WEST VIRGINIA CODE CHAPTER 33 ARTICLE 13C

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§33-13C-1. Short title.

This article may be cited as the "Viatical Settlements Act".

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§33-13C-2. Definitions.

As used in this article:

(1) "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 or indirectly, before the public in this state for the purpose of creating an interest in or inducing a person to sell, assign, devise, bequest or transfer the death benefit or ownership of a life insurance policy pursuant to a viatical settlement contract.

(2) "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.

(3) "Chronically ill" means having been certified within the preceding twelve-month period by a licensed health professional as:

(A) Being unable to perform, without substantial assistance from another individual, at least two of the following activities of daily living, including, but not limited to, eating, toileting, transferring, bathing, dressing or continence due to a loss of functional capacity;

(B) Requiring substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment; or

(C) Having a level of disability similar to that described in paragraph (A) of this subdivision as determined under regulations prescribed by the United States Secretary of the Treasury in consultation with the United States Secretary of Health and Human Services.

(4) "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 whose principal activity related to the transaction is providing funds to effect the viatical settlement or purchase of one or more viaticated policies and who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of viatical settlement contracts. "Financing entity" does not include a nonaccredited investor or a viatical settlement purchaser.

(5) "Fraudulent viatical settlement act" includes:

(A) 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:

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(i) 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, 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;

(V) Payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract 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 or insurance policy;

(VIII) The issuance of written evidence of viatical settlement contract or insurance; or

(IX) A financing transaction; and

(ii) Employing any plan, financial structure, device, scheme or artifice to defraud related to viaticated policies;

(B) 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:

(i) 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;

(ii) Misrepresent or conceal the financial condition of a licensee, financing entity, insurer or other person;

(iii) 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

(iv) 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;

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(C) Embezzlement, theft, misappropriation or conversion of moneys, 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;

(D) 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;

(E) 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 article for the express purposes of evading or avoiding the provisions of this article;

(F) Issuing, soliciting, marketing or otherwise promoting stranger-originated life insurance; or

(G) Attempting to commit, assisting, aiding or abetting in the commission of, or conspiracy to commit the acts or omissions specified in this subsection.

(6) "Life insurance producer" means any person licensed in accordance with the provisions of article twelve of this chapter as a resident or nonresident insurance producer who has received qualification or authority for a license in the life insurance coverage line of authority.

(7) "Person" means a natural person or a legal entity, including, without limitation, an individual, partnership, limited liability company, association, trust or corporation.

(8) "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.

(9) "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.

(10) "Special purpose entity" means a corporation, partnership, trust, limited liability

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company or other similar entity formed solely to provide either directly or indirectly access, either directly or indirectly, to institutional capital markets for a financing entity or licensed viatical settlement provider or in connection with a transaction in which the securities in the special purpose entity are acquired by qualified institutional buyers.

(11) "Terminally ill" means certified by a physician as having an illness or physical condition that can reasonably be anticipated to result in death in twenty-four months or less.

(12) "Viatical settlement broker" means a person 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, provided that the viatical settlement activities are incidental to the professional practice of the attorney, certified public accountant or financial planner.

(13) "Viatical settlement contract" means any of the following:

(A) 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;

(B) A premium finance loan made for a life insurance policy by a lender to a viator on, before or after the date of issuance of the policy in either of the following situations:

(i) The viator or the insured receives a guarantee of a future viatical settlement value of the policy; or

(ii) The viator or the insured agrees to sell the policy or any portion of its death benefit on any date following the issuance of the policy.

(C) The transfer or acquisition for compensation or anything of value for ownership or beneficial interest in a trust or other person that owns such a policy if the trust or other person was formed or availed of for the principal purpose of acquiring one or more life insurance policies.

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(D) "Viatical settlement contract" does not include any of the following unless part of a plan, scheme, device or artifice to avoid the application of this article:

(i) A policy loan or accelerated death benefit made by the insurer pursuant to the policy's terms;

(ii) Loan proceeds that are used solely to pay premiums for the policy and the costs of the loan, including 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;

(iii) 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 article;

(iv) An agreement where all the parties are closely related to the insured by blood or law or 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;

(v) 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;

(vi) Any of the following business succession planning arrangements if those arrangements are bona fide arrangements:

(I) An arrangement between one or more shareholders in a corporation or between a corporation and one or more of its shareholders or one or more trusts established by its shareholders;

(II) An arrangement between one or more partners in a partnership or between a partnership and one or more of its partners or one or more trusts established by its partners; or

(III) An arrangement 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 trusts established by its members;

(vii) 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

(viii) Any other contract, transaction or arrangement exempted from the definition of a viatical settlement contract by the commissioner based on a determination that the contract,

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transaction or arrangement is not of the type intended to be regulated by this article.

(14) (A) "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.

(B) "Viatical settlement provider" does not include:

(i) 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;

(ii) The issuer of the life insurance policy;

(iii) 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;

(iv) An individual who enters into or effectuates no more than one viatical settlement contract in a calendar year for the transfer of life insurance policies for any value less than the expected death benefit;

(v) A financing entity;

(vi) A special purpose entity;

(vii) A related provider trust;

(viii) A viatical settlement purchaser; or

(ix) Any other person that the commissioner determines is not the type of person intended to be covered by the definition of viatical settlement provider.

(15)(A) "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.

(B) "Viatical settlement purchaser" does not include:

(i) A licensee under this article;

(ii) An accredited investor or qualified institution buyer as defined in, respectively, Rule 501(a) or Rule 144A promulgated under the Federal Securities Act of 1933, as amended;

(iii) A financing entity;

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(iv) A special purpose entity; or

(v) A related provider trust.

(16) "Viaticated policy" means a life insurance policy or certificate that has been acquired by a viatical settlement provider pursuant to a viatical settlement contract.

(17)(A) "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 article, 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.

(B) "Viator" does not include:

(i) A licensee under this article, including a life insurance producer acting as a viatical settlement broker pursuant to this article;

(ii) Qualified institution buyer as defined, respectively, in Rule 144A promulgated under the Federal Securities Act of 1933, as amended;

(iii) A financing entity;

(iv) A special purpose entity; or

(v) A related provider trust.

(18) "Stranger-originated life insurance" or "STOLI" means a plan or agreement that provides for both of the following at the time of the origination of a life insurance policy.

(A) The purchase of a life insurance policy by an applicant primarily for the benefit of a third-party investor that lacks insurable interest in the insured person; and

(B) The subsequent accrual, directly or indirectly, to that third-party investor of the legal or beneficial ownership of the policy or the benefits of the policy.

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§33-13C-3. License and bond requirements.

(a)(1) A person may not operate as a viatical settlement provider or viatical settlement broker without first obtaining a license from the commissioner.

(2)(A) An insurance producer who is authorized to sell life insurance in this state pursuant to a resident or nonresident license issued in accordance with the provisions of §33-12-1 *et seq.* of this code may operate as a viatical settlement broker without obtaining a license pursuant to this section if the viatical settlement activities of the producer are incidental to the producer's insurance business activities.

(B) The insurer that issued the policy being viaticated is not 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.

(3) 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 or viatical settlement broker license and for renewals of the licenses shall be made in the manner prescribed by the commissioner and shall be accompanied by fees established in legislative rules, including emergency rules, promulgated by the commissioner.

(1) The commissioner may not disqualify an applicant from initial licensure because of a prior criminal conviction that remains unreversed unless that conviction is for a crime that bears a rational nexus to the activity requiring licensure. In determining whether a criminal conviction bears a rational nexus to a profession or occupation, the commissioner shall consider at a minimum:

(A) The nature and seriousness of the crime for which the individual was convicted;

(B) The passage of time since the commission of the crime;

(C) The relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the profession or occupation; and

(D) Any evidence of rehabilitation or treatment undertaken by the individual.

(2) Notwithstanding any other provision of this code to the contrary, if an applicant is disqualified from licensure because of a prior criminal conviction, unless that conviction is a felony pursuant to §33-13C-14 of this code, the commissioner shall permit the applicant to

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apply for initial licensure if:

(A) A period of five years has elapsed from the date of conviction or the date of release from incarceration, whichever is later;

(B) The individual has not been convicted of any other crime during the period of time following the disqualifying offense; and

(C) The conviction was not for an offense of a violent or sexual nature: *Provided*, That a conviction for an offense of a violent or sexual nature may subject an individual to a longer period of disqualification from licensure, to be determined by the commissioner.

(3) An individual with a criminal record who has not previously applied for licensure may petition the commissioner at any time for a determination of whether the individual's criminal record will disqualify the individual from obtaining a license. This petition shall include sufficient details about the individual's criminal record to enable the commissioner to identify the jurisdiction where the conviction occurred, the date of the conviction, and the specific nature of the conviction. The commissioner shall provide the determination within 60 days of receiving the petition from the applicant. The commissioner may charge a fee to recoup its costs for each petition.

(c) The commissioner has the 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 of the entity who may materially influence the applicant's conduct meets the standards of this article.

(d) 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 acts in good faith in the capacity of a licensee;

(3) Has a good business reputation and is qualified by experience, training, or education as a viatical settlement provider or broker;

(4) Has demonstrated evidence of financial responsibility, in a format prescribed by the commissioner, by possessing a minimum equity of not less than $250,000 in cash or cash equivalents reflected in the applicant's audited financial statements or through a surety bond executed and issued by an insurer authorized to issue surety bonds in this state in the amount of $250,000: *Provided,* That the commissioner may permit an applicant for a broker's license to demonstrate evidence of financial responsibility through a policy of insurance covering legal liability resulting from erroneous acts or failure to act in their capacity as a viatical settlement broker and inuring to the benefit of any aggrieved party as

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the result of any single occurrence in the sum of not less than $100,000 and $300,000 in the aggregate for all occurrences within one year. Any surety bond issued pursuant to this subdivision 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. 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 a state in which the applicant is licensed as a viatical settlement provider or viatical settlement broker. The commissioner may ask for evidence of financial responsibility at any time he or she considers it necessary.

(5) If a legal entity has provided a certificate of good standing from the state of its domicile; and

(6) Has provided an antifraud plan that meets the requirements of §33-13C-14(g) of this code.

(e) The commissioner may not issue a license to a nonresident applicant unless the applicant files with the commissioner either a written designation of an agent for service of process or 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.

(f) A viatical settlement provider or viatical settlement broker shall provide to the commissioner new or revised information about officers, 10 percent or more stockholders, partners, directors, members, or designated employees within 30 days of the change.

(g) An individual licensed as a viatical settlement broker shall complete on a biennial basis 15 hours of training related to viatical settlements and viatical settlement transactions as required by the commissioner. A life insurance producer operating as a viatical settlement broker pursuant to subdivision (2), subsection (a) of this section is not subject to the requirements of this subsection. Any person failing to meet the requirements of this subsection is subject to the penalties imposed by the commissioner.

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§33-13C-4. License revocation and denial.

(a) The commissioner may refuse to issue, suspend, revoke, place on probation, or refuse to renew the license of a viatical settlement provider or viatical settlement broker 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, regardless of whether a judgment of conviction has been entered by the court: *Provided*, That the commissioner shall apply §33-13C-3(b) of this code and any relevant legislative rules in determining whether an applicant's prior criminal convictions bear a rational nexus to the license being sought;

(5) The viatical settlement provider has entered into any viatical settlement contract that has not been approved pursuant to this article;

(6) The viatical settlement provider has failed to honor contractual obligations set out in a viatical settlement contract;

(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 article.

(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 article if the commissioner finds that the viatical settlement broker or life insurance producer has violated the provisions of this article or has otherwise engaged in bad faith conduct with one or more viators.

(c) If the commissioner denies a license application or suspends, revokes, or refuses to

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renew the license of a viatical settlement provider, viatical settlement broker, or life insurance producer operating as a viatical settlement broker, the commissioner shall conduct a hearing in accordance with §33-2-13 of this code.

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§33-13C-5. Approval of viatical settlement contracts and disclosure statements.

(a) A person shall not use a viatical settlement contract form or provide a disclosure statement form to a viator in this state unless it has been filed with and approved by the commissioner. The commissioner shall disapprove a viatical settlement contract form, disclosure statement form or any provision contained therein if, in the commissioner's opinion, the contract, disclosure form or any provision contained therein fail to meet the requirements of section eight, ten, thirteen or fourteen of this article, is unreasonable, is contrary to the interests of the public or is otherwise misleading or unfair to the viator. At the commissioner's discretion, the commissioner may require the submission of advertising material.

(b) Forms required to be filed are subject to the provisions of section eight, article six of this chapter and shall be deemed "forms for noncommercial insurance". The commissioner shall establish fees for form filings by rule, including emergency rule.

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§33-13C-6. Reporting requirements and privacy.

(a) On or before March 1 of each year, each viatical settlement provider shall file with the commissioner an annual statement containing such information as the commissioner may prescribe. The 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, 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 provided in response to an investigation or examination by the commissioner or any other governmental officer or agency or pursuant to the requirements of subsection (c), section fourteen of this article;

(3) Is a term of or condition to the transfer of a policy by one viatical settlement provider to another viatical settlement provider;

(4) 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;

(5) Is necessary to allow the viatical settlement provider or viatical settlement broker or their authorized representative to make contacts for the purpose of determining health status; or

(6) Is required to purchase stop loss coverage or financial guaranty insurance.

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§33-13C-7. Examination or investigation.

(a) (1) The commissioner may conduct an examination under this article of a licensee as often as he or she deems appropriate after considering such matters as 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 article, 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 article 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; 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) (1) A person required to be licensed by this article shall for five years retain copies of all records and documents related to the requirements of this article, including, but not limited to, 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; and all checks, drafts or other evidence and documentation related to the payment, transfer, deposit or release of funds from the date of the transaction: Provided, That this subsection 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.

(2) Records required to be retained by this section shall 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) (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 eleven, article two of this chapter.

(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 is punishable as contempt of court.

(4) When making an examination under this article, 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 article 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) No later than sixty 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 days to make a written submission or rebuttal with respect to any matters contained in the examination report.

(7) 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.

(d) (1) Names and individual identification data for all viators is considered private and confidential information and shall not be disclosed by the commissioner unless required by law.

(2) Except as otherwise provided in this article, all examination reports, working papers,

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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 article, or in the course of analysis or investigation by the commissioner of the financial condition or market conduct of a licensee is confidential by law and privileged, is not subject to the public disclosure provisions of article one, chapter twenty-nine-b of this code, is not subject to subpoena and is not 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 is confidential by law and privileged, is not subject to subpoena, and is not 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 article, 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 subdivision (5) of this subsection by a commissioner.

(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 subdivision (1) of this subsection.

(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 subdivision (1) of this subsection, 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

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(C) 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 subdivision (5) of this subsection.

(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 article 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 article.

(e) (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 article. 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 article.

(f) (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 article.

(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 article, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive. This subdivision does not abrogate or

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modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified in subdivision (1) of this subsection.

(3) A person identified in subdivision (1) or (2) of this subsection 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 article 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.

(g) The insurance fraud unit created in article forty-one of this chapter may investigate suspected violations of this article by persons engaged in the business of viatical settlements in the same manner as the fraud unit investigates suspected violators of those statutes set forth in subsection (b), section eight, article forty-one of this chapter.

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§33-13C-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) That 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) That 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) That proceeds of the viatical settlement could be subject to the claims of creditors.

(5) That 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 by providing notice of rescission and repaying all viatical settlement proceeds paid to the viator pursuant to the escrow agreement by the earlier of sixty calendar days after the date upon which the viatical settlement contract is executed by all parties or thirty calendar days after the viatical settlement proceeds have been paid to the viator, as provided in subsection (e), section ten of this article. 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 to the viatical settlement provider within sixty days of the insured's death.

(7) That funds will be sent to the viator within three 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) That 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 and that assistance should be sought from a financial adviser.

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(9) Disclosure to a viator shall include distribution of a brochure prescribed by the commissioner describing the process of viatical settlements.

(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) That 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 article. This contact shall be limited to once every three months if the insured has a life expectancy of more than one year, and not 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 point policy or involved 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

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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 subdivision (4) 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 days after the change.

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§33-13C-9. Disclosure to insurer.

Before 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 part, 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 years after, issuance of the policy.

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§33-13C-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 days after a viator executes documents necessary to transfer any rights under an insurance policy or within twenty 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 subdivision (3) of this subsection.

(3) The viatical provider shall deliver a copy of the medical release required under paragraph (B), subdivision (1) of this subsection, a copy of the viator's application for the viatical settlement contract, the notice required under subdivision (2) of this subsection and a request for verification of coverage to the insurer that issued the life insurance policy that is the subject of the viatical transaction. The request for verification of coverage shall be on a form prescribed by the commissioner.

(4) The insurer shall respond to a request for verification of coverage within thirty 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 made on an approved form or any 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 subsection (c), section eleven of this article and section sixteen of this article.

(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 understanding of the viatical settlement contract, that he or she has a full 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.

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(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.

(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 calendar days after the date upon which the viatical settlement contract is executed by all parties or thirty calendar days after the viatical settlement proceeds have been sent to the viator as provided in subsection (e) of this section. 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 result 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, any premiums, loans and loan interest that have been paid by the viatical settlement provider or purchaser, which shall be paid within sixty 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 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 business days after the escrow agent receives the document or, if the viator erroneously provides the documents directly to the provider, after the viatical settlement provider receives the documents, the provider shall pay or transfer the proceeds of the viatical settlement into an escrow or trust account maintained in a state or federally charted 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.

(e) Failure to tender consideration to the viator for the viatical settlement contract within the time set forth in the disclosure pursuant to subdivision (7), subsection (a), section eight

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of this article 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 State Postal Service or other nationally recognized delivery service.

(f) 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 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.

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§33-13C-11. Prohibited practices.

(a) It is a violation of this article for any person to enter into a viatical settlement contract at any time prior to the application for or issuance of a policy that is the subject of a 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 after issuance of the policy or certificate:

(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 computed without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship;

(2) The viator certifies and submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within that 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 court of competent jurisdiction enters a final order, judgment or decree on the application of a creditor of the viator and adjudicates the viator bankrupt or insolvent or approves a petition seeking reorganization of the viator or appoints 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 years after the date of issuance of a policy and, at all times during that two-year period, all of the following conditions are true with respect to the policy;

(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 on a person described in subparagraph (iv), paragraph (C), subdivision (13), section two of this article;

(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

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(C) Neither the insured nor the policy has been evaluated for settlement.

(b) Copies of the independent evidence described in subdivision (2), subsection (a) of this section and documents required by subsection (a), section ten of this article 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 subdivision (2), subsection (a) of this section 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 calendar days with written acknowledgment confirming that the change has been effected or specifying the reasons why the request 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.

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§33-13C-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, 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, financing entity or related provider trust that is involved in such viatical settlement contract.

(c) A violation of subsection (a) or (b) of this section 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 rule, 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 article.

(e) No life insurance producer, insurance company, viatical settlement broker or viatical settlement provider 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.

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§33-13C-13. Advertising for viatical settlements.

(a) The purpose of this section is to provide prospective viators 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. 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.

(b) This section shall apply to any advertising of viatical settlement contracts 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.

(c) 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 disseminates advertisements of the requirements and procedures for approval prior to the use of any advertisements not furnished by the viatical settlement license.

(d) Advertisements shall be truthful and not misleading in fact or by implication. The form and content of an advertisement of a viatical settlement contract 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.

(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 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 offered is made available for inspection prior to consummation of the sale, or an

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offer is made to refund the payment if the viator is not satisfied or that the viatical settlement contract 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 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.

(4) 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.

(5) Testimonials, appraisals or analysis used in advertisements must be genuine; represent the current opinion of the author; be applicable to the viatical settlement contract product or service advertised, if any; and be accurately reproduced with sufficient completeness to avoid misleading or deceiving prospective viators as to the nature or scope of the testimonials, appraisals or analysis, a licensee under this article 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 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, the fact shall be disclosed in the advertisement.

(C) When an endorsement refers to benefits received under a viatical settlement contract all pertinent information shall be retained for a period of five years after its use.

(f) An advertisement shall not contain statistical information unless it accurately reflects recent and relevant facts. The course of all statistics used in an advertisement shall be identified.

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(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, products or services, and if any specific viatical settlement contract is advertised, the viatical settlement contract 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.

(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 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 licensees may not be so licensed. The advertisement may ask the audience to consult the licensee's website or contact the department of insurance to find out if the state requires licensing and, if so, whether the viatical settlement provider or viatical settlement broker 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 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.

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(n) An advertisement shall not, directly or indirectly, create the impression that any division or agency of the state or of the United States 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;

(3) Any viatical settlement contract; 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 months.

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§33-13C-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 article or investigations of suspected or actual violations of this article.

(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 settlement contracts 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 is guilty of a crime and may be subject to fines and confinement in prison."

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

(c) (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 such information to 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) (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 without actual malice and 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

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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) A person furnishing information pursuant to subdivision (1) of this subsection 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 article and the party bringing the action was not substantially justified in doing so.

(3) This subsection does not abrogate or modify common law or statutory privileges or immunities enjoyed by a person described in subdivision (1) of this subsection.

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

(2) The commissioner may release documents and evidence obtained in an investigation of suspected or actual fraudulent viatical settlement acts in administrative or judicial proceedings to enforce laws administered by the commissioner; 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, at the discretion of the commissioner, to a person in the business of viatical settlements that is aggrieved by a fraudulent viatical settlement act: Provided, That release of documents and evidence under this subdivision does not abrogate or modify the privilege granted in subdivision (1) of this subsection.

(f) This section does 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.

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(g) (1) Viatical settlement providers and viatical settlement brokers shall have in place antifraud initiatives reasonably computed 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 organization 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.

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§33-13C-15. Injunctions; civil remedies; cease and desist.

(a) In addition to the penalties and other enforcement provisions of this chapter, if any person violates any provision of this article or of any rule implementing this article, 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 article may bring a civil action against the person committing the violation in a court of competent jurisdiction.

(c) The commissioner may issue cease and desist order upon a person that violates any provision of this article or any rule promulgated thereunder, any order adopted by the commissioner, or any written agreement entered into with the commissioner.

(d) When the commissioner finds that an activity in violation of this article 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 days. If the commissioner begins nonemergency cease and desist proceedings, the emergency cease and desist order remains effective, absent an order by a court of competent jurisdiction pursuant to this chapter.

(e) In addition to the penalties and other enforcement provisions of this article, any person who violates this article is subject to civil penalties of up to $10,000 per violation. Imposition of civil penalties shall be pursuant to an order of the commissioner issued after notice and hearing. The commissioner's order may require a person found to be in violation of this article to make restitution to persons aggrieved by violations of this article.

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§33-13C-16. Criminal penalties.

(a) A person convicted of a fraudulent viatical settlement act is guilty of a felony and, upon conviction thereof, shall be sentenced as follows:

(1) Imprisonment in a state correctional facility for not more than twenty years or payment of a fine of not more than $100,000, or both, if the value of the viatical settlement contract is more than $35,000;

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

(3) Imprisonment in a state correctional facility for not more than five years or payment of a fine of not more than $10,000, or both, if the value of the viatical settlement contract is more than $500, but not more than $2,500.

(b) Any person who violates any other provision of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000 or confined in jail not more than one year, or both fined and confined.

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§33-13C-17. Authority to promulgate rules.

The commissioner shall have the authority to promulgate legislative rules, including emergency rules, implementing this article, pursuant to article three, chapter twenty-nine-a of this code. Such rules may include standards for evaluating reasonableness of payments under viatical settlement contracts for persons who are terminally or chronically ill; 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; and provisions governing the relationship and responsibilities of both insurers and viatical settlement providers and viatical settlement brokers during the viatication of a life insurance policy or certificate.

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§33-13C-18. No preemption of securities laws.

This article shall not preempt, supersede or limit any provision of any state securities law or any rule, order or notice issued thereunder.

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