

CHAPTER 229

AN ACT concerning certain viatical settlements, supplementing Title 17B of the New Jersey Statutes, amending P.L.1967, c.93 and repealing P.L.1999, c.211.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

C.17B:30B-1 Short title.

1. This act shall be known and may be cited as the "Viatical Settlements Act."

C.17B:30B-2 Definitions relative to viatical settlements.

2. As used in this act:

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

"Business of viatical settlements" means an activity involved in, but not limited to, the offering, solicitation, negotiation, procurement, effectuation, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, hypothecating of, or in any other manner involving, viatical settlement contracts.

"Chronically ill" means:

- (1) Being unable to perform at least two activities of daily living, including, but not limited, to 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) of this subsection as determined by the United States Secretary of Health and Human Services.

"Commissioner" means the Commissioner of Banking and Insurance.

"Department" means the Department of Banking and Insurance.

"Financing entity" means:

- (1) an underwriter, placement agent, lender, purchaser of securities, purchaser of a policy from a viatical settlement provider, credit enhancer, or any entity that has a direct ownership in a policy 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 contract 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 purchaser of a policy from a viatical settlement provider.

"Fraudulent viatical settlement act" means and 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, life insurance producer, financing entity, insurer 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) The solicitation, offer, effectuation or sale of a settlement contract or insurance policy;
 - (viii) The issuance of written evidence of a viatical settlement contract or insurance; or

- (ix) A financing transaction;
- (b) Employing any device, scheme, or artifice to defraud related to viaticated policies;
- (2) In the furtherance of a fraud or to prevent the detection of a fraud any person commits or permits its employees or its agents to:
 - (a) Remove, conceal, alter, destroy or sequester from the commissioner the assets or records of a viatical settlement provider licensee or other person engaged in the business of viatical settlements;
 - (b) Misrepresent or conceal the financial condition of a licensee, financing entity, insurer or other person;
 - (c) Transact the business of viatical settlements in violation of laws requiring a license, certificate of authority or other legal authority for the transaction of the business of viatical settlements; or
 - (d) File with the commissioner or the chief insurance regulatory official of another jurisdiction a document containing false information or otherwise concealing 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 policy owner or any other person engaged in the business of viatical settlements or insurance;
- (4) Recklessly entering into, brokering or otherwise dealing in a viatical settlement contract, the subject of which is a life insurance policy that was obtained by presenting false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where the viator or the viator's agent intended to defraud the policy's issuer. For the purposes of this paragraph, "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; or
- (5) Attempting to commit, assisting, aiding or abetting in the commission of, or conspiracy to commit the acts or omissions specified in this subsection.

"Life insurance producer" means any person licensed as a resident or nonresident insurance producer with a life insurance line of authority pursuant to the "New Jersey Insurance Producer Licensing Act of 2001," P.L.2001, c.210 (C.17:22A-26 et seq.).

"Person" means a natural person or a legal entity, including, but not limited to, an individual, partnership, limited liability partnership, limited liability company, association, trust or corporation.

"Policy" means an individual or group policy, group certificate, contract or arrangement of life insurance affecting the rights of a resident of this State or bearing a reasonable relation to this State, regardless of whether delivered or issued for delivery in this State.

"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 viaticated 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.

"Special purpose entity" means a corporation, partnership, trust, limited liability company or other similar entity formed solely to provide, either directly or indirectly, access to institutional capital markets for a financing entity or licensed viatical settlement provider.

"Terminally ill" means having an illness or sickness that can reasonably be expected to result in death in 24 months or less.

"Viatical settlement contract" means a written agreement establishing the terms under which compensation or anything of value will be paid, which compensation or value is less than the expected death benefit of the policy, in return for the viator's assignment, transfer, sale, devise or bequest of the death benefit or ownership of any portion of the policy. A viatical settlement contract also includes a contract for a loan or other financing transaction with a viator secured

primarily by an individual or group life insurance policy, other than a loan by a life insurance company pursuant to the terms of the life insurance contract, or a loan secured by the cash value of a policy. A viatical settlement contract includes an agreement with a viator to transfer ownership or change the beneficiary designation at a later date regardless of the date that compensation is paid to the viator. A viatical settlement contract does not mean or include a written agreement between a viator and a person having an insurable interest in the insured's life. A viatical settlement contract shall not include any accelerated benefit pursuant to the terms of a life insurance policy issued in accordance with Title 17B of the New Jersey Statutes.

"Viatical settlement provider" means a person, other than a viator, that enters into or effectuates a viatical settlement contract. Viatical settlement provider does not include:

(1) A bank, savings bank, savings and loan association, credit union or other licensed lending institution that takes an assignment of a life insurance policy as collateral for a loan;

(2) The issuer of a life insurance policy providing accelerated benefits pursuant to regulations prescribed by the commissioner and pursuant to the policy;

(3) An authorized or eligible insurer that provides stop loss coverage to a viatical settlement provider, financing entity, special purpose entity or related provider trust;

(4) A natural person who enters into or effectuates no more than one agreement in a calendar year for the transfer of life insurance policies for any value less than the expected death benefit;

(5) A financing entity;

(6) A special purpose entity;

(7) A related provider trust; or

(8) An accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 (17 C.F.R. 230.501 through 230.508) or Rule 144A (17 C.F.R. 230.144A) of the federal "Securities Act of 1933"(15 U.S.C. s.77a et seq.) as amended, and who purchases a viaticated policy from a viatical settlement provider.

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

"Viator" means the owner of a policy who enters or seeks to enter into a viatical settlement contract. For the purposes of this act, a viator shall not be limited to an owner of a 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 viators. Viator shall not include:

(1) A viatical settlement provider licensed under this act;

(2) An accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 (17 C.F.R. 230.501 through 230.508) or Rule 144A (17 C.F.R. 230.144A) of the federal "Securities Act of 1933"(15 U.S.C. s.77a et seq.), as amended;

(3) A financing entity;

(4) A special purpose entity; or

(5) A related provider trust.

C.17B:30B-3 License to operate as viatical settlement provider.

3. a. A person shall not operate as a viatical settlement provider without first obtaining a license from the commissioner of the state of residence of the viator.

b. (1) No person shall act on behalf of a viator residing in this State, or otherwise negotiate, as that term is defined in section 3 of P.L.2001, c.210 (C.17:22A-28), viatical settlement contracts between a viator residing in this State and one or more viatical settlement providers unless that person is licensed as a life insurance producer pursuant to the "New Jersey Insurance Producer Licensing Act of 2001," P.L.2001, c.210 (C.17:22A-26 et seq.) and has been licensed as a resident insurance producer in his home state for not less than one year.

(2) Irrespective of the manner in which the life insurance producer is compensated, a life insurance producer is deemed to represent only the viator and not the viatical settlement provider or any insurer, and owes a fiduciary duty to the viator to act according to the viator's

instructions and in the best interest of the viator.

(3) Not later than 30 days from the first day of negotiating a viatical settlement contract on behalf of a viator, such producer shall notify the commissioner of that activity on a form or in a manner that may be prescribed by, and shall pay any applicable fees determined by, the commissioner by regulation. The notification shall include an acknowledgment by the producer that he will operate in accordance with the provisions of this act.

(4) Notwithstanding paragraph (1) of this subsection, a person licensed as an attorney, or a certified public accountant, representing a viator, and whose compensation is not paid directly or indirectly by the viatical settlement provider, may negotiate a viatical settlement contract without a license as a life insurance producer.

c. Application for a viatical settlement provider license pursuant to subsection a. of this section shall be made to the commissioner by the applicant on a form prescribed by the commissioner, and the application shall be accompanied by a fee, the amount of which shall be set by the commissioner by regulation, provided, however, that the license and renewal fees for a viatical settlement license shall not exceed that established by law or regulation for a domestic stock life insurance company.

d. A viatical settlement provider license may be renewed from year to year on the anniversary date upon payment of the annual renewal fee in an amount set by the commissioner by regulation. Failure to pay the fee by the renewal date shall result in expiration of the license.

e. The applicant for a license pursuant to subsection a. of this section shall provide information on forms required by the commissioner. The commissioner shall have the authority, at any time, to require the applicant to fully disclose the identity of all stockholders except those owning fewer than five percent of the shares of an applicant whose shares are publicly traded, partners, officers, members and employees, and the commissioner may, in his 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.

f. A license pursuant to subsection a. of this section issued to a legal entity authorizes all partners, officers, members and designated employees to act as viatical settlement providers, under the license, and all those persons shall be named in the application and any supplements to the application.

g. 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) Has provided a detailed plan of operation;
- (2) Is competent and trustworthy and intends to act in good faith in the capacity involved by the license applied for;
- (3) Has a good business reputation and has had experience, training or education so as to be qualified in the business for which the license is applied for;
- (4) If a legal entity, provides a certificate of good standing from the state of its domicile; and
- (5) Has provided an anti-fraud plan that meets the requirements of section 12 of this act.

h. 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.

i. A viatical settlement provider shall provide to the commissioner any new or revised information about officers, stockholders holding 10% or more of the outstanding shares, partners, directors, members or designated employees within 30 days of the change.

C.17B:30B-4 Refusal to issue, suspension, revocation, refusal to renew license.

4. a. The commissioner may refuse to issue, suspend, revoke or refuse to renew the license of a viatical settlement provider, 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 to act as a licensee;

(3) The licensee 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 licensee has entered into any settlement contract that has not been approved pursuant to this act;

(6) The licensee 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 licensee has assigned, transferred or pledged a viaticated policy to a person other than a viatical settlement provider licensed in this State, an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 (17 C.F.R. 230.501 through 230.508) or Rule 144A (17 C.F.R. 230.144A) of the federal "Securities Act of 1933"(15 U.S.C. s.77a et seq.), 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 life insurance producer if the commissioner finds that the life insurance producer has violated the provisions of this act.

c. Before the commissioner denies a license application or suspends, revokes or refuses to renew the license of a viatical settlement provider or suspends, revokes or refuses to renew the license of a life insurance producer pursuant to this act, the commissioner shall conduct a hearing in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

C.17B:30B-5 Approval of viatical settlement forms by commissioner.

5. A person shall not use a viatical settlement contract form or provide a disclosure statement or application 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 or disclosure statement form if, in the commissioner's opinion, the contract form, disclosure form, or provisions contained therein are unreasonable, contrary to the interests of the public, or otherwise misleading or unfair to the viator. The commissioner may require the submission of advertising material used in connection with a viatical settlement contract.

C.17B:30B-6 Filing of annual statement.

6. a. Each viatical settlement provider licensee shall file with the commissioner on or before March 1 of each year an annual statement containing that information which the commissioner by regulation may prescribe. This information is limited to only those transactions in which the viator is a resident of this State and shall not include individual transaction data or data which compromises the privacy of personal, financial, and health information of the viator or insured.

b. Except as otherwise allowed or required by law, a viatical settlement provider, insurance company, life insurance producer, information bureau, rating agency or company, or any other person with actual knowledge of the identity of the insured, shall not disclose that identity, or the insured's financial or medical information, to any other person unless the disclosure:

(1) Is necessary to effect a viatical settlement contract 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 e. of section 12 of this act;

(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 its authorized representative to make contacts for the purpose of determining health status; or

(6) Is required to purchase stop loss coverage.

c. In addition to the information required in this section, the commissioner may require that either or both viatical settlement providers and life insurance producers provide to the commissioner that information the commissioner determines by regulation, regarding the amount and method of compensation paid to life insurance producers for negotiating a viatical settlement contract pursuant to this act.

C.17B:30B-7 Examinations of licensees by commissioner.

7. a. (1) The commissioner may conduct an examination of a licensee under this act as often as the commissioner, in his sole discretion, deems appropriate.

(2) For purposes of completing an examination of a licensee under this act, the commissioner may examine or investigate any person, or the business of any person, insofar 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 or other regulator for the licensee's state of domicile or port-of-entry state.

b. (1) A person required to be licensed by this act shall for five years retain copies of all:

(a) Proposed, offered or executed viatical settlement contracts, underwriting documents, policy forms and applications from the date of the proposal, offer, or execution of the viatical settlement contract, 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 of the transaction; and

(c) All other records and documents related to the requirements of this act.

(2) This subsection shall not relieve a person of the obligation to produce these documents to the commissioner after the retention period has expired if that person has retained the documents.

(3) Records required to be retained pursuant to this subsection 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 other guidelines or procedures as the commissioner deems 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 business of viatical settlements 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 the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

(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 work papers 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.

d. (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 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 30 days to make a written submission or rebuttal with respect to any matters contained in the examination report.

(3) Within 30 days of the end of the period allowed for the receipt of written submissions or rebuttals, the commissioner shall fully consider and review the report, together with any written submissions or rebuttals, and any relevant portions of the examiner's workpapers and either:

(a) Adopt the examination as filed or with modification or corrections. If the examination report reveals that the company is operating in violation of any law, regulation or prior order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure the violation; or

(b) Reject the examination report with directions to the examiners to reopen the examination for purposes of obtaining additional data, documentation or information, and refile pursuant to paragraph (1) of this subsection; or

(c) Call for an investigatory hearing with no less than 20 days' notice to the company for purposes of obtaining additional documentation, data, information and testimony.

(4) (a) All determinations made pursuant to subparagraph (a) of paragraph (3) of this subsection shall be accompanied by findings and conclusions resulting from the commissioner's consideration and review of the examination report, relevant examiner workpapers and any written submissions or rebuttals. Any such determination shall be served upon the company, together with a copy of the adopted examination report. Within 30 days of the issuance of the adopted report, the company shall file affidavits executed by each of its directors stating under oath that they have received a copy of the adopted report and related orders.

(b) Any hearing under subparagraph (c) of paragraph (3) of this subsection shall be conducted by the commissioner or an authorized representative of the commissioner as a nonadversarial, confidential investigatory proceeding, as necessary for the resolution of any inconsistencies, discrepancies or disputed issues apparent upon the face of the filed examination report or raised by or as a result of the commissioner's review of relevant workpapers or by the written submission or rebuttal of the company. Within 20 days of the conclusion of any such hearing, the commissioner shall make a determination pursuant to subparagraph (a) of paragraph (3) of this subsection.

(i) The hearing shall proceed expeditiously with discovery by the company limited to the examiner's workpapers which tend to substantiate any assertions set forth in any written submission or rebuttal. The commissioner or his representative may issue subpoenas for the attendance of any witnesses or the production of any documents relevant to the investigation whether under the control of the department, the company or other persons. Nothing contained in this section shall require the department to disclose any information or records which would indicate or show the existence or content of any investigation or activity of a criminal justice agency.

(ii) The hearing shall proceed with the commissioner or his representative posing questions to the persons subpoenaed. Thereafter the company and the department may present testimony relevant to the investigation. Cross-examination shall be conducted only by the commissioner or his representative. The company and the department shall be permitted to make closing statements and may be represented by counsel of their choice.

(5) Upon the adoption of the examination report under subparagraph (a) of paragraph (3) of this subsection, the commissioner may continue to hold the content of the examination report as private and confidential information for a period of 90 days except to the extent provided in paragraph (6) of subsection c. of this section.

(6) If 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. (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 any State or federal freedom of information law, 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 the 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 paragraph (4) of this subsection by the commissioner.

(c) For the purposes of paragraph (2) of this subsection, "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 paragraph (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 paragraph (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; and

(b) May receive documents, materials, communications or information, including otherwise confidential and privileged documents, materials or information, from the NAIC and its affiliates

and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information.

(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 paragraph (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 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 that 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. (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 subsection 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 subsection, 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. (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 shall not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified in paragraph (1) of this subsection.

(3) A person identified in paragraph (1) or (2) of this subsection shall be entitled to an award of attorney's fees and costs if that person 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.

h. The commissioner may investigate suspected fraudulent viatical settlement acts and persons engaged in the business of viatical settlements.

C.17B:30B-8 Disclosures to viator, procedure.

8. a. With each application for a viatical settlement, a viatical settlement provider or life insurance producer 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, and shall provide the following information:

(1) There are possible alternatives to viatical settlement contracts, including any accelerated death benefits or policy loans offered under the viator's life insurance policy;

(2) Some or all of the proceeds of the viatical settlement contract may be taxable under federal income tax and state franchise and income taxes, and assistance should be sought from a professional tax advisor;

(3) Proceeds of the viatical settlement contract could be subject to the claims of creditors;

(4) Receipt of the proceeds of a viatical settlement contract may adversely affect the viator's eligibility for Medicaid or other government benefits or entitlements, and advice should be obtained from the appropriate government agencies;

(5) The viator has the right to rescind a viatical settlement contract before the earlier of 30 calendar days after the date upon which the settlement contract is executed by all parties or 15 calendar days after the receipt of the viatical settlement proceeds by the viator, as provided in subsection c. of section 9 of this act. If exercised by the viator, rescission is effective only if both notice of the rescission is given and repayment of all proceeds and any premiums, loans and loan interest to the settlement provider is made 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 of all viatical settlement proceeds and any premiums, loans and loan interest to the viatical settlement provider;

(6) Funds will be sent to the viator within three business days after the viatical settlement provider has received the insurer or group administrator's acknowledgment that ownership of the policy has been transferred and the beneficiary has been designated pursuant to the viatical settlement contract;

(7) Entering into a viatical settlement contract may cause other rights or benefits, including conversion rights and waiver of premium benefits that may exist under the policy, to be forfeited by the viator and that assistance should be sought from a financial adviser;

(8) Disclosure to a viator shall include distribution of a brochure, describing the process of viatical settlements approved by the commissioner. The National Association of Insurance Commissioners (NAIC) form for the brochure shall be used unless one is developed by the commissioner;

(9) The disclosure document shall contain the following language:

"All medical, financial or personal information solicited or obtained by a viatical settlement provider or life insurance producer 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."; and

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

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

(1) State the affiliation, if any, between the viatical settlement provider and the issuer of the insurance policy to be acquired pursuant to a viatical settlement contract;

(2) The document shall include the name, address and telephone number of the viatical settlement provider;

(3) If the policy to be acquired pursuant to a viatical settlement contract 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 acquired pursuant to a viatical settlement contract, the viator shall be informed of the possible loss of coverage on the other lives;

(4) State the dollar amount of the current death benefit payable to the viatical settlement provider under the policy. The viatical settlement provider shall, if known, also disclose the availability of any additional guaranteed insurance benefits, the dollar amount of any accidental death and dismemberment benefits under the policy and the viatical settlement provider's interest in those benefits; and

(5) State the name, business address and telephone number of the independent third party escrow agent, and the fact that the viator or owner may inspect or receive copies of the relevant escrow or trust agreements or documents.

c. If the viatical settlement provider transfers ownership or changes the beneficiary of the policy, the viatical settlement provider shall communicate the change in ownership or beneficiary to the insured within 20 days after the change.

C.17B:30B-9 Material required prior to entering into viatical settlement contract.

9. 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 medical records to a viatical settlement provider, life insurance producer and, if the policy was issued less than two years from the date of application for a viatical settlement contract, to the insurance company that issued the policy covering the life of the insured.

(2) The insurer shall respond to a request for verification of coverage submitted by a viatical settlement provider not later than 30 calendar days after the date the request is received. The request for verification of coverage shall be made on a form approved by the commissioner. The insurer shall complete and issue the verification of coverage or indicate in which respects it is unable to respond. In its response, the insurer shall indicate whether, based on the medical evidence and documents provided, the insurer intends to pursue an investigation at that time regarding the validity of the insurance contract.

(3) 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 the viator has a full and complete understanding of the benefits of the life insurance policy, acknowledges that the viator 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 was diagnosed after the life insurance policy was issued.

(4) If a life insurance producer performs any of the activities required of the viatical settlement provider, the viatical settlement 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 unconditional right to rescind the contract before the earlier of 30 calendar days after the date upon which the settlement contract is executed by all parties or 15 calendar days after the receipt of the viatical settlement proceeds by the viator. If exercised by the viator, rescission is effective only if both notice of the rescission is given and a full repayment of all proceeds and any premiums, loans and loan interest to the settlement provider is made 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 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 settlement provider.

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 date the escrow agent receives

the documents (or from the date the viatical settlement provider receives the documents, if the viator erroneously provides the documents directly to the provider), the provider shall pay or transfer the proceeds of the viatical settlement into an escrow or trust account maintained in a State or federally-chartered financial institution whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC). Upon payment of the settlement proceeds into the escrow account, the escrow agent shall deliver the original change in ownership, assignment or change in beneficiary forms to the viatical settlement provider or related provider trust. Upon the escrow agent's receipt of the acknowledgment of the properly completed transfer of ownership or designation of beneficiary from the insurance company, the escrow agent shall pay the viatical settlement proceeds to the viator.

e. Failure to tender consideration to the viator for the viatical settlement contract within the time disclosed pursuant to paragraph (6) of subsection a. of section 8 of this act 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.

f. Contacts with the insured for the purpose of determining the health status of the insured by the viatical settlement provider after the viatical settlement has occurred shall only be made by the settlement provider 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 shall explain to the insured 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 shall be responsible for the actions of their authorized representatives.

g. If the insured is not terminally or chronically ill, viatical settlement providers shall pay an amount greater than the cash surrender value or accelerated death benefit then available.

C.17B:30B-10 Two-year period required between issuance of policy and viatical settlement; exceptions.

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

(1) The policy was issued upon the viator's exercise of conversion rights arising out of a group or individual life insurance policy, so long as the total amount of time covered under the conversion policy plus the time covered under the prior policy is at least 24 months. The time covered under a group policy shall be calculated without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship;

(2) The viator submits independent evidence to the viatical settlement provider that within the two-year period: (a) the viator or insured was terminally ill or chronically ill; or (b) the viator or insured disposed of his ownership interests in a closely held corporation pursuant to a buyout or other similar agreement in effect at the time the insurance policy was initially issued; or (c) both.

b. Copies of the independent evidence described in paragraph (2) of subsection a. of this section and documents required by subsection a. of section 9 of this act shall be submitted to the insurer when the viatical settlement provider submits a request to the insurer for verification of coverage. The copies shall be accompanied by a letter of attestation from the viatical settlement provider that the copies are true and correct copies of the documents received by the viatical settlement provider.

c. If the viatical settlement provider submits to the insurer a copy of the owner or insured's certification described in subsection a. of this section when the provider submits a request to the insurer to effect the transfer of the policy 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.

C.17B:30B-11 Advertisement of viatical settlement contracts; guidelines, standards.

11. The purpose of this section is to provide prospective viators with clear and unambiguous statements in the advertisement of viatical settlement contracts 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 settlement contracts 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 licensees under this act.

a. 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.

b. Every viatical settlement provider 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 provider licensee, as well as the individual who created or presented the advertisement. A system of control shall include regular, routine notification, at least once a year, to life insurance producers and others authorized by the viatical settlement provider who disseminates advertisements, of the requirements and procedures for approval prior to the use of any advertisements not furnished by the viatical settlement provider.

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, 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 advertisements are deemed false and misleading on their face and are prohibited. False and misleading 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; and

(6) "High yield," "superior return," "excellent return," "high return," "quick profit," or similar representations;

(7) Purported favorable representations or testimonials about the benefits of viatical settlement contracts 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 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 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 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 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, 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, appraisal, analysis or endorsement. In using testimonials, appraisals or analysis, the viatical settlement provider licensee makes as its own all the statements contained therein, and the statements are subject to all the provisions of this section.

(a) If the individual making a testimonial, appraisal, analysis or an endorsement has a financial interest in the viatical settlement provider or related entity as a stockholder, director, officer, employee or otherwise, or receives any benefit directly or indirectly other than required union scale wages, that fact shall be prominently disclosed in the advertisement.

(b) An advertisement shall not state or imply that a viatical settlement contract, 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 licensee is disclosed. If the entity making the endorsement or testimonial is owned, controlled or managed by the licensee, or receives any payment or other consideration from the 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 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 source of all statistics used in an advertisement shall be identified.

g. An advertisement shall not disparage insurers, viatical settlement providers, life insurance producers, policies, services or methods of marketing.

h. The name of the 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 licensee, name of a particular division of the licensee, service mark, slogan, symbol or other device or reference without disclosing the name of the licensee, if the advertisement would have the capacity or tendency to mislead or deceive as to the true identity of the licensee, or to create the impression that a company other than the 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 licensee is licensed in the state where the advertisement appears so long as it does not exaggerate that fact or suggest or imply that competing licensees may not be so licensed. The advertisement may ask the audience to consult the licensee's website or contact the department to find out if the state requires licensing and, if so, whether the viatical settlement provider, or life insurance producer 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 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 federal government endorses, approves or favors:

(1) Any viatical settlement provider 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 shall disclose the average time from the date of the 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.

C.17B:30B-12 Fraudulent viatical settlement acts, prohibited, reporting, investigation, prosecution.

12. a. A person shall not commit a fraudulent viatical settlement act as defined in section 2 of this act.

b. 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.

c. 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.

d. (1) Viatical settlement contracts and applications for viatical settlement contracts, 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 paragraph (1) of this subsection does not constitute a defense in any prosecution for a fraudulent viatical settlement act.

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

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

f. (1) No civil liability shall be imposed on and no cause of action shall arise from the furnishing of 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 Administration Association or their employees, agents or representatives, or other regulatory body overseeing life insurance, viatical settlements, securities or investment fraud; or
- (e) The life insurer, including its agents and employees, that issued the life insurance policy covering the life of the insured.

(2) Paragraph (1) of this subsection shall not apply to statements made with actual malice. In an action brought against a person for filing a report or furnishing other information concerning a fraudulent viatical settlement act or a fraudulent insurance act, the party bringing the action shall plead specifically any allegation that paragraph (1) does not apply because the person filing the report or furnishing the information did so with actual malice.

(3) A person identified in paragraph (1) of this subsection shall be entitled to an award of attorney's fees and costs if he is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this act and the party bringing the action was not substantially justified in doing so. For purposes of this section a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.

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

g. (1) The documents and evidence provided pursuant to subsection e. 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 provisions of paragraph (1) of this subsection shall 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 National Association of Insurance Commissioners (NAIC); or

(c) At the discretion of the commissioner, to a person in the business of viatical settlements or the business of life insurance that is aggrieved by a fraudulent viatical settlement act.

(3) Release of documents and evidence under paragraph (2) of this subsection shall not abrogate or modify the privilege granted in paragraph (1) of this subsection.

h. 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 a fraudulent viatical settlement act to a law enforcement or regulatory agency other than the department; or

(3) Limit the powers granted elsewhere by the laws of this State to the commissioner or the Insurance Fraud Prosecutor to investigate and examine possible violations of law and to take appropriate action against wrongdoers.

i. Viatical settlement providers 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, modifications of the following required initiatives as necessary to ensure an effective

antifraud program. The modifications may be more or less restrictive than the required initiatives so long as the modifications may reasonably be expected to accomplish the purpose of this section. Antifraud initiatives shall include:

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

(2) An antifraud plan, which shall be submitted to the commissioner. The antifraud plan shall include, but not be limited to:

(a) A description of the procedures for detecting and investigating possible fraudulent viatical settlement acts and procedures for resolving material inconsistencies between medical records and insurance applications;

(b) A description of the procedures for reporting possible fraudulent viatical settlement acts to the commissioner;

(c) A description of the plan for antifraud education and training of underwriters and other personnel; and

(d) A description or chart outlining the organizational arrangement of the antifraud personnel who are responsible for the investigation and reporting of possible fraudulent viatical settlement acts and investigating unresolved material inconsistencies between medical records and insurance applications.

(3) Antifraud plans submitted to the commissioner shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a civil or criminal action.

(4) The commissioner may refer suspected fraudulent viatical settlement acts to the Department of Law and Public Safety, Office of Insurance Fraud Prosecutor, for investigation, prosecution or other action or disposition involving such suspected fraudulent viatical settlement acts.

C.17B:30B-13 Injunction in addition to penalties, enforcement provisions.

13. 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. The commissioner may issue, in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), 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.

d. 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 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 the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

e. In addition to the penalties and other enforcement provisions of this act, any person who violates this act shall be subject to civil penalties of up to \$10,000 per violation which may be collected in a summary proceeding pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.). 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.

f. 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.

g. A person convicted of a violation of this act may be sentenced in accordance with

paragraph (1), (2), (3) or (4) of this subsection based on the greater of: the value of property, services, or other benefit wrongfully obtained or attempted to be obtained; or the aggregate economic loss suffered by any person as a result of the violation. A person convicted of a fraudulent viatical settlement act shall be ordered to pay restitution to persons aggrieved by the fraudulent viatical settlement act. Restitution shall be ordered in addition to a fine or imprisonment but not in lieu of a fine or imprisonment.

(1) Imprisonment for not more than 20 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 for not more than 10 years or 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 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; or

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

h. In any prosecution under paragraphs (1), (2), (3) and (4) of subsection g. of this section 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 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.

C.17B:30B-14 Violation considered unfair trade practice; penalties.

14. A violation of this act shall be considered an unfair trade practice pursuant to N.J.S.17B:30-1 et seq. and shall be subject to the penalties contained in N.J.S.17B:30-17.

C.17B:30B-15 Regulations, authority of commissioner.

15. The commissioner shall have the authority to promulgate regulations implementing the provisions of this act pursuant to the "Administrative Procedure Act," P.L.1968 c.410 (C.52:14B-1 et seq.) including, but not limited to, the following:

a. Establishing standards for evaluating reasonableness of payments under viatical settlement contracts for persons terminally or chronically ill;

b. Establishing appropriate licensing requirements, fees and standards for continued licensure for viatical settlement providers;

c. Requiring a bond or other mechanism for financial accountability for viatical settlement providers; and

d. Governing the relationship and responsibilities of insurers, viatical settlement providers, life insurance producers and others in the business of viatical settlements during the period of consideration or effectuation of a viatical settlement contract.

C.17B:30B-16 Construction of act with Uniform Securities Law.

16. Nothing in this act shall be construed to preempt or otherwise limit the provisions of the "Uniform Securities Law (1967)," P.L.1967, c.93 (C.49:3-47 et seq.) or any regulations, orders, policy statements, notices, bulletins, or other interpretations issued by or through the Attorney General or his designee acting pursuant thereto. Compliance with the provisions of this act does not constitute compliance with any applicable provisions of the "Uniform Securities Law (1967)."

C.17B:30B-17 Continuation of negotiating viatical settlements, certain circumstances prior to act.

17. a. Notwithstanding the provisions of sections 1 through 16 of this act, a person who has lawfully negotiated viatical settlement contracts between a viator and one or more viatical

settlement providers for at least one year immediately prior to the effective date of this act may continue to negotiate viatical settlements in this State for a period of one year from the effective date of this act, provided that person registers with the department on a form prescribed by the department. The registration form shall be published by the department not later than 30 days from the effective date of this act and shall require a person registering to evidence that he has lawfully negotiated viatical settlement contracts and include an acknowledgment by that person that he will operate in accordance with and comply with this act.

b. A viatical settlement provider that is either licensed or is lawfully transacting business in this State immediately prior to the effective date of this act may continue to do so pending approval or disapproval of the viatical settlement provider's application for a license pursuant to this act.

18. Section 2 of P.L.1967, c.93 (C.49:3-49) is amended to read as follows:

C.49:3-49 Definitions relative to Uniform Securities Law.

2. When used in this act, unless the context requires otherwise:

(a) "Bureau" means the agency designated in subsection (a) of section 19 of P.L.1967, c.93 (C.49:3-66);

(b) "Agent" means any individual other than a broker-dealer, who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents an issuer in (1) effecting transactions in a security exempted by paragraph (1), (2), (3), or (11) of subsection (a) of section 3 of P.L.1967, c.93 (C.49:3-50); (2) effecting transactions exempted by subsection (b) of section 3 of P.L.1967, c.93 (C.49:3-50); (3) effecting transactions with existing employees, partners, or directors of the issuer, if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this State; or (4) a broker-dealer in effecting transactions in this State limited to those transactions described in paragraph (2) of subsection (h) of section 15 of the "Securities Exchange Act of 1934," 15 U.S.C. s.78o(h)(2); or (5) such other persons not otherwise within the intent of this subsection (b), as the bureau chief may by rule or order designate. A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if he otherwise comes within this definition. The bureau chief may by rule or order, as to any transaction, waive the requirement of agent registration. The bureau chief may by rule define classes of persons as "agents," if those persons are regulated as "agents" by the Securities and Exchange Commission or any self-regulatory organization established pursuant to the laws of the United States;

(c) "Broker-dealer" means any person engaged in the business of effecting or attempting to effect transactions in securities for the accounts of others or for his own account. "Broker-dealer" does not include (1) an agent, (2) an issuer, (3) a person who effects transactions in this State exclusively in securities described in paragraphs (1) and (2) of subsection (a) of section 3 of P.L.1967, c.93 (C.49:3-50), (4) a bank, savings institution, or trust company, or (5) a person who effects transactions in this State exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other broker-dealers, (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the "Investment Company Act of 1940," pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees or (iv) such other persons not otherwise within the intent of this subsection (c), as the bureau chief may by rule or order designate;

(d) "Capital" shall mean net capital, as defined and adjusted under the formula established by the Securities and Exchange Commission in Rule 15c3-1, 17 C.F.R. s.240.15c3-1, made pursuant to the "Securities Exchange Act of 1934," prescribing a minimum permissible ratio of aggregate indebtedness to net capital as such formula presently exists or as it may hereafter be amended;

(e) "Fraud," "deceit," and "defraud" are not limited to common-law fraud or deceit. "Fraud," "deceit" and "defraud" in addition to the usual construction placed on these terms and accepted in courts of law and equity, shall include the following, provided, however, that any promise,

representation, misrepresentation or omission be made with knowledge and with intent to deceive or with reckless disregard for the truth and results in a detriment to the purchaser or client of an investment adviser:

(1) Any misrepresentation by word, conduct or in any manner of any material fact, either present or past, and any omission to disclose any such fact;

(2) Any promise or representation as to the future which is beyond reasonable expectation or is unwarranted by existing circumstances;

(3) The gaining of, or attempt to gain, directly or indirectly, through a trade in any security, a commission, fee or gross profit so large and exorbitant as to be unconscionable, unreasonable or in violation of any law, regulation, rule, order or decision of the Securities and Exchange Commission, or the bureau chief; or to the extent that such law, regulation, rule or order directly applies to the person involved, the gaining of, or attempt to gain, directly or indirectly, through a trade in any security, a commission, fee or gross profit so large and exorbitant as to be in violation of any law, regulation, rule, order or decision of any other state or Canadian securities administrator, or any self-regulatory organization established pursuant to the laws of the United States;

(4) Generally any course of conduct or business which is calculated or put forward with intent to deceive the public or the purchaser of any security or investment advisory services as to the nature of any transaction or the value of such security;

(5) Any artifice, agreement, device or scheme to obtain money, profit or property by any of the means herein set forth or otherwise prohibited by this act;

(f) "Guaranteed" means guaranteed as to payment of principal, interest or dividends;

(g) (1) "Investment adviser" means:

(i) any person who, for direct or indirect compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, selling or holding securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities; and

(ii) any financial planner and other person who provides investment advisory services to others for compensation and as part of a business or who holds himself out as providing investment advisory services to others for compensation.

(2) "Investment adviser " does not include:

(i) a bank, savings institution, or trust company;

(ii) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice or conduct of the profession and who does not hold himself out as providing investment advisory or financial planning services, and who receives no special compensation for those investment advisory or financial planning services;

(iii) a broker-dealer registered under this act;

(iv) a publisher of any bona fide newspaper, news magazine, or business or financial publication of general, regular, and paid circulation;

(v) a person whose advice, analyses, or reports relate only to securities exempted by paragraphs (1) and (2) of subsection (a) of section 3 of P.L.1967, c.93 (C.49:3-50);

(vi) a person whose only clients in this State are other investment advisers, any person that is registered as an "investment adviser" under section 203 of the "Investment Advisers Act of 1940," 15 U.S.C. s.80b-3, or excluded from the definition of an "investment adviser" under paragraph (11) of subsection (a) of section 202 of the "Investment Advisers Act of 1940," 15 U.S.C. s.80b-2(a)(11), broker-dealers, banks, bank holding companies, savings institutions, trust companies, insurance companies, investment companies as defined in the "Investment Company Act of 1940," pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees;

(vii) any person that is registered as an "investment adviser" under section 203 of the "Investment Advisers Act of 1940," 15 U.S.C. s.80b-3, or excluded from the definition of an "investment adviser" under paragraph (11) of subsection (a) of section 202 of the "Investment Advisers Act of 1940," 15 U.S.C. s.80b-2(a)(11);

(viii) an investment adviser representative; or

(ix) such other persons not otherwise within the intent of this subsection (g) as the bureau chief may by rule or order designate.

Subject to applicable federal law, the bureau chief may by rule limit the exclusions set out in this paragraph (2), except for those exclusions provided in subparagraph (i) of paragraph (2).

For purposes of this act, "investment advisory services" means those services rendered by an "investment adviser" as defined in this subsection;

(h) "Issuer" means any person who issues or proposes to issue any security, except that (1) with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued; and (2) with respect to certificates of interest in oil, gas, or mining titles or leases, there is not considered to be any "issuer";

(i) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government;

(j) (1) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security or investment advisory services for value;

(2) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of any offer to buy, a security or interest in a security or investment advisory services for value;

(3) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value;

(4) A purported gift of assessable stock is considered to involve an offer and sale;

(5) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security;

(6) The terms defined in this subsection (j) do not include (i) any bona fide pledge or loan; (ii) any stock dividend, whether the corporation distributing the dividend is the issuer of the stock or not, if nothing of value is given by stockholders for the dividend other than the surrender of a right to a cash or property dividend when each stockholder may elect to take the dividend in cash or property or in stock; (iii) any act incident to a class vote by stockholders, pursuant to the certificate of incorporation or the applicable corporation statute, on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of another corporation; or (iv) any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash;

(k) "Savings institutions" shall mean any savings and loan association or building and loan association operating pursuant to the "Savings and Loan Act (1963)," P.L.1963, c.144 (C.17:12B-2 et seq.), and any federal savings and loan association and any association or credit union organized under the laws of the United States or of any state whose accounts are insured by a federal corporation or agency;

(l) "Securities Act of 1933," 15 U.S.C. s.77a et seq.; "Securities Exchange Act of 1934," 15 U.S.C. s.78a et seq.; "Public Utility Holding Company Act of 1935," 15 U.S.C. s.79 et seq.; "Investment Advisers Act of 1940," 15 U.S.C. s.80b-1 et seq.; "Investment Company Act of 1940," 15 U.S.C. s.80a-1 et seq.; and "Commodity Exchange Act," 7 U.S.C. s.1 et seq. mean the federal statutes of those names;

(m) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement, including, but not limited to, certificates of interest or participation in real or personal property; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; certificate of interest in an oil, gas or mining title or lease; a viatical investment; or, in general, any interest

or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable number of dollars either in a lump sum or periodically for life or some other specified period;

(n) "State" means any state, territory, or possession of the United States, as well as the District of Columbia and Puerto Rico;

(o) "Nonissuer" means secondary trading not involving the issuer of the securities or any person in a control relationship with the issuer;

(p) "Accredited investor" means any person who is an "accredited investor" as defined by subsection (15) of section 2 of the "Securities Act of 1933," 15 U.S.C. s.77b(a)(15), and 17 C.F.R. s.230.215 and s.230.501 or any successor rule promulgated pursuant to that act.

The bureau chief may rule, or order, waive or modify the conditions in this subsection (p) and shall interpret and apply this subsection (p) so as to effectuate greater uniformity and coordination in federal-state securities registration exemptions;

(q) "Direct participation security" means a security which provides for flow-through tax consequences (tax shelter), regardless of the structure of the legal entity or vehicle for distribution, including, but not limited to, a security representing an interest in gas, oil, real estate, agricultural property, cattle, a condominium, a Subchapter S corporation, a limited liability company and all other securities of a similar nature, regardless of the industry represented by the security, or any combination thereof. Excluded from this definition are real estate investment trusts, tax qualified pension and profit-sharing plans pursuant to sections 401 and 403(a) of the Internal Revenue Code of 1986, 26 U.S.C. ss.401 and 403(a), and individual retirement plans under section 408 of the Internal Revenue Code of 1986, 26 U.S.C. s.408, tax sheltered annuities pursuant to the provisions of section 403(b) of the Internal Revenue Code of 1986, 26 U.S.C. s.403(b), and any company including separate accounts registered pursuant to the "Investment Company Act of 1940;"

(r) "Blind pool" means an offering of securities in which, as to 65% or more of the proceeds of the offering, the prospectus discloses no specific purpose to which the proceeds of the offering will be put, or the prospectus discloses no specific assets to be purchased, projects to be undertaken, or business to be conducted, except for:

(1) an offering of securities to provide working capital for an operating company (as opposed to a development stage company);

(2) an offering of securities by an investment company registered under the "Investment Company Act of 1940," including a business development company; or

(3) an offering of securities by a small business investment company licensed by the Small Business Administration or a business development company within the meaning of the "Investment Advisers Act of 1940;"

(s) "Investment adviser representative" means any person, including, but not limited to, a partner, officer, or director, or a person occupying a similar status or performing similar functions, or other individual, except clerical or ministerial personnel, who is employed by or associated with an investment adviser registered under this act, or who has a place of business located in this State and is employed by or associated with a person registered or required to be registered as an investment adviser under section 203 of the "Investment Advisers Act of 1940," 15 U.S.C. s.80b-3; and who does any of the following:

(1) makes any recommendations or otherwise renders advice regarding securities if the person has direct advisory client contact;

(2) manages accounts or portfolios of clients;

(3) determines recommendations or advice regarding securities;

(4) solicits, offers or negotiates for the sale of or sells investment advisory services; or

(5) directly supervises any investment adviser representative or the supervisors of those investment adviser representatives. "Investment adviser representative" does not include a broker-dealer or an agent;

(t) "Institutional buyer" includes, but is not limited to, a "qualified institutional buyer" as defined in SEC Rule 144A, 17 C.F.R. s.230.144A;

(u) "Willful" or "willfully" means a person who acts intentionally in the sense that the person is aware of what he is doing;

(v) "Federal covered security" means any security described as a covered security in subsection (b) of section 18 of the "Securities Act of 1933," 15 U.S.C. s.77r(b);

(w) "Viatical investment" means the contractual right to receive any portion of the death benefit or ownership of a life insurance policy or certificate, for consideration that is less than the expected death benefit of the life insurance policy or certificate. Viatical investment does not include:

(1) any transaction between a viator and a viatical settlement provider as defined by the "Viatical Settlements Act", P.L.2005, c.229 (C.17B:30B-1 et al.);

(2) any transfer of ownership or beneficial interest in a life insurance policy from a viatical settlement provider to another viatical settlement provider as defined in the "Viatical Settlements Act", P.L.2005, c.229 (C.17B:30B-1 et al.) or to any legal entity formed solely for the purpose of holding ownership or beneficial interest in a life insurance policy or policies;

(3) the bona fide assignment of a life insurance policy to a bank, savings bank, savings and loan association, credit union, or other licensed lending institution as collateral for a loan;

(4) the exercise of accelerated benefits pursuant to the terms of a life insurance policy issued in accordance with the provisions of Title 17B of the New Jersey Statutes; or

(5) a loan by a life insurance company pursuant to the terms of the life insurance contract.

Repealer.

19. P.L.1999, c.211 (C.17B:30A-1 et seq.) is repealed.

20. Section 15 of this act shall take effect immediately and the remainder of this act shall take effect on the 90th day after enactment.

Approved September 22, 2005.