosures be divided into two sets, one for generic disclosures that could be given early and one set of disclosures that were specific to the policy being purchased. **2000 Proc. 2<sup>nd</sup> Quarter 91.**

An interested party questioned the assertion in Paragraph (3) that the funds “may not be available” until the death of the insured. He asked if there are circumstances when the funds would be available sooner. A viatical industry representative said that some viatical settlement providers buy stop loss coverage so that if death does not occur within two years of the predicted life span, the insurer will pay the funds. A regulator pointed out that the investor could sell the policy in the secondary market. He suggested making the language stronger so the purchaser understood that he was not likely to get the money out earlier. **2000 Proc. 1<sup>st</sup> Quarter 79.**

The working group discussed the limitations in regard to investments in group policies and decided specific disclosure of the special risks of group policies was necessary. **2000 Proc. 1<sup>st</sup> Quarter 79.**

A viatical industry representative asked why the disclosures could not describe the existence of a guaranty fund, which would mitigate the dangers described in Paragraph (4). The chair responded that insurers are not allowed to advertise the existence of a guaranty fund either. **2000 Proc. 3<sup>rd</sup> Quarter 112.**

An interested party asked if the investment brochure developed as part of the viatical advisory package should be required in this subsection. The working group agreed to require delivery of the brochure. **2000 Proc. 1<sup>st</sup> Quarter 79.**

Discussion turned to whether the NAIC’s brochures should be included in the disclosure requirements. An interested party suggested referencing the NAIC’s form unless one is developed by the commissioner. **2000 Proc. 3<sup>rd</sup> Quarter 112.**

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#### Section 9. General Rules

A suggestion was made that this section include a provision that insurance companies be required to cooperate with viatical settlement companies and brokers by supplying needed information in a timely fashion. The working group decided not to consider the issue here since it would be inappropriate for a law regulating insurance companies to be placed in a chapter on viatical settlement companies. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

A. One writer suggested the word “first” be removed from Subsection A. The working group rejected this suggestion, considering it appropriate to require these steps before entering into a contract. **1993 Proc. 2<sup>nd</sup> Quarter 729.**

Representatives from the viatical industry pointed out that Subsection A was written in such a way to assume that the viator was the same individual as the person with the catastrophic, life threatening or chronic illness. They suggested the addition of a paragraph where the insured consents to the release of his or her medical records to be sure the individual whose life is being insured is aware of the viatical settlement. The working group agreed to this suggestion and made appropriate adjustments to the rest of Subsection A to accomplish this end. **1997 Proc. 3<sup>rd</sup> Quarter 1221.**

The working group considered a comment on Paragraph (1) that required a statement from a licensed attending physician that the viator was of sound mind. An interested party said that a person did not need to be of sound mind to buy insurance or do many other transactions, and she questioned its inclusion here. She recommended its deletion, but regulators decided to leave the language as written. **2000 Proc. 3<sup>rd</sup> Quarter 115.**

An insurance industry representative said regulators had asked for ideas on how to combat life insurance fraud and he provided a list of suggestions. He emphasized the need for communication between the insurer and the viatical settlement provider. If the applicant was trying to commit fraud, he would tell the insurer he was healthy, but tell the viatical settlement provider a different story. Representatives of the viatical industry did not respond well to the suggestions and questioned the insurers’ need for the information. One expressed concern that the insurer would rescind the policy after the viatical settlement transaction had been completed. **2000 Proc. 1<sup>st</sup> Quarter 79.**

A viatical industry representative said the viatical industry had a tremendous problem getting information from insurers and they were now asking the viatical industry to send them information. A regulator pointed out that one of the charges to the working group was to address issues related to insurance fraud, and he suggested looking at any suggestion that would help address these problems. A securities regulator opined that the availability of medical records would go a long way toward preventing fraud, which protects the ultimate investor. **2000 Proc. 1<sup>st</sup> Quarter 79-80.**

The working group reviewed the language submitted by a life insurance industry representative for a new Paragraph (2) and (3) to require sharing of information with the insurer. A viatical industry representative said the purpose of Paragraph (3) was to get medical records into the hands of the insurer and he did not think that was appropriate. The chair said the purpose of the additional language was to help identify fraud against the insurance company. An insurance trade association representative said these provisions help the viatical settlement provider and the insurer work together to prevent fraud. The insurer representative said the insurer could not root out fraud without this information. The insurer needed the medical records and the application to see if the viatical application was different from the information provided to the insurer. **2000 Proc. 2<sup>nd</sup> Quarter 93.**

The viatical industry representative questioned whether the insurer would be given an opportunity to re-underwrite the policy when it was being viaticated. A regulator said these provisions would allow the insurance industry to depend on the viatical industry to do its underwriting. If the policy was viaticated, the insurer will look at the medical information. The working group considered limiting this requirement to a certain time period. A commissioner said that some people hoped to get through the two-year contestability period and expressed concern about those who lie on their insurance application. An insurance trade association representative noted the incontestability law was created to protect beneficiaries, but it was now being used to protect a sick person who lied on his application and then pocketed the money. **2000 Proc. 2<sup>nd</sup> Quarter 93.**

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#### Section 9A (cont.)

Discussion continued on what information should be provided to the insurer. An interested party opined that the insurer did not have a right to information that the policy was being viaticated. A regulator responded that, given the fraud level within the viatical industry, it was important that insurers have as much information as possible. A representative from the viatical industry opined that insurers would then harass policyholders to not viaticate their policies. An insurer representative responded that the federal fraud investigations by the FBI and the Mail Fraud Task Force were not instigated by the life insurance industry. She emphasized that the life insurance industry talked with the working group for a year and a half about ways to prevent fraud; it was not trying to cancel legitimate policies. **2000 Proc. 4<sup>th</sup> Quarter 130.**

The working group decided to add Paragraph (4) to address concerns that insurers would be able to pursue an investigation at any time. An interested party noted that several states required insurers to respond to the verification of coverage request within 30 days and suggested making the same requirement for a decision as to whether to pursue an investigation. An insurer representative asked that regulators not lock a company into a position of never being able to investigate even if fraud was suspected at a later time. The working group decided to include language that required the insurer to state, within 30 days, whether it intended to pursue an investigation at this time. **2000 Proc. 4<sup>th</sup> Quarter 131.**

A viatical settlement broker asked if these requirements also applied when a broker gathered information from an insurer. If a broker provided records from the insurer, it was value added for the provider. A provider representative said her company preferred to do its own investigation and would not accept documents from a broker. A regulator opined that most of the fraud he had seen involved brokers and suggested that allowing brokers to do them could perpetuate fraud. The group concluded it should allow the broker to provide the information, recognizing that the insurer may have to respond to the same request for information from the provider. **2000 Proc. 4<sup>th</sup> Quarter 131.**

One writer suggested that the requirement in Paragraph (5) to have the statement witnessed was inappropriate and maybe even a violation of privacy. The chair asked what the duty of the witness was under this provision, and another regulator responded that it was the duty of the witness to testify that the viator was acting of his own free will and had the mental capacity to sign the contract. This testimony protected all parties to the contract. The group agreed that the witness should be a disinterested third party. **1993 Proc. 2<sup>nd</sup> Quarter 729-730.**

The working group requested and received information from a representative of a viatical settlement association. He opined that the witnesses were useful because they assisted the viator in understanding the importance of his or her actions. Help from an independent third party was most appropriate. **1993 Proc. 2<sup>nd</sup> Quarter 723.**

One regulator asked if it would be a good idea to have the beneficiary as a witness. The industry representative said it was not a good idea, in his opinion, because the viator might not want that person to know he was beneficiary or that the viator was ill. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

B. An NAIC staffer who was a principal drafter of the regulation said he was comfortable that there was no conflict between the privacy rule and the viatical model. Regulators agreed to make two changes to the model in response to the privacy issue. One change was a drafting note at the end of Section 9B suggesting that states may wish to make specific reference to their privacy regulation adopted in response to the Gramm-Leach-Bliley Act. **2000 Proc. 4<sup>th</sup> Quarter 127.**

C. One comment opined Subsection C was unclear because it allowed a refund provision of “at least” 30 days. The writer suggested states might extend the period because of these two words. The working group decided to leave the language because it gave the viatical company the option of providing a longer period. If a state wanted a different length of time, the state law would simply be written with a different time period. **1993 Proc. 2<sup>nd</sup> Quarter 730.**

At the same time the time period in Section 8A was revised, this section was also changed to refer only to a 15-day recession period. **1997 Proc. 3<sup>rd</sup> Quarter 1213.**

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#### Section 9C (cont.)

A securities regulator expressed concern that there was no provision for returning money to the investors if the contract was revoked. An interested party responded that the investors may want it back or may want to invest in something different. He opined putting a provision to return the funds in the model would restrict the right to contract. The working group decided this issue could be addressed in the contract between the provider and investor. **2000 Proc. 1<sup>st</sup> Quarter 80.**

E. A representative from a viatical company suggested that funds should be set aside in a trust account while the contract was being finalized. After some discussion on ways to assure the availability of funds, the regulators agreed to add an escrow requirement. **1993 Proc. 2<sup>nd</sup> Quarter 723-724.**

The working group decided to strengthen the requirements regarding the escrow account when amendments were being redrafted. An interested party offered more suggestions in regard to escrow agents. **1997 Proc. 2<sup>nd</sup> Quarter 608.**

An interested party pointed out that there are two types of escrow arrangements. In one type the escrow agent holds the money but does not provide any services. The second arrangement requires the escrow agent to provide services. He suggested revising the language to contemplate both methods. **2000 Proc. 4<sup>th</sup> Quarter 131.**

F. Representatives of the viatical industry recommended deletion of language from the original model that said failure to tender the viatical settlement by the date disclosed rendered the contract void. They suggested alternative language to the working group, which was included. **1997 Proc. 3<sup>rd</sup> Quarter 1221.**

G. Subsection G was moved from the regulation. The viatical industry suggested adding language to require a financing entity to appoint the viatical settlement provider as its agent for the purpose of determining health status. While waiting for refinement of the concept of financing entities, the group decided not to consider this suggestion. **1997 Proc. 4<sup>th</sup> Quarter 774.**

A regulator expressed concern about the provisions of Subsection G. He said there must be a better way than to contact the viator and ask if he was still alive. **1998 Proc. 1<sup>st</sup> Quarter 700.**

An interested party expressed concern about a new sentence added to Subsection G that made the provider or broker responsible for the actions of someone who made improper contacts related to health status. A regulator responded that the industry said this action was often delegated so regulators wanted the licensed provider or broker to take responsibility. **2000 Proc. 4<sup>th</sup> Quarter 131.**

#### Section 10. Prohibited Practices

One of the members of the working group presented a draft for a new section on prohibited practices. He reminded the group that an insurance representative had suggested limiting transfer during the contestability period. If that provision was to be included, it should go here. He said the original purpose of the contestability rules was to protect widows and orphans so they could receive policy proceeds. It was decided as a public policy issue that the insurer could better bear that burden. It was not intended that people could defraud the insurer and then collect money from the insurance policy. He spoke against lengthening the contestability period. **2000 Proc. 1<sup>st</sup> Quarter 80.**

One regulator said his state just had a bill introduced that did not allow the sale of a policy during the first two years, except that a rebuttable presumption existed so that an individual could prove that the situation had changed. **2000 Proc. 1<sup>st</sup> Quarter 80.**

At a later meeting the working group reviewed the newly drafted section again. An interested party noted that many of the provisions dealt with fraud and probably needed to go in the new section being drafted on that topic. The chair noted there is a prohibited practices section in the regulation and suggested pulling those provisions into this section. **2000 Proc. 2<sup>nd</sup> Quarter 93.**

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#### Section 10 (cont.)

Although the language for Section 10 was a recommendation of the viatical settlement and life insurance industries, a representative from a life insurers' trade association later recommended deleting the whole section. During the development of the model and the activity over the past year, the association changed its mind about the recommendation. She explained that if regulators prohibited transfers during the contestability period, they would eliminate one of the mechanisms for insurers to detect fraud. After two years have passed, insurers in many states had no remedy when fraud was discovered. **2000 Proc. 3<sup>rd</sup> Quarter 113.**

The chair responded that one of the important charges to the group was to reduce fraud. The group talked about “wet paper” transactions extensively and the group decision was that it was appropriate public policy not to allow sales of newly issued policies. The working group recognized that there were legitimate instances to allow the sale of a policy, so the exceptions were included. An insurer representative said it was her understanding that the transaction was not economically feasible unless the viatical settlement provider believed the individual would live a shorter period than the insurer believed when it priced the product. In that case some fraud must be involved. The chair distinguished wet paper sales from fraud. Insurance is issued for certain purposes, and selling the policy for financial gain was not one of them. **2000 Proc. 3<sup>rd</sup> Quarter 113.**

Late in the drafting policy, the introductory paragraph to Section 10 was revised. It had said the contract was unlawful and the working group agreed that left that status of the insurance coverage unclear. In this way it was clear that the contract was still valid and enforceable. **2000 Proc. 4<sup>th</sup> Quarter 131.**

An interested party suggested prohibiting a person from entering into a viatical settlement contract at any time prior to the application or issuance of a policy or certificate unless the viator certifies to the viatical settlement provider that the insured is terminally or chronically ill and other certain conditions are met. **2006 Proc. 2<sup>nd</sup> Quarter 288.**

D. The working group discussed the practice of selling a newly issued life insurance policy. The chair said regulators all agree wet paper transactions were bad. A viatical industry representative proposed language that made it a prohibited practice to enter into a viatical settlement within a certain period of time after the policy was issued. An interested party opined that the exceptions in Subsection D were too broad. It would cover arthritis, high blood pressure, and any illness that required a course of treatment for an unspecified period of time. A regulator said that language was too broad and left large loopholes. **2000 Proc. 2<sup>nd</sup> Quarter 94.**

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

The working group drafting amendments in 2000 looked at a proposal from one state for a section on false representations and deceptive words. The chair noted that these were really advertising standards. He said the regulation already included some provisions and suggested adding them to this section. **2000 Proc. 2<sup>nd</sup> Quarter 94.**

A. Interested parties pointed out that this section permitted life settlements after two years even if the policy was financed. This Section also protected lenders. **2006 Proc. 4<sup>th</sup> Quarter 581.**

D. As the drafting progressed, the working group refined the draft of Section 11. One suggestion was to delete Paragraph (5), which an interested party suggested belonged in a regulation. A regulator responded that some states will adopt the whole model as an act or regulation, depending on their style of regulation; it was important for the NAIC to address the issue. **2000 Proc. 3<sup>rd</sup> Quarter 112.**

E. An interested party from the viatical industry questioned the propriety of a statement in Paragraph (7) about testimonials. An interested party from the insurance industry said the same language was used for insurers. A regulator opined that the same standards should be applied to viatical settlement providers as are applied to insurers. **2000 Proc. 3<sup>rd</sup> Quarter 113.**

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#### Section 11 (cont.)

F. An interested party questioned the requirement to reflect relevant recent facts. He asked what was “recent” and the chair responded that this was up to the commissioner’s discretion. Several members of the working group commented that insurers often came to the department with that type of question and they encouraged viatical settlement licensees to have the same type of communication. **2000 Proc. 3<sup>rd</sup> Quarter 113.**

P. An interested party suggested the subsection was misleading because the advertised price will vary, depending on whether the provider generally purchased policies of those who were terminally ill. A regulator responded that the advertisement must not be misleading, so a company that wanted to emphasize the dollar amount must give enough information so the consumer was not misled. **2000 Proc. 3<sup>rd</sup> Quarter 113.**

#### Section 12. Fraud Prevention and Control

An interested party suggested language for several new subsections on fraud. They required reporting of fraudulent acts to the insurer and provided immunity for that reporting. A regulator responded that regulators wanted to encourage that activity and agreed it was appropriate to include in the model. Another regulator suggested taking the NAIC’s Insurance Fraud Prevention Model Act and revising it to deal with viatical settlements. He suggested pulling all the fraud provisions from various places in the model and drafting one section on fraud. **2000 Proc. 2<sup>nd</sup> Quarter 93.**

An insurance association representative expressed concern about a proposal that prohibited viatication of a policy within the first two years. She said this actually encouraged people to wait two years to viaticate a fraudulently obtained policy, so in most states an insurer had no recourse. She said she assumed regulators would provide some freedom to rescind a policy after two years if fraud was discovered. The regulators indicated that was not their intent. She responded that this created an inducement to hide fraud for two years. **2000 Proc. 2<sup>nd</sup> Quarter 94.**

A regulator prepared a draft of a new Section 12 that was based on the NAIC Insurance Fraud Prevention Model Act. He said the provisions of this new section prohibited fraudulent viatical settlement acts, provided immunity from liability, required a fraud warning, mandated reporting of fraudulent viatical settlement acts, and required confidentiality. The section required each viatical settlement provider to have an antifraud plan and provided for the creation of a viatical settlement fraud unit. **2000 Proc. 2<sup>nd</sup> Quarter 69.**

The working group considered further the recommendation to create a fraud unit. The working Group decided that investigation of viatical fraud would be the responsibility of the insurance department, so decided to delete reference to a viatical fraud unit. **2000 Proc. 3<sup>rd</sup> Quarter 111.**

B. A viatical industry representative suggested that the fraud warning in Subsection B should also be required in life insurance policies. He said that there are many antifraud initiatives that insurers could undertake so the provisions of Section 12 should not be limited to viatical settlement providers. A regulator responded that a law regulating viatical settlement providers was not an appropriate location for requirements for life insurers. He also noted that the majority of states already have included similar requirements in the insurance fraud laws, which do apply to insurers. **2000 Proc. 2<sup>nd</sup> Quarter 69.**

D. Interested parties spoke in favor of a broader immunity section to encourage viatical settlement licensees to report fraud to the insurance company that was being defrauded. The working group agreed to add this language. The regulators also decided to add a provision allowing reporting to the North American Securities Administrators Association (NASAA). **2000 Proc. 3<sup>rd</sup> Quarter 111.**

E. Discussion turned to the provision in Paragraph (2)(c), which allowed the commissioner to share information about fraud with a person in the viatical settlement business. A regulator pointed out the benefit of sharing information about fraud committed by a broker with other viatical settlement providers that used the same broker so they could make their own investigation. An interested party opined that the information would not be used recklessly because otherwise the person would be subject to a lawsuit. **2000 Proc. 4<sup>th</sup> Quarter 132.**

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#### Section 12 (cont.)

F. One regulator asked if the confidentiality provisions allowed for sharing information with the securities commissioner. The drafter indicated it might be necessary to add a drafting note to clarify that sharing with the securities commissioner was intended. **2000 Proc. 2<sup>nd</sup> Quarter 69.**

G. Regulators considered a suggestion that providers needed an antifraud plan. A viatical industry spokesperson said insurance departments are just now getting ready to receive information on fraud, but it is geared toward claims fraud. A regulator responded that just because states are not ready now, does not mean that it should not be included in the model act. An interested party said that not all viatical settlement providers review the policy to determine if there was fraud. She opined that this needed to be a requirement. **2000 Proc. 2<sup>nd</sup> Quarter 93-94.**

#### Section 13. Injunctions; Civil Remedies; Cease and Desist

A regulator suggested adding a section to deal with criminal penalties. It provided for injunctive relief and a civil cause of action, and provided that the contract be voidable. **2000 Proc. 2<sup>nd</sup> Quarter 94.**

C. An interested party opined that Subsection C was not clear because if the transaction was rescinded by the purchaser, what would happen to the title to the policy? The drafter offered to delete the subsection, but a securities regulator asked why regulators would want to leave out such a significant consumer protection. He said that where these transactions are regulated as securities, there will most likely be a provision for rescission, which is typical in securities transactions. **2000 Proc. 2<sup>nd</sup> Quarter 94.**

A regulator asked who would get the policy if the transaction was unwound. Another responded that this was only the investment side of the transaction, so the policy would go back to the provider. In exchange for the return of the money, the investor would transfer the policy back to the provider. **2000 Proc. 2<sup>nd</sup> Quarter 94.**

D. The working group accepted the suggestions for Subsections D and E and agreed to add a drafting note alerting states to the fact that they may already have provisions in their state law. **2000 Proc. 2<sup>nd</sup> Quarter 94-95.**

G. A regulator suggested referencing the graded penalties in his state. Another regulator suggested the information was helpful and recommended including it as a drafting note. **2000 Proc. 2<sup>nd</sup> Quarter 69.**

A viatical representative asked that the phrase “or its authorized representative” be added to Subsection G when referring to comments made to determine health status. He explained that some companies used a tracking service to maintain contact after the policy has been transferred. A regulator suggested adding a provision that said the provider was responsible for the acts of its authorized representatives. **2000 Proc. 1<sup>st</sup> Quarter 80.**

A regulator asked if the three month versus one month period for contacts meant that the timing of the contacts accelerated once the person’s life expectancy had been reduced to one year or less. An industry spokesperson expressed concern that not all states would read that provision the same. A regulator responded that the *Market Conduct Examiners Handbook* group would develop standards so that all states would treat the provision the same way. **2000 Proc. 1<sup>st</sup> Quarter 80.**

#### Section 14. Unfair Trade Practices

After listening to comments on the draft, the working group decided to add a section referring to the Unfair Trade Practices Act. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

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#### Section 15. Authority to Promulgate Regulations

An interested party suggested giving the commissioner the authority to establish standards for evaluating the reasonableness of payments under viatical settlement contracts generally, not just those contracts for individuals who were terminally ill or chronically ill. This revision would curb premium financing arrangements entered into with the intent to sell, while preserving traditional premium financing arrangements that permitted consumers to obtain insurance coverage where they could otherwise not be able to afford to do so. **2006 Proc. 2<sup>nd</sup> Quarter 288.**

A Commissioner suggested adding a new subsection – Injunctions; Civil Remedies; Cease and Desist. This subsection would provide that the enforcement provisions and penalties in that section did not apply to a viator unless the viator committed a fraudulent viatical settlement act. The Committee adopted this subsection with a minor revision. **2006 Proc. 4<sup>th</sup> Quarter 583.**

A. After adopting the model act, the working group asked for a charge to develop a regulation to accompany the act. **1993 Proc. 3<sup>rd</sup> Quarter 439.**

B. One of the comments on the first draft was that competition and the free market provided the most effective way to arrive at a fair price. The speaker was not in favor of regulating discount rates or the prices that were required to be paid to viaticate life insurance policies. **1993 Proc. IB 782.**

One regulator noted there were regulatory concerns from both a securities and an insurance perspective. He spoke in favor of a fair minimum floor for payouts with market forces establishing payouts above the minimum floor. **1993 Proc. IB 782.**

A spokesperson for an association of people with AIDS expressed concern about minimum payments. While wanting to assure that the association's members receive the highest payout for their policies, he said he did not feel mandating a minimum payment was an effective way. While seemingly well-intended, regulating a minimum payout could very well have the negative impact that it was intended to solve. He pointed out that viatical settlement companies take risks when buying a policy: risks related to time and to the rating of the underlying insurance company. He said the length of time that a viatical settlement company will hold the policy will naturally effect its carrying costs, since there is no way that an insured's exact longevity can be determined, particularly as more effective therapies are being developed that offer the promise of extended life for people with AIDS. He was also concerned that a minimum payout would greatly discourage, if not eliminate, the terminally ill person's option of selling a lower rated company's insurance policy. **1993 Proc. IB 787.**

One regulator asked whether one component of the offer price was a fee and a viatical association representative responded that if a broker was involved, approximately 3.5 percent of the negotiated price was paid to the broker. He said his company paid no fee to financial planners, doctors, attorneys or insurers who made referrals. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

Representatives from the viatical industry suggested elimination of Subsection B providing standards for reasonableness of payment. The working group members said they thought the provision was very important and declined to eliminate it from the model. **1997 Proc. 3<sup>rd</sup> Quarter 1223.**

C. Several comments were received relating to the role of viatical settlement brokers. One writer suggested an exemption for brokers and another suggested a separate provision on brokers with a smaller license fee. One of the commenters suggested *requiring* a broker so that the viatical company was not representing both buyer and seller. One regulator said he saw no need for continuing education and other regular agent and broker requirements. **1993 Proc. 2<sup>nd</sup> Quarter 728.**

D. As a further protection to assure the availability of the funds, the drafters decided to add authority for the commissioner to require a bond. **1993 Proc. 2<sup>nd</sup> Quarter 724.**

When discussing revisions to the model, an interested party said that some state laws now require a very large bond and he encouraged the working group to include language for another mechanism for financial accountability. **1997 Proc. 2<sup>nd</sup> Quarter 609.**



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#### Section 15D (cont.)

One regulator reported that his state's new law required a bond for providers and brokers and suggested adding that requirement. The chair responded that a bond for providers was already in the model. The working group decided to add brokers to Subsection D. A viatical broker asked what the financial accountability of a broker was. The working group said that if someone filed a suit against the broker, the bond could pay. The broker cautioned that it was sometimes difficult for brokers to get bonds. **2000 Proc. 2<sup>nd</sup> Quarter 96.**

E. A recurring complaint from the viatical settlement industry has been the inability to get timely confirmation from insurers of the conditions of the life insurance being considered for viatication. The redraft presented for discussion in June 1997 contained an extensive section on the duties of insurers. **1997 Proc. 2<sup>nd</sup> Quarter 614.**

A representative of the life insurance industry said it appeared the intent of the provision was to transfer the costs involved in the transaction from the viatical settlement provider to the insurer. **1997 Proc. 2<sup>nd</sup> Quarter 609.**

After considerable discussion, the interested parties in the life insurance and viatical settlement industries recommended creation of a group of technical resource advisors to address these issues. The working group decided to provide authority to promulgate regulations and then receive a report from the advisors later when redrafting the model regulation. **1997 Proc. 3<sup>rd</sup> Quarter 1213.**

One issue remaining for discussion was the exact wording of Subsection E. The language proposed by a representative from an insurance trade association was designed to reflect that the rules being developed were intended to address the relationship between viatical settlement providers and insurers. She noted that one of the insurers' concerns was a lack of limitations on the requests being received by insurers. A representative of a viatical trade association said the proposed draft language was agreeable to the viatical settlement industry. **1997 Proc. 4<sup>th</sup> Quarter 773-774.**

#### Section 17. Effective Date

The model was amended in 1998 to allow a provider already transacting business to continue in business while the application was pending. **1998 Proc. 1<sup>st</sup> Quarter 706.**

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#### *Chronological Summary of Actions*

*December 1993 Model adopted.*

*June 1998 Amended model extensively.*

*March 2001 Model amended extensively. New sections added to address fraud, advertising and civil remedies. Revision to include "life settlements" in the definition of viatical settlement and to strengthen disclosures. Optional provisions added to address investor side of the viatical transaction.*

*June 2007 Model amended. Revisions address the issue of Stranger Originated Life Insurance (SOLI).*

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