



Am. Sub. H.B. 551
123rd General Assembly
(As Passed by the General Assembly)

Reps. Salerno, Peterson, Callender, Womer Benjamin, Willamowski, Goodman, Hoops, Jolivette, Olman, Perry, Barnes, Verich, Jones, Britton, Stevens

Sens. Latta, Ray, Nein, Johnson, Gardner, Oelslager, Harris

Effective date: *

ACT SUMMARY

- Creates a new R.C. chapter, Chapter 3916., to regulate viatical settlements.
- Among its provisions, the new Chapter:
 - (1) Generally prohibits any person from acting as a viatical settlement provider or broker without first having obtained a license from the Superintendent of Insurance pursuant to an application procedure it enacts, but provides a limited authority to continue specified preexisting viatical settlement practices during the pendency of the license application;
 - (2) Specifies that a viatical settlement broker is deemed to represent only the viator;
 - (3) Prohibits the use of a viatical settlement contract form or a disclosure statement form unless the form is approved by the Superintendent and provides procedures relative to the approval of such a form;
 - (4) Requires a viatical settlement provider or broker to disclose certain specified information to a viator no later than the time all

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared.*

parties sign the application for a viatical settlement contract and requires the provider to disclose additional specified information to the viator prior to the date the contract is signed by the parties;

(5) Requires a provider who transfers ownership or changes the beneficiary of the insurance policy or certificate to notify the insured within 20 days after the change;

(6) Requires a viatical settlement provider entering into a viatical settlement contract to first obtain certain specified statements and documents from the viator's attending physician, the insured, and the viator, imposes requirements regarding those statements and documents, and requires the provider to notify the insurer when an insurance policy or certificate has or will become a viaticated policy;

(7) Provides a right to rescind a viatical settlement contract for a specified period of time;

(8) Establishes procedures for the payment of viatical settlement proceeds;

(9) Imposes restrictions on a viatical settlement provider's or broker's contact with the insured after a viatical settlement has occurred;

(10) Establishes record retention requirements upon licensed viatical settlement providers and brokers;

(11) Provides for examinations regarding viatical settlement licensing, licensed viatical settlement providers and brokers, and other matters, requires the Superintendent to appoint examiners to conduct the examinations, enacts examination procedures, powers, and duties, requires that persons cooperate with the examiners, imposes duties upon the completion of an examination, and provides general confidentiality regarding information and materials related to viators and examinations;

(12) Requires viatical settlement providers and brokers to file annual statements with the Superintendent;

(13) Provides general confidentiality of the identity of the insured;

(14) Permits the Superintendent to refuse to issue or to suspend, revoke, or refuse to renew the license of a viatical settlement provider or broker in specified circumstances, and enacts



notification, hearing, and other rules regarding any such refusal, suspension, or revocation;

(15) Imposes conditions that must be satisfied before entering into a viatical settlement contract;

(16) Enacts provisions that regulate advertising regarding viatical settlement contracts;

(17) Enacts prohibitions, and related provisions, regarding fraudulent viatical settlement contract acts, and requires viatical settlement providers and brokers to adopt and use antifraud initiatives;

(18) Enacts enforcement mechanisms regarding viatical settlements, and identifies other sanctions that might be available regarding violations of the new Chapter;

(19) Authorizes the Superintendent to adopt rules for purpose of implementing the new Chapter;

(20) Specifies that any person who fails to comply with the new Chapter is deemed to have engaged in an "unfair and deceptive act or practice" under specified preexisting provisions of the Insurance Law.

- Defines "security," for purposes of the Ohio Securities Law, to include any "life settlement interest" and makes viatical settlement interests subject to that Law.
- Modifies the registration exemption provided in the Ohio Securities Law for certain securities that is based upon the type of securities exchange on which the securities are listed by modifying the recognized stock exchanges on which they may be listed to qualify for the exemption and modifies the Division of Securities ability to revoke the approval of an exchange or system or the exemption of a security by allowing the Division to revoke the approval of an exchange or system or the exemption of a security if it is not listed in section 18(b)(1) of the Securities Act of 1933 or any rule promulgated under the Act or not listed on an exchange that is so listed.
- Modifies the Ohio Securities Law requirement that every applicant for registration or for claim of exemption, and every person submitting a



notice filing, for the sale of securities file an irrevocable written consent to be sued in Ohio in actions arising out of the sale of the securities by requiring that each person not organized under Ohio law, not licensed under Ohio Securities Law, or not having its principal place of business in Ohio submit to the Division of Securities an irrevocable written consent to service of process in connection with certain specified filings or applications and requires that the irrevocable written consent be executed and acknowledged by an individual duly authorized to give the consent, designate the Secretary of State as agent for service of process, and state that the consent to be sued also applies to actions growing out of the giving of investment advice.

- Permits the Division of Securities to provide by rule for the electronic filing or submission of a consent to service of process.
- Removes the Ohio Securities Law requirement that an application to act as a dealer contain the names and addresses of all salesmen of the applicant and the nature and place of business of the applicant for the prior ten years, removes the requirement that the application be verified by oath of the applicant or his or her agent or attorney, and removes a limitation on the information that must be provided by an applicant to act as a dealer who is renewing the applicant's license for the previous year.
- Replaces the Ohio Securities Law requirement that an applicant to act as a dealer pass an examination that covers the applicant's knowledge of securities laws and practices with a requirement that one natural person who is a principal, officer, employer, etc., of a dealer pass an examination designated by the Division of Securities.
- Replaces the specific Ohio Securities Law requirements for service of process with regards to an application for an investment adviser's license with the same requirements the act imposes upon issuers of securities.
- Removes the Ohio Securities Law requirement that the application for a salesman's license include the nature of the employment, and the names and addresses of the employers, of the applicant for the prior ten years, removes the limit on the information that must be in such an application for renewal of a license, and replaces the requirement that Division of Securities require an applicant for a salesman's license pass an examination that covers his or her knowledge of securities law with a



requirement that the Division require an applicant to pass an examination designated by the Division.

- With respect to an investigation of a violation of Ohio's Securities Law, permits a subpoena issued requiring the attendance of witnesses and the production of books, records, and papers to be served by personal service in addition to being served by certified mail, return receipt requested.
- Grants the Division of Securities expedited rulemaking authority to promulgate a provision similar to any provision included within any of a list of specified federal bodies of law, within a related rule, regulation, release, statement, or position, or within a rule, regulation, or guideline of a specified type of self-regulatory organization, if: (1) the provision is not contained in the Ohio Securities Law or the rules adopted under that Law, and (2) the provision affects any matter within the scope of that Law.
- Repeals provisions dealing with securities class action lawsuits that were enacted in Am. Sub. H.B. 350 of the 121st General Assembly and that were declared unconstitutional under *State, ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, and a related provision.
- Makes other changes in Ohio's Securities Law.

TABLE OF CONTENTS

REGULATION OF VIATICAL SETTLEMENTS

Background.....	7
Licensing of viatical settlement provider or broker and governing law	7
General license requirement.....	7
Application for license and fees	8
Issuance of license.....	8
Renewal of license	9
Nonresident applicant	9
Authority to continue preexisting viatical settlement business during pendency of license application.....	10
Representation by viatical settlement broker	10
Approval of viatical settlement-related forms; use of approved forms	10
Viatical settlement providers and brokers--required disclosures to viators	10
Initial disclosures by providers and brokers	10
Additional disclosures by providers.....	12
Provider change in ownership or beneficiaries--required notice to insured.....	12



Regulation of viatical settlements	13
Right to, and effect of, rescission of viatical settlement contract.....	14
Payment of viatical settlement proceeds.....	14
Restrictions on contact with the insured.....	15
Record retention by licensed viatical settlement providers and brokers	15
Examinations--appointment of examiners, procedures, use of information, and confidentiality.....	16
Appointment of examiners.....	16
Examination procedures	17
Relationship to other actions	17
Completion of examination.....	18
Confidentiality, and use of materials or information.....	18
Expenses of examination; sanctions for failure to maintain records	20
Immunities, and attorneys fees and costs.....	20
Superintendent's investigations.....	21
Annual statements of licensed viatical settlement providers and brokers.....	21
Confidentiality of insured's identity	21
Examinations--frequency, subjects, and any foreign or alien licensee.....	22
Refusal to issue, or suspension, revocation, or refusal to renew, a license.....	22
Refusal, suspension, or revocation in general.....	22
Special rules for notices and hearings.....	24
Conditions to be met prior to entering into a viatical settlement contract.....	25
Regulation of advertising.....	26
Purpose and application of advertising provisions.....	26
General advertising requirements.....	26
Advertisements that are false and misleading on their face.....	27
Presentation of information in advertisement; prohibited content; testimonials; etc.....	28
Fraudulent viatical settlement acts and related provision.....	30
Prohibitions	30
Required warning.....	31
Reporting fraud to superintendent	31
Qualified immunity regarding information about fraud; attorney's fees and costs	31
Confidentiality of information.....	32
Relationship to other authority, powers, and duties.....	33
Antifraud initiatives.....	33
Enforcement of the act's new chapter regulating viatical settlements, and imposition of civil penalties	34
Adoption of rules by the Superintendent	34
Unfair and deceptive act or practice in the business of insurance.....	35
Definitions	35

CHANGES TO OHIO SECURITIES LAW

Designation of "life settlement interest" as a "security" under the Ohio Securities Law... 40
Formerly... 40
Operation of the act... 40
Exempt securities... 41
Formerly... 41
Operation of the act... 42
Consent to service... 43
Formerly... 43
Operation of the act... 44
Application for and issuance of dealer's license... 45
Application for and issuance of investment adviser's license... 46
Application for and issuance of salesman's license... 47
Enforcement powers of the Division of Securities... 48
Expedited rulemaking authority of Division of Securities... 48
Clarification of a prohibition in the Ohio Securities Law... 49
Repeal of securities class action provisions... 50
Overview of Ohio Securities Law... 50
Licensing... 50
Registration... 52
Prohibitions... 56
Delayed effective date... 58

CONTENT AND OPERATION

REGULATION OF VIATICAL SETTLEMENTS

Background

The act enacts new R.C. Chapter 3916. to adopt, generally, the Viatical Settlements Model Act of the National Association of Insurance Commissioners.

Licensing of viatical settlement provider or broker and governing law

General license requirement

Subject to the exception described below in "Authority to continue preexisting viatical settlement business during pendency of license application," the act prohibits any person from operating in Ohio as a viatical settlement provider or viatical settlement broker (see "Definitions," below) without first having obtained a license from the following (R.C. 3916.02):

- (1) The Superintendent of Insurance (hereafter, "Superintendent");



(2) If Ohio is not the residence of the *viator* (see "*Definitions*," below), in addition to the Superintendent, the official of the viator's state of residence that is comparable to the Superintendent.

A person who violates this prohibition is guilty of a felony of the third degree (R.C. 3916.99(A)).

If a single policy or certificate has more than one viator and the viators are residents of different states, the *viatical settlement* (see "*Definitions*," below) is governed by the law of the state in which the viator having the largest percentage ownership of the policy or certificate resides or, if the viators hold equal ownership, the state of residence of one viator agreed upon in writing by all viators (R.C. 3916.02).

Application for license and fees

The act requires an applicant for a license as a viatical settlement provider or viatical settlement broker to submit an application in the manner prescribed by the Superintendent. The application must be accompanied by a fee that the Superintendent establishes under the Administrative Procedure Act. The application fees must be paid into the State Treasury to the credit of the preexisting Department of Insurance Operating Fund, not changed by the act. (R.C. 3916.03(A) and (H).)

Issuance of license

Under the act, upon the filing of the application and payment of the fee, the Superintendent must investigate the applicant. The Superintendent must issue a license that states that the person is authorized to act as a viatical settlement provider or viatical settlement broker, as applicable, if all of the following apply (R.C. 3916.03(C)):

(1) Regarding a viatical settlement provider license application, the applicant provides a detailed plan of operation.

(2) The Superintendent finds that the applicant is competent, trustworthy, and intends to act in good faith in the capacity of a viatical settlement provider or viatical settlement broker, as applicable; has a good business reputation; and has had experience, training, or education that qualifies the applicant to act as a viatical settlement provider or viatical settlement broker, as applicable.

(3) If the applicant is a person other than an individual, the applicant provides a certificate of good standing from the state of its domicile.



(4) The applicant provides an antifraud plan that meets the requirements of the act (see "**Fraudulent viatical settlement acts and related provision**," below).

An applicant must provide all information requested by the Superintendent. The Superintendent, at any time, may require an applicant to fully disclose the identity of all stockholders, partners, officers, members, and employees. The Superintendent may refuse to issue a license to an applicant that is not an individual if not satisfied that each officer, employee, stockholder, partner, or member who may materially influence the applicant's conduct meets the standards set forth in the act. A viatical settlement provider or viatical settlement broker must provide to the Superintendent new or revised information regarding any change in its officers, 10% or more of its stockholders, or its partners, directors, members, or designated employees within 30 days of the change. (R.C. 3916.03(D) and (G).)

A license issued to a person other than an individual authorizes all partners, officers, members, or designated employees of the person to act as viatical settlement providers or viatical settlement brokers, as applicable. An applicant must name in the application and any application supplements all of those partners, officers, members, or designated employees. (R.C. 3916.03(B).)

Renewal of license

The act specifies that, except as described in this paragraph, a license as a viatical settlement provider or viatical settlement broker expires on the last day of March next after its issuance. The Superintendent, in the Superintendent's discretion and upon payment of an annual renewal fee, may continue past the last day of March next after its issue and after the last day of March in each succeeding year a license as a viatical settlement provider or viatical settlement broker. The Superintendent must establish the renewal fee under the Administrative Procedure Act. A licensee's failure to pay the renewal fee by the required date results in the expiration of the license. (R.C. 3916.03(E).)

Nonresident applicant

The Superintendent cannot issue a license to a nonresident applicant unless *either* the applicant files and maintains a written designation of an agent for service of process with the Superintendent *or* the applicant has filed with the Superintendent the applicant's written irrevocable consent that any action against the applicant may be commenced against the applicant by service of process on the Superintendent (R.C. 3916.03(F)).

Authority to continue preexisting viatical settlement business during pendency of license application

The act specifies that any person that, on the act's effective date (see "**Delayed effective date**," below) transacts business in Ohio as a viatical settlement provider, viatical settlement representative, or viatical settlement broker may continue to do so pending approval of the person's application for a license, if the person applies for the license during the six-month period immediately following the act's effective date (Section 4).

Representation by viatical settlement broker

The act provides that, irrespective of the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent *only* the viator and owes a fiduciary duty to the viator to act according to the viator's instructions and in the best interest of the viator (R.C. 3916.04).

Approval of viatical settlement-related forms; use of approved forms

The act prohibits a person from using a viatical settlement contract form or providing a disclosure statement form to a viator in Ohio unless the particular form is filed with and approved by the Superintendent. The Superintendent must *disapprove* a viatical settlement contract form or a disclosure statement form if, in the Superintendent's opinion, the form, or any provision contained in it is unreasonable, contrary to the interests of the public, or otherwise misleading or unfair to the viator. At the Superintendent's discretion, the Superintendent may require the submission of advertising material to which the act's advertising regulations, as described below in "**Regulation of advertising**," apply.

The Superintendent may adopt rules under the Administrative Procedure Act to establish reasonable fees for any service or transaction performed by the Department of Insurance under the provision described in the preceding paragraph. Any fee collected pursuant to those rules must be paid into the State Treasury to the credit of the preexisting Department of Insurance Operating Fund, not changed by the act. (R.C. 3916.05.)

Viatical settlement providers and brokers--required disclosures to viators

Initial disclosures by providers and brokers

The act specifies that, with each application for a viatical settlement, a viatical settlement provider or viatical settlement broker must disclose at least the following to a viator no later than the time all parties sign the application for the viatical settlement contract:

(1) That there are possible alternatives to *viatical settlement contracts* (see "Definitions," below), including any accelerated death benefits offered under the viator's life insurance policy or certificate;

(2) That some or all of the proceeds of the viatical settlement may be subject to Federal income taxation and state franchise and income taxation, and that assistance should be sought from a professional tax advisor;

(3) That the proceeds could be subject to the claims of creditors;

(4) That receipt of the proceeds may adversely affect the viator's eligibility for medical assistance under preexisting R.C. Chapter 5111. (the Medical Assistance Program Law) or other government benefits or entitlements, and that advice should be obtained from the appropriate government agencies;

(5) That the viator has a right to rescind the viatical settlement contract for at least 15 calendar days after the viator receives the settlement proceeds, as provided in the act (if the insured dies during the rescission period, the settlement contract is deemed to have been rescinded, subject to repayment of all viatical settlement proceeds to the viatical settlement company);

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

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

The viatical settlement provider or viatical settlement broker must provide these disclosures in a separate document that is signed by the viator and the viatical settlement provider or viatical settlement broker. Disclosure to a viator under this provision must include distribution of a brochure describing the process of viatical settlements; the viatical settlement provider or broker must use the NAIC's (see "Definitions," below) form for the brochure unless one is developed by the Superintendent. The act specifies language that must be contained in the disclosure document under this provision. (R.C. 3916.06(A).)

Additional disclosures by providers

The act also requires a viatical settlement provider to disclose at least the following to a viator prior to the date the viatical settlement contract is signed by all the necessary parties:

- (1) The affiliation, if any, between the viatical settlement provider and the issuer of the insurance policy or certificate to be viaticated;
- (2) The name, address, and telephone number of the viatical settlement provider;
- (3) Regarding a viatical settlement broker, the amount and method of calculating the broker's compensation ("compensation" includes anything of value paid or given to a viatical settlement broker for the placement of a policy or certificate);
- (4) If an insurance policy or certificate to be viaticated has been issued as a joint policy or certificate or involves family riders or any coverage of a life other than the insured under the policy or certificate to be viaticated, the possible loss of coverage on the other lives under the policy or certificate and that advice should be sought from the viator's insurance producer or the company issuing the policy or certificate;
- (5) The dollar amount of the current death benefit payable to the viatical settlement provider under the policy or certificate, and, if known, the availability of any additional guaranteed insurance benefits, the dollar amount of any accidental death and dismemberment benefits under the policy or certificate, and the viatical settlement provider's interest in those benefits;
- (6) 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.

The viatical settlement provider or viatical settlement broker must conspicuously display these disclosures in a separate document signed by the viator and the viatical settlement provider or viatical settlement broker. (R.C. 3916.06(B).)

Provider change in ownership or beneficiaries--required notice to insured

If the provider transfers ownership or changes the beneficiary of the insurance policy or certificate, the act requires that the provider communicate the change in ownership or beneficiary to the insured within 20 days after the change (R.C. 3916.06(C)).



Regulation of viatical settlements

Under the act, a viatical settlement provider entering into a viatical settlement contract must first obtain all of the following (R.C. 3916.07(A)):

(1) If the viator is the insured, a written statement from an attending physician that the viator is of sound mind and under no constraint or undue influence to enter into a viatical settlement contract. As used in this provision, "physician" means a person authorized under preexisting R.C. Chapter 4731., not changed by the act, to practice medicine and surgery or osteopathic medicine and surgery.

(2) A document in which the insured consents in writing, as required by R.C. 3916.13(E), as described below in paragraph (5) of "Confidentiality of insured's identity," to the release of the insured's medical records to a viatical settlement provider or viatical settlement broker and to the insurance company that issued the life insurance policy or certificate covering the life of the insured (note: the reference to R.C. 3916.13(E) appears to be a mistake; the reference probably should be a reference to R.C. 3916.13(D), as described below in paragraph (4) of the cited part).

Within 20 days after a viator executes documents necessary to transfer any rights under an insurance policy or certificate or within 20 days of entering any expressed or implied agreement, option, promise, or other form of understanding to viaticate the policy, the viatical settlement provider must give written notice to the insurer that issued that insurance policy or certificate that the policy or certificate has or will become a *viaticated policy* (see "Definitions," below) or certificate. The notice must be accompanied by the documents required under the provision described in the next paragraph. (R.C. 3916.07(B).)

The viatical provider must deliver a copy of the medical release required as described under the second preceding paragraph, a copy of the viator's application for the viatical settlement contract, the notice required as described in the preceding paragraph, and a request for verification of coverage to the insurer that issued the life insurance policy or certificate that is the subject of the viatical transaction. The viatical provider must use the NAIC's form for verification unless standards for verification are developed by the Superintendent. The insurer must respond to a request for verification of coverage submitted on an approved form by a viatical settlement provider within 30 calendar days after the date the request is received and must 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 life insurance contract or certificate that is the subject of the request. (R.C. 3916.07(C) and (D).)



Prior to or at the time of execution of the viatical settlement contract, the viatical settlement provider must 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 and a full and complete understanding of the benefits of the life insurance policy or certificate, and acknowledges that the viator is entering into the viatical settlement contract freely and voluntarily and, for persons with a *terminal* or *chronic illness* (see "Definitions," below) or condition, acknowledges that the insured has a terminal or chronic illness and that the terminal or chronic illness or condition was diagnosed after the life insurance policy or certificate was issued (R.C. 3916.07(E)).

If a viatical settlement broker performs any of the activities under "Regulation of viatical settlements" specified above on behalf of the viatical settlement provider, the provider is deemed to have fulfilled the requirements of the section containing those provisions. All medical information solicited or obtained by any licensee is subject to the applicable provisions of state law relating to confidentiality of medical information. (R.C. 3916.07(F) and (G).)

Right to, and effect of, rescission of viatical settlement contract

The act specifies that each viatical settlement contract entered into in Ohio must provide the viator with an unconditional right to rescind the contract for at least 15 calendar days after the receipt of the viatical settlement proceeds. If the insured dies during the rescission period, the viatical settlement contract is deemed to have been rescinded, subject to repayment of all viatical settlement proceeds to the viatical settlement provider. If a viatical settlement contract is rescinded by the viator pursuant to this provision, ownership of the insurance policy or certificate reverts to the viator or to the viator's estate if the viator is deceased, irrespective of any transfer of ownership of the policy or certificate by the viator, viatical settlement provider, or any other person. (R.C. 3916.08.)

Payment of viatical settlement proceeds

Under the act, the viatical settlement provider must 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 must pay or transfer the proceeds of the viatical settlement to an escrow or trust account in a state or federally chartered financial institution whose deposits are insured by the Federal Deposit Insurance Corporation. Upon payment of the settlement proceeds into the escrow or trust account, the escrow agent or trustee



must deliver the original change in ownership, assignment, or change in beneficiary forms to the viatical settlement provider or related provider trust. Upon the licensed provider's receipt of the acknowledgment of the properly completed transfer of ownership, assignment, or designation of beneficiary from the insurance company, the licensed provider must instruct the escrow agent to pay the settlement proceeds to the viator. The escrow agent must make payment within three business days of the date the provider received the acknowledged forms from the insurance company.

Failure to transfer the proceeds to the viator within three business days after the viatical settlement provider has received acknowledgment that ownership of the policy or interest in the certificate has been transferred and that the beneficiary has been designated pursuant to the viatical settlement contract 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. If a viatical settlement contract is voided by the viator pursuant to this provision, ownership of the insurance policy or certificate reverts to the viator or to the viator's estate if the viator is deceased, irrespective of any transfer of ownership of the policy or certificate by the viator, viatical settlement provider, or any other person. (R.C. 3916.09.)

Restrictions on contact with the insured

The act provides that, after a viatical settlement has occurred, contact with the insured for the purpose of determining the health status of the insured by the viatical settlement provider or viatical settlement broker may be made only by the viatical settlement provider or broker licensed in Ohio. The viatical settlement provider or viatical settlement broker cannot contact the insured for the purpose of determining the insured's health status more than once every three months if the insured has a life expectancy of more than one year, or more than once per month if the insured has a life expectancy of one year or less. The viatical settlement provider or viatical settlement broker must explain the procedure for making these contacts at the time the viatical settlement contract is entered into.

The limitations set forth in this provision do not apply to contacts made with an insured under a viaticated policy for purposes other than to determine the insured's health status. Viatical settlement providers and viatical settlement brokers are responsible for the actions of their authorized representatives, for the purposes of this provision. (R.C. 3916.10.)

Record retention by licensed viatical settlement providers and brokers

The act requires each licensed viatical settlement provider and licensed settlement broker to retain, for five years, copies of all of the following:



(1) All proposed, offered, or executed contracts, purchase agreements, underwriting documents, policy forms, and applications from the date of the proposal, offer, or execution of the contract or purchase agreement, whichever is later;

(2) All checks, drafts, or other evidence and documentation related to the payment, transfer, deposit, or release of funds from the date of the transaction;

(3) All other records and documents related to the requirements of the act's new chapter regulating viatical settlements.

The act states that this provision does not relieve a person of the obligation to produce the documents described above in (1) to (3) to the Superintendent after the retention period specified in the provision has expired if the person has retained the documents.

Records required to be retained by this provision must be legible and complete and may be retained in paper, photograph, microprocess, magnetic, mechanical, or electronic media, or by any process that accurately reproduces or forms a durable medium for the reproduction of a record. (R.C. 3916.11(A).)

Examinations--appointment of examiners, procedures, use of information, and confidentiality

Appointment of examiners

Under the act, upon determining that an examination should be conducted, subject to the limitations described below on the appointment of examiners, the Superintendent must appoint one or more examiners to perform the examination and instruct them as to the scope of the examination. The Superintendent may employ any guidelines or procedures for purposes of this provision that the Superintendent considers appropriate. The Superintendent may not appoint an examiner 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 the act's new chapter regulating viatical settlements. This limitation on appointment of examiners does not automatically preclude any of the following from being an examiner: (1) a viator, (2) an insured in a viaticated insurance policy or certificate, or (3) a beneficiary in an insurance policy or certificate that is proposed to be viaticated. Notwithstanding this limitation, the Superintendent 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 the new chapter. (R.C. 3916.11(B)(1) and (E).)

Examination procedures

Every licensee or person from whom information is sought under the act, and all officers, directors, employees, and agents of any licensee or person from whom information is sought, must provide to the examiners timely, convenient, and free access at all reasonable hours at the licensee's or person's 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 must 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 Superintendent is grounds for suspension, revocation, denial of issuance, or nonrenewal of any license or authority held by the licensee to engage in the viatical settlement business or other business subject to the Superintendent's jurisdiction. Any proceeding for suspension, revocation, denial, or nonrenewal of any license or authority is subject to the Administrative Procedure Act.

The Superintendent may issue subpoenas, administer oaths, and 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 Superintendent may petition a court of competent jurisdiction, and, upon proper showing, the court may enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the court order is punishable as contempt of court.

When making an examination under the act's new chapter regulating viatical settlements, the Superintendent may retain attorneys, appraisers, independent actuaries, independent certified public accountants, or other professionals and specialists as examiners, and the licensee that is the subject of the examination must bear the cost of those examiners. Examiners who are appointed by the Superintendent, but who are not Department of Insurance employees, must be compensated for their work, travel, and living expenses at reasonable and customary rates. (R.C. 3916.11(B)(2) to (4).)

Relationship to other actions

The act states that nothing contained in its new chapter regulating viatical settlements limits the Superintendent's authority to: (1) terminate or suspend an examination in order to pursue other legal or regulatory action pursuant to the Ohio insurance laws, or (2) use and, if appropriate, make public any final or preliminary examination report, any examiner or licensee working 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 that the

Superintendent, in the Superintendent's sole discretion, considers appropriate. Findings of fact and conclusions made pursuant to any examination are prima-facie evidence in any legal or regulatory action. (R.C. 3916.11(B)(5) and (6).)

Completion of examination

Upon completion of the examination under the act, the examiner in charge must file with the Superintendent a verified written *report of examination* (see below); the Superintendent must transmit the report to the licensee examined, together with a notice that affords the licensee examined a reasonable opportunity of not more than 30 days from receipt of the report to make a written submission or rebuttal with respect to any matters contained in the examination report. If the Superintendent determines that regulatory action is appropriate as a result of an examination, the Superintendent may initiate any proceedings or actions provided by law. Examination reports are to 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, agents, or other persons examined concerning its affairs, and the conclusions and recommendations that the examiners find reasonably warranted from the facts. (R.C.3916.11(C).)

Confidentiality, and use of materials or information

The act specifies that names and individual identification data for all viators are considered private and confidential information and cannot be disclosed by the Superintendent, unless required by law. Except as otherwise provided in the act's new chapter regulating viatical settlements or in the law of another state or jurisdiction that is substantially similar to that chapter, all examination reports, working papers, recorded information, documents, and copies of those reports, papers, information, documents, and copies produced by, obtained by, or disclosed to the Superintendent or to any other person in the course of an examination made under that chapter or under the law of another state or jurisdiction that is substantially similar to that chapter, or in the course of the Superintendent's analysis or investigation of the financial condition or market conduct of a licensee are confidential by law and privileged, are not a public record open for inspection under the preexisting Public Records Law, not changed by the act, are not subject to subpoena, and are not subject to discovery or admissible in evidence in any private civil action. The Superintendent may use the documents, materials, or other information in the furtherance of any regulatory or legal action brought as part of the Superintendent's official duties.

Documents, materials, or other information, including, but not limited to, all working papers, and copies of working papers, in the possession or control of the NAIC and its affiliates and subsidiaries are confidential by law and privileged,



are not subject to subpoena, and are not subject to discovery or admissible in evidence in any private civil action, if either of the following applies: (1) they are created, produced, or obtained by or disclosed to the NAIC and its affiliates and subsidiaries in the course of assisting an examination made under the act's new chapter regulating viatical settlements or assisting the Superintendent or the comparable official in another state in the analysis or investigation of the financial condition or market conduct of a licensee, or (2) the Superintendent or the comparable official in another state discloses them to the NAIC and its affiliates and subsidiaries under the provision described in the next paragraph. Neither the Superintendent nor any person that received the documents, material, or other information while acting under the Superintendent's authority, including the NAIC and its affiliates and subsidiaries, is permitted to testify in any private civil action concerning any confidential documents, materials, or information subject to the provisions described above.

In order to assist in the performance of the Superintendent's duties, the Superintendent may do any of the following: (1) share documents, materials, or other information, including the otherwise confidential and privileged documents described above, materials, or information, 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, if the recipient agrees to maintain the confidentiality and privileged status of the document, material, communication, or other information, (2) 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, or (3) enter into agreements governing sharing and use of information consistent with this section. The Superintendent must maintain as confidential or privileged any document, material, or information received under clause (2) of the preceding sentence 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.

The act states that no waiver of any applicable privilege or claim of confidentiality in the documents, materials, or information occurs as a result of disclosure to the Superintendent under the above-described confidentiality provisions or as a result of sharing as authorized in the preceding paragraph. A privilege established under the law of any state or jurisdiction that is substantially similar to the privilege established under the act is available and must be enforced in any proceeding in, and in any court of, Ohio.

The act states that nothing contained in its new chapter regulating viatical settlements prevents or prohibits the Superintendent from disclosing the content of



an examination report, preliminary examination report or results, or any matter relating to those reports or results, to the official of any other state or country that is comparable to the Superintendent, or to law enforcement officials of Ohio or any other state or agency of the federal government at any time, or to the NAIC, if the agency or office receiving the report or matters relating to it agrees in writing to hold it confidential and in a manner consistent with the new chapter. (R.C. 3916.11(D).)

Expenses of examination; sanctions for failure to maintain records

When a market conduct examination is made of an insurer under the act, the insurer must pay the expenses (see below) of the examination. The expenses of an examination include those incurred on or after the date on which the Superintendent notifies the insurer of the examination through the issuance of the final examination report. As used in this provision, "expenses" include all of the following: (1) compensation of examiners for each day or portion of a day worked, (2) travel and living expenses of examiners, (3) all other incidental expenses incurred by or on behalf of examiners, and (4) an allocated share of all expenses not described in clauses (1) to (3) that are necessarily incurred in the performance of a market conduct examination, including the expenses of direct overhead and support staff for examiners.

Upon an insurer's failure to retain copies of specified records for five years, as required under the act (see **Record retention by licensed viatical settlement providers and brokers**," above), the Superintendent may initiate proceedings in accordance with the Administrative Procedure Act to revoke, suspend, or refuse to renew the certificate of authority or license of the insurer. Additionally, the Superintendent may request the Attorney General to initiate a civil action in the court of common pleas of Franklin County to obtain and enforce a judgment for expenses incurred in the performance of a market conduct examination. (R.C. 3916.11(F).)

Immunities, and attorneys fees and costs

The act specifies that no cause of action arises and that no liability may be imposed against the Superintendent, any authorized representative of the Superintendent, or any examiner appointed by the Superintendent for any statements made or conduct performed in good faith while carrying out the provisions of its new chapter regulating viatical settlements. Further, the act specifies that no cause of action arises and that no liability may be imposed against any person for the act of communicating or delivering information or data to the Superintendent, any authorized representative of the Superintendent, or any examiner appointed by the Superintendent pursuant to an examination made under its new chapter regulating viatical settlements, if the act of communication or

delivery was performed in good faith and without fraudulent intent or the intent to deceive; the act states that this provision does not abrogate or modify in any way any common law or statutory privilege or immunity previously enjoyed by any person identified in the first sentence of this paragraph.

A person identified in either provision described in the preceding paragraph is entitled to an award of attorney's fees and costs if the person is the prevailing party in a civil action for libel, slander, or any other relevant tort arising out of activities in carrying out the provisions of the act's new chapter regulating viatical settlements and the party bringing the action was not substantially justified in bringing the action. For purposes of this provision, a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated. (R.C. 3916.11(G).)

Superintendent's investigations

The act authorizes the Superintendent to investigate suspected fraudulent viatical settlement acts and persons engaged in the business of viatical settlements (R.C. 3916.11(N)).

Annual statements of licensed viatical settlement providers and brokers

The act requires each viatical settlement provider and viatical settlement broker licensed under its new chapter regulating viatical settlements to file with the Superintendent, on or before March 1 of each year, an annual statement containing the information required by the Superintendent by rule adopted in accordance with the Administrative Procedure Act (R.C. 3916.12).

Confidentiality of insured's identity

Under the act, except as otherwise permitted or required by law, a viatical settlement provider, viatical settlement broker, insurance company, insurance agent, insurance broker, information bureau, rating agency or company, or any other person with actual knowledge of an insured's identity, is prohibited from disclosing that identity as an insured, including the insured's name and individual identification data, or the insured's financial or medical information, unless any of the following apply (R.C. 3916.13):

(1) The disclosure is necessary to effect a viatical settlement between the viator and a viatical settlement provider, and the viator and insured have provided prior written consent to the disclosure.

(2) The disclosure is provided in response to an investigation or examination by the Superintendent or by any other governmental officer or agency or pursuant to the requirements of the act.



(3) The disclosure is a term of, or condition to, the transfer of a viaticated policy by one viatical settlement provider to another viatical settlement provider.

(4) The disclosure is necessary to permit a financing entity, related provider trust, or special purpose entity to finance the purchase of policies or certificates by a viatical settlement provider, and the viator and insured have provided prior written consent to the disclosure.

(5) The disclosure is necessary to allow the viatical settlement provider or viatical settlement broker or their authorized representatives to make contacts for the purpose of determining health status.

(6) The disclosure is required to purchase stop-loss coverage.

Examinations--frequency, subjects, and any foreign or alien licensee

The act permits the Superintendent to conduct an examination under its new chapter regulating viatical settlements of a licensed viatical settlement provider or broker as often as the Superintendent in the Superintendent's sole discretion considers appropriate.

For the purposes of completing an examination of a licensee under that new chapter, the Superintendent may examine or investigate any person, or the business of any person, insofar as the examination or investigation, in the sole discretion of the Superintendent, is necessary or material to the examination of the licensee.

In lieu of an examination under the new chapter of any foreign or alien licensee, the Superintendent, at the Superintendent's discretion, may accept an examination report on the licensee as prepared by the official of the licensee's state of domicile or port-of-entry state who is comparable to the Superintendent.

The licensee or applicant must pay to the Superintendent all costs, assessments, forfeitures, or fines incurred in conducting an examination under the above-described provisions. The Superintendent must deposit the money into the State Treasury to the credit of the preexisting Department of Insurance Operating Fund, not changed by the act. (R.C. 3916.14.)

Refusal to issue, or suspension, revocation, or refusal to renew, a license

Refusal, suspension, or revocation in general

The act permits the Superintendent to refuse to issue or to suspend, revoke, or refuse to renew the license of a viatical settlement provider or viatical



settlement broker, if the Superintendent finds that any of the following apply (R.C. 3916.15(A)):

(1) There was a material misrepresentation in the application for the license.

(2) The applicant or licensee or any officer, partner, member, key management personnel, or designee of the applicant or licensee has been convicted of fraudulent or dishonest practices, is subject to a final administrative action in another state, or is otherwise shown to be untrustworthy or incompetent.

(3) The licensee is a viatical settlement provider that demonstrates a pattern of unreasonable payments to viators.

(4) The licensee or any officer, partner, member, key management personnel, or designee of the licensee has been convicted of or has pleaded guilty or no contest to a felony or to a misdemeanor involving fraud, moral turpitude, dishonesty, or breach of trust, regardless of whether a judgment of conviction has been entered by the court.

(5) The licensee is a viatical settlement provider that has used a viatical settlement contract form that has not been approved under the act.

(6) The licensee is a viatical settlement provider that 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 is a viatical settlement provider that has assigned, transferred, or pledged a viaticated policy to a person that is not a viatical settlement provider licensed in Ohio, a financing entity, a special purpose entity, or a related provider trust.

(9) The licensee or any officer, partner, member, key management personnel, or designee of the licensee has violated any provision of the act's new chapter regulating viatical settlements or any rule adopted under that chapter.

(10) The licensee or any officer, partner, member, key management personnel, or designee of the licensee has committed any coercive, fraudulent, or dishonest act, or made any untrue, deceptive, or misleading statement, in connection with a viatical transaction or a proposed viatical transaction.



Special rules for notices and hearings

Before the Superintendent refuses to issue a license under the act's new chapter regulating viatical settlements, or suspends, revokes, or refuses to renew the license of a viatical settlement provider or viatical settlement broker, the Superintendent must provide the licensee or applicant with notice and an opportunity for hearing as provided in the Administrative Procedure Act, except as follows:

(1) Any notice of opportunity for hearing, the hearing officer's findings and recommendations, or the Superintendent's order must be served by certified mail at the last known address of the licensee or applicant. Service must be evidenced by return receipt signed by any person. For purposes of this provision, the "last known address" is the address that appears in the licensing records of the Department of Insurance.

If the certified mail envelope is returned with an endorsement showing that service was refused, or that the envelope was unclaimed, the notice and all subsequent notices required by the Administrative Procedure Act may be served by ordinary mail to the last known address of the licensee or applicant. The mailing must be evidenced by a certificate of mailing. Service is deemed complete as of the date of such certificate provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery. The time period in which to request a hearing, as provided in the Administrative Procedure Act, begins to run on the date of mailing.

If service by ordinary mail fails, the Superintendent may cause a summary of the substantive provisions of the notice to be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the last known place of residence or business of the licensee or applicant is located. The notice is considered served on the date of the third publication.

Any notice required to be served under the Administrative Procedure Act also must be served upon the attorney of the licensee or applicant by ordinary mail if the attorney has entered an appearance in the matter. The Superintendent may, at any time, perfect service on a licensee or applicant by personal delivery of the notice by an employee of the Department of Insurance.

Notices regarding the scheduling of hearings and all other matters not described in the first paragraph under (1) must be sent by ordinary mail to the licensee or applicant and to the attorney of the licensee or applicant.

(2) Any subpoena for the appearance of a witness or the production of documents or other evidence at a hearing, or for the purpose of taking testimony



for use at a hearing, must be served by certified mail, return receipt requested, by an attorney or by an employee of the Department of Insurance designated by the Superintendent. Such subpoenas must be enforced in the manner provided in R.C. 119.09 of the Administrative Procedure Act. The act states that nothing in the above-described provisions may be construed as limiting the Superintendent's other statutory powers to issue subpoenas. (R.C. 3916.15(B).)

Conditions to be met prior to entering into a viatical settlement contract

The act provides that it is a violation of its new chapter regulating viatical settlements for any person to enter into a viatical settlement contract within a two-year period commencing with the date of issuance of the insurance policy or certificate unless the viator certifies to the viatical settlement provider that one or more of the following conditions have been met within that two-year period:

(1) The policy or certificate was issued upon the viator's exercise of conversion rights arising out of a group policy or certificate, provided the total of the time covered under the conversion policy or certificate plus the time covered under the group policy or certificate is at least 24 months. The time covered under the group policy or certificate must 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 is a charitable organization exempt from taxation under 26 U.S.C. section 501(c)(3).

(3) The viator is not an individual.

(4) The viator submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within that two-year period: (a) the viator or insured is terminally or chronically ill, (b) the viator's spouse dies, (c) the viator divorces the viator's spouse, (d) the viator retires from full-time employment, (e) the viator becomes physically or mentally disabled, and a physician determines that the disability prevents the viator from maintaining full-time employment, (f) the viator was the insured's employer at the time the policy or certificate was issued, and the employment relationship terminated, (g) a court of competent jurisdiction enters a final order, judgment, or decree on the application of a creditor of the viator and adjudicates the viator bankrupt or insolvent or approves a petition seeking reorganization of the viator or appointing a receiver, trustee, or liquidator to all or a substantial part of the viator's assets, (h) the viator experiences a significant decrease in income that is unexpected and that impairs the viator's reasonable ability to pay the policy premium, or (i) the viator or insured disposes of the viator's or insured's ownership interests in a closely held corporation.



Copies of the independent evidence described in (4), above, and documents otherwise required under a specified provision of the act must be submitted to the insurer when the viatical settlement provider submits a request to the insurer for verification of coverage. The copies must 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.

If the viatical settlement provider submits to the insurer a copy of the owner or insured's certification described in (4), above, when the provider submits a request to the insurer to effect the transfer of the policy or certificate to the viatical settlement provider, the copy conclusively establishes that the viatical settlement contract satisfies the requirements described in this part of the analysis, and the insurer must timely respond to the request. (R.C. 3916.16.)

Regulation of advertising

Purpose and application of advertising provisions

The act contains a provision that states that the General Assembly declares that the purpose of the act's provisions regarding *advertising* (see "**Definitions**," below), as described in this part of the analysis, is to provide prospective viators with clear and unambiguous statements in the advertisement of viatical settlements and to assure the clear, truthful, and adequate disclosure of the benefits, risks, limitations, and exclusions of any viatical settlement contract. This purpose is intended to be accomplished by the establishment of guidelines and standards of permissible and impermissible conduct in the advertising of viatical settlements to assure that product descriptions are presented in a manner that prevents unfair, deceptive, or misleading advertising and is conducive to accurate presentation and description of viatical settlements through the advertising media and material used by viatical settlement licensees.

The act states that its advertising provisions described below apply to any advertising of viatical settlement contracts, or any related products or services intended for dissemination in Ohio, including, but not limited to, Internet advertising viewed by persons located in Ohio. In cases in which disclosure requirements are established pursuant to federal regulation, the act's advertising provisions are to be interpreted so as to minimize or eliminate conflict with federal regulation wherever possible. (R.C. 3916.17(A).)

General advertising requirements

Under the act, every viatical settlement licensee must establish and at all times must 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 they are written, created, designed, or presented, are the responsibility of the viatical settlement licensee and of the individual who created or presented the advertisement. A system of control must include regular routine notification, at least once a year, to agents and others authorized by the viatical settlement licensee who disseminate advertisements of the requirements and procedures for approval prior to the use of any advertisements not furnished by the viatical settlement licensee.

All advertisements that are subject to the act's provisions must be truthful and not misleading in fact or by implication. The form and content of an advertisement of a viatical settlement contract must be sufficiently complete and clear so as to avoid deception and must not have the capacity or tendency to mislead or deceive. The determination of whether an advertisement has the capacity or tendency to mislead or deceive is to be made by the Superintendent, 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. (R.C. 3916.17(B) and (C).)

Advertisements that are false and misleading on their face

The act specifies that viatical settlement advertisements containing any representation set forth below are deemed false and misleading on their face and are prohibited. False and misleading viatical settlement advertisements include, but are not limited to, those including any of 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 (SEPs), 403(b), Keogh plans, TSA, or other retirement account rollovers," "tax deferred," or similar representations, (4) utilization of the word "guaranteed" to describe the fixed return, annual return, principal, earnings, profits, investment, or similar representations, (5) "no sales charges or fees" or similar representations, (6) "high yield," "superior return," "excellent return," "high return," "quick profit," or similar representations, or (7) purported favorable representations or testimonials about the benefits of viatical settlement contracts or viatical settlement purchase agreements as an investment, taken out of context from any newspaper, trade paper, journal, radio or television program, or any other form of print and electronic media (R.C. 3916.17(D)).

Presentation of information in advertisement; prohibited content; testimonials; etc.

The information required to be disclosed under the act's advertisement provisions cannot 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. An advertisement cannot omit material information or use any 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, that 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 any misleading statements.

An advertisement cannot do any of the following: (1) use the name or title of a life insurance company or a life insurance policy unless the advertisement has been approved by the insurer, (2) represent that any premium payments will not be required to be paid on the life insurance policy that is the subject of a viatical settlement contract or viatical settlement purchase agreement in order to maintain that policy, unless that is the fact, (3) state or imply that interest charged on an accelerated death benefit or a policy loan is unfair, inequitable, or in any manner an incorrect or improper practice, (4) contain statistical information unless the information accurately reflects recent and relevant facts (the source of all statistics used in an advertisement must be identified), (5) disparage any insurer, viatical settlement provider, viatical settlement broker, viatical settlement investment agent, insurance producer, policy, service, or method of marketing, (6) 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, or (7) create the impression that the viatical settlement provider, its financial condition or status, the payment of its claims, or the merits, desirability, or advisability of its viatical settlement contracts are recommended or endorsed by any government entity.

The words "free," "no cost," "without cost," "no additional cost," "at no extra cost," or words of similar import cannot 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.



Testimonials, appraisals, analyses, or endorsements used in advertisements must satisfy all of the following: (1) they must be genuine, (2) they must represent the current opinion of the author, (3) they must be applicable to the viatical settlement contract product or service advertised, if any, and (4) they must be accurately reproduced with sufficient completeness to avoid misleading or deceiving prospective viators as to the nature or scope of the testimonials, appraisals, analyses, or endorsements. In using testimonials, appraisals, analyses, or endorsements, the viatical settlement licensee makes as its own all the statements contained in the testimonials, appraisals, analyses, or endorsements, and the statements are subject to all of the act's advertisement provisions. If the individual making a testimonial, appraisal, analysis, or 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 must be prominently disclosed in the advertisement.

An advertisement cannot 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 the individual, society, association, or organization and the viatical settlement provider is disclosed. If the entity making the endorsement or testimonial is owned, controlled, or managed by the viatical settlement provider, or receives any payment or other consideration from the viatical settlement provider for making an endorsement or testimonial, that fact must be disclosed in the advertisement. When an endorsement refers to benefits received under a viatical settlement contract, all pertinent information must be retained for a period of at least five years after its use.

All advertisements about a viatical settlement provider or its viatical settlement contract, products, or services must clearly identify the viatical settlement provider's name. If any specific viatical settlement contract is advertised, the viatical settlement contract must 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 must be shown on the application.

An advertisement cannot use a trade name, group designation, name of the parent company of a viatical settlement licensee, name of a particular division of the viatical settlement licensee, service mark, slogan, symbol, or other device or reference without disclosing the name of the viatical settlement licensee, if either of the following applies regarding the advertisement: (1) it would have the capacity or tendency to mislead or deceive as to the true identity of the viatical settlement licensee, or (2) it would have the capacity or tendency to create the

impression that a company other than the viatical settlement licensee would have any responsibility for the financial obligation under a viatical settlement contract.

An advertisement may state that a viatical settlement provider is licensed in the state in which the advertisement appears, provided it does not exaggerate that fact or suggest or imply that competing viatical settlement providers may not be so licensed. The advertisement may ask the audience to consult the licensee's web site or contact the Department of Insurance to find out if the state in which the advertisement appears requires licensing and, if it does, whether the viatical settlement provider or viatical settlement broker is licensed.

All advertisements of an actual licensee must state the name of the actual licensee. An advertisement cannot 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.

An advertisement cannot directly or indirectly create the impression that any division or agency of Ohio, any other state, or the United States government endorses, approves, or favors any of the following: (1) any viatical settlement licensee or its business practices or methods of operation, (2) the merits, desirability, or advisability of any viatical settlement contract, or viatical settlement program, (3) any viatical settlement contract, or viatical settlement program, or (4) any life insurance policy or certificate or life insurance company.

If the advertiser emphasizes the speed with which the viatication will occur, the advertising must disclose the average time frame, from completed application to the date of offer and from acceptance of the offer to receipt of the funds by the viator. If the advertising emphasizes the dollar amounts available to viators, the advertising must disclose the average purchase price as a per cent of face value obtained by viators contracting with the licensee during the past six months. (R.C. 3916.17(E) to (P).)

Fraudulent viatical settlement acts and related provision

Prohibitions

The act contains the following prohibitions related to *fraudulent viatical settlement acts* (see "Definitions," below): (1) a prohibition against any person committing a fraudulent viatical settlement act, (2) a prohibition against any person knowingly or intentionally interfering with the enforcement of the provisions of the act's new chapter regulating viatical settlements or investigations



of suspected or actual violations of the new chapter, and (3) a prohibition against a person in the business of viatical settlements knowingly or intentionally permitting any person convicted of a felony involving dishonesty or breach of trust to participate in the business of viatical settlements. It specifies that a person who violates the prohibition contained in clause (1) is guilty of the offense of "theft" under existing law. (R.C. 3916.18(A) and 3916.99(B).)

Required warning

Under the act, each viatical settlement contract and each application for a viatical settlement, regardless of the form of transmission, must contain a warning, in a specified form, that 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 imprisonment. The lack of such a statement does not constitute a defense in any prosecution for a fraudulent viatical settlement act. (R.C. 3916.18(B).)

Reporting fraud to superintendent

The act requires every 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 to provide to the Superintendent the information required by the Superintendent. The person must provide the information in a manner prescribed by the Superintendent. Every 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 Superintendent the information required by the Superintendent. The person must provide the information under this provision in a manner prescribed by the Superintendent. (R.C. 3916.18(C).)

Qualified immunity regarding information about fraud; attorney's fees and costs

The act states that no civil liability may be imposed on, and no cause of action may arise from, a person's furnishing information concerning suspected, anticipated, or completed fraudulent viatical settlement acts or suspected or completed fraudulent insurance acts, if the information is provided to or received from any of the following: (1) the Superintendent, or the Superintendent's employees, agents, or representatives, (2) law enforcement or regulatory officials of Ohio, another state, the United States, or a political subdivision of Ohio or another state, or any employee, agent, or representative of any of those officials, (3) a person involved in the prevention and detection of fraudulent viatical settlement acts or any agent, employee, or representative of any person so involved, (4) the NAIC, the National Association of Securities Dealers, the North



American Securities Administrators Association, any employee, agent, or representative of any of those associations, or other regulatory body overseeing life insurance, viatical settlements, securities, or investment fraud, or (5) the life insurer that issued the life insurance policy or certificate covering the life of the insured.

The immunity described in the preceding paragraph does not apply to any statement 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 must plead specifically any allegation that the immunity described in the preceding paragraph does not apply because the person filing the report or furnishing the information did so with actual malice. If a person is the prevailing party in a civil action for libel, slander, or any other relevant tort arising out of activities in carrying out the provisions of the act's new chapter regulating viatical settlements, if the prevailing party is a person identified in the preceding paragraph and the immunity described in that paragraph applies to the person, and if the party who brought the action was not substantially justified in doing so, the person who is the prevailing party is entitled to an award of attorney's fees and costs arising out of the action (for purposes of this provision, an action is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated). The act states that the above-described provisions do not abrogate or modify any common law or statutory privilege or immunity enjoyed by a person described in the preceding paragraph. (R.C. 3916.18(D).)

Confidentiality of information

The documents and evidence provided pursuant to the provisions of the act described in the two preceding paragraphs or obtained by the Superintendent in an investigation of any suspected or actual fraudulent viatical settlement act is privileged and confidential, is not a public record open for inspection under the preexisting Public Records Law, and is not subject to discovery or subpoena in a civil or criminal action.

The provision described in the preceding paragraph does not prohibit release by the Superintendent of any document or evidence obtained in an investigation of suspected or actual fraudulent viatical settlement acts, in any of the following manners or circumstances: (1) in any administrative or judicial proceeding to enforce any laws administered by the Superintendent, (2) to any law enforcement or regulatory agency of Ohio, another state, the United States, or a political subdivision of Ohio or another state, to an organization established for the purpose of detecting and preventing fraudulent viatical settlement acts, or to the NAIC, or (3) at the discretion of the Superintendent, to a person in the business of viatical settlements that is aggrieved by a fraudulent viatical settlement act.



Release of documents and evidence under the provision described in this paragraph does not abrogate or modify the privilege granted in the provision described in the preceding paragraph. (R.C. 3916.18(E).)

Relationship to other authority, powers, and duties

The act states that the provisions of its new chapter regulating viatical settlements do not do any of the following: (1) preempt the authority or relieve the duty of any other law enforcement or regulatory agencies to investigate, examine, or prosecute suspected violations of law, (2) prevent or prohibit a person from disclosing voluntarily any information concerning viatical settlement fraud to a law enforcement or regulatory agency other than the Department of Insurance, or (3) limit any power granted elsewhere by Ohio law to the Superintendent or an insurance fraud unit to investigate and examine possible violations of law and to take appropriate action against wrongdoers (R.C. 3016.18(F)).

Antifraud initiatives

The act requires viatical settlement providers and viatical settlement brokers to adopt and have in place antifraud initiatives reasonably calculated to detect, prosecute, and prevent fraudulent viatical settlement acts. At the discretion of the Superintendent, the Superintendent may order, or a licensee may request and the Superintendent may grant, any modifications of the following required initiatives described in (1) and (2), below, that are 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 the act's antifraud provisions. Antifraud initiatives under this provision must include all of the following:

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

(2) An antifraud plan that includes, but is not limited to, all of the following: (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 Superintendent, (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.

The Superintendent, by rule adopted under the Administrative Procedure Act, may require that antifraud plans required under the preceding paragraph be submitted to the Superintendent. If the Superintendent requires that such plans be submitted to the Superintendent, the plans so submitted are privileged and confidential, are not a public record open for inspection under the Public Records Law, and are not subject to discovery or subpoena in a civil or criminal action. (R.C. 3916.18(G).)

Enforcement of the act's new chapter regulating viatical settlements, and imposition of civil penalties

The act provides that, in addition to the penalties and other enforcement provisions contained in its new chapter regulating viatical settlements, if any person violates any provision of that chapter or any rule or regulation implementing any provision of that chapter, the Superintendent may seek an injunction in a court of competent jurisdiction and may apply for any temporary or permanent order that the Superintendent determines is necessary to restrain the person from committing the violation.

Further, any person damaged by any act of a person in violation of any provision of the new chapter may bring a civil action against the person committing the violation in a court of competent jurisdiction. A civil action brought under this provision does not preclude the Superintendent from exercising any regulatory, enforcement, or other authority available to the Superintendent under the new chapter.

The act specifies that, in addition to the penalties and other enforcement provisions contained in the new chapter, any person who violates any provision of that chapter is subject to a civil penalty of up to \$10,000 per violation. Imposition of civil penalties described in this paragraph must be pursuant to an order of the Superintendent issued under the Administrative Procedure Act. The Superintendent's order may require a person found to be in violation of the new chapter to make restitution to persons aggrieved by violations. (R.C. 3916.19.)

Adoption of rules by the Superintendent

The act authorizes the Superintendent to adopt rules in accordance with the Administrative Procedure Act for purposes of implementing the act's new chapter regulating viatical settlements, including, but not limited to, rules that do the following (R.C. 3916.20)):

(1) Govern the relationship and responsibilities of both insurers and viatical settlement providers and viatical settlement brokers during the viatication of a life insurance policy or certificate;

(2) Establish standards for evaluating the reasonableness of payments under viatical settlement contracts for persons with a terminal or chronic illness or condition. This authority includes, but is not limited to, the regulation of discount rates used to determine the amount paid in exchange for the assignment, transfer, sale, devise, or bequest of a benefit under a life insurance policy or certificate.

(3) Establish appropriate licensing requirements, fees, and standards for continued licensure for viatical settlement providers and viatical settlement brokers;

(4) Require a bond or other mechanism for ensuring the financial accountability of viatical settlement providers and viatical settlement brokers.

Unfair and deceptive act or practice in the business of insurance

The act prohibits any person from failing to comply with its new chapter regulating viatical settlements, and specifies that any person who violates the prohibition is deemed to have engaged in an "unfair and deceptive act or practice in the business of insurance" under preexisting R.C. 3901.19 to 3901.26, not in the act (R.C. 3916.21).

Definitions

The act defines the following terms for use in the new chapter it enacts regulating viatical settlements (R.C. 3916.01):

(1) "Advertising" means any written, electronic, or printed communication or any communication by means of recorded telephone messages or transmitted on radio, television, the Internet, or similar communications media, including, but not limited to, film strips, motion pictures, and videos, that is directly or indirectly published, disseminated, circulated, or placed before the public for the purpose of creating an interest in or inducing a person to sell a life insurance policy pursuant to a viatical settlement contract.

(2) "Business of viatical settlements" means an activity involved in the offering, solicitation, negotiation, procurement, effectuation, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, or hypothecating of viatical settlement contracts or purchase agreements or any similar activity related to viatical settlement contracts or purchase agreements.

(3) "Chronically ill" means any of the following:



(a) Being unable to perform at least two activities of daily living, including, but not limited to, eating, toileting, transferring, bathing, dressing, or continence;

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

(c) Having a level of disability similar to that described in paragraph (3)(a), above, as determined by the United States Secretary of Health and Human Services;

(4) "Financing entity" means an underwriter, placement agent, lender, purchaser of securities, purchaser of a policy or certificate from a viatical settlement provider, credit enhancer, or any other person that has a direct ownership interest in a policy or certificate that is the subject of a viatical settlement contract and to which both of the following apply: (a) its principal activity related to the transaction is providing funds to effect the viatical settlement or the purchase of one or more viaticated policies, and (b) it has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of viatical settlement contracts. "Financing entity" does not include a non-accredited investor or viatical settlement purchaser.

(5) "Fraudulent viatical settlement act" means an act or omission committed by any person who, knowingly or with intent to defraud and for the purpose of depriving another of property or for pecuniary gain, commits, or permits any of its employees or agents to commit, any of the following acts:

(a) Presenting, causing to be presented, or preparing with knowledge or belief that it will be presented to or by a viatical settlement provider, viatical settlement broker, viatical settlement purchaser, financing entity, insurer, insurance broker, insurance agent, or any other person, any false material information, or concealing any 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 or certificate, (ii) the underwriting of a viatical settlement contract or insurance policy or certificate, (iii) a claim for payment or benefit pursuant to a viatical settlement contract or insurance policy or certificate, (iv) any premiums paid on an insurance policy or certificate, (v) any payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract or insurance policy or certificate, (vi) the reinstatement or conversion of an insurance policy or certificate, (vii) the solicitation, offer, effectuation, or sale of a viatical settlement contract or insurance policy or certificate, (viii) the issuance of written evidence of a viatical settlement contract or insurance policy or certificate, or (ix) a financing transaction.



(b) In the furtherance of a fraud or to prevent the detection of a fraud, doing any of the following: (i) removing, concealing, altering, destroying, or sequestering from the Superintendent the assets or records of a licensee or another person engaged in the business of viatical settlements, (ii) misrepresenting or concealing the financial condition of a licensee, financing entity, insurer, or any other person, (iii) transacting the business of viatical settlements in violation of any law of Ohio requiring a license, certificate of authority, or other legal authority for the transaction of the business of viatical settlements, or (iv) filing with the Superintendent or the chief insurance regulatory official of another jurisdiction a document containing false information or otherwise concealing from the Superintendent any information about a material fact.

(c) Presenting, causing to be presented, or preparing with knowledge or reason to believe that it will be presented, to or by a viatical settlement provider, viatical settlement broker, insurer, insurance agent, financing entity, viatical settlement purchaser, or any other person, in connection with a viatical settlement transaction or insurance transaction, an insurance policy or certificate that the actor knows was fraudulently obtained by the insured, the owner, or any agent of the insured or owner;

(d) Committing any embezzlement, theft, misappropriation, or conversion of moneys, funds, premiums, credits or other property of a viatical settlement provider, insurer, insured, viator, insurance policyowner, or any other person engaged in the business of viatical settlements or insurance;

(e) Attempting to commit, assisting, aiding or abetting in the commission of, or conspiracy to commit any act or omission specified in paragraphs (5)(a) to (d), above.

(6) Notwithstanding the general Revised Code definition of person, "person" means a natural person or a legal entity, including, but not limited to, an individual, partnership, limited liability company, association, trust, or corporation.

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

(8) "Related provider trust" means a titling trust or any other trust established by a licensed viatical settlement provider or a financing entity for the sole purpose of holding ownership or beneficial interest in purchased policies in connection with a financing transaction, provided that the trust has 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 Superintendent as if those records and files were maintained directly by the licensed viatical settlement provider.

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

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

(11) "Viatical settlement broker" means a person that, on behalf of a viator and for a fee, commission, or other valuable consideration, offers or attempts to negotiate viatical settlements between a viator and one or more viatical settlement providers. "Viatical settlement broker" does not include an attorney, a certified public accountant, or a financial planner accredited by a nationally recognized accreditation agency, who is retained to represent the viator and whose compensation is not paid directly or indirectly by the viatical settlement provider or purchaser.

(12) "Viatical settlement contract" means any of the following: (a) a written agreement establishing the terms under which compensation or any thing of value, that is less than the expected death benefit of the insurance policy or certificate will be paid in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance, (b) a contract for a loan or any other financing transaction secured primarily by an individual or group life insurance policy or certificate, 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 or certificate, or (c) an agreement to transfer ownership or change the beneficiary designation of the policy or certificate at a later date, regardless of the date that compensation is paid to the viator.

(13) "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 any of the following: (a) a bank, savings bank, savings and loan association, credit union, or other financial institution that takes an assignment of a life insurance policy or certificate as collateral for a loan, (b) the issuer of a life insurance policy or certificate providing accelerated benefits as defined in R.C. 3915.21 and pursuant to the contract, (c) an individual who enters into or effectuates not more than one agreement in any calendar year for the



transfer of life insurance policies or certificates for any value less than the expected death benefit, (d) an authorized or eligible insurer that provides stop loss coverage to a viatical settlement provider, purchaser, financing entity, special purpose entity, or related provider trust, (e) a financing entity, (f) a special purpose entity, (g) a related provider trust, or (h) a viatical settlement purchaser.

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

(15) "Viator" means the owner of a life insurance policy or a certificate holder under a group policy who, in return for compensation or any thing of value that is less than the expected death benefit of the policy or certificate, assigns, transfers, sells, devises, or bequests the death benefit or ownership of any portion of the insurance policy or certificate of insurance. For the purposes of the act's new chapter regulating viatical settlements, a "viator" is not limited to an owner of a life insurance policy or a certificate holder under a group policy insuring the life of an individual with a terminal or chronic illness or condition except where specifically addressed. "Viator" does not include any of the following: (a) a licensee under the new chapter, (b) an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Securities Act of 1933, (c) a financing entity, (d) a special purpose entity, or (e) a related provider trust.

(16) "Viatical settlement purchaser" means a person who gives a sum of money as consideration for a life insurance policy or an interest in the death benefits of a life insurance policy, or a person who owns, acquires, or is entitled to a beneficial interest in a trust that owns a viatical settlement contract or is the beneficiary of a life insurance policy that has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit. "Viatical settlement purchaser" does not include any of the following: (a) a licensee under the act's new chapter regulating viatical settlements, (b) an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Securities Act of 1933, (c) a financing entity, (d) a special purpose entity, or (e) a related provider trust.

(17) "Licensee" means a person licensed under the act's new chapter regulating viatical settlements.

(18) "NAIC" means the National Association of Insurance Commissioners.

(19) "Securities Act of 1933" has the same meaning as in preexisting R.C. 1707.01, not changed by the act.



CHANGES TO OHIO SECURITIES LAW

Designation of "life settlement interest" as a "security" under the Ohio Securities Law

Formerly

Under preexisting law, unchanged by the act, as used in the Ohio Securities Law (R.C. Chapter 1707.), "security" means any certificate or instrument that represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property, or credit of any person or of any public or governmental body, subdivision, or agency. Formerly, the definition specified that "security" included shares of stock, certificates for shares of stock, membership interests in limited liability companies, voting-trust certificates, warrants and options to purchase securities, subscription rights, interim receipts, interim certificates, promissory notes, all forms of commercial paper, evidences of indebtedness, bonds, debentures, land trust certificates, fee certificates, leasehold certificates, syndicate certificates, endowment certificates, certificates or written instruments in or under profit-sharing or participation agreements or in or under oil, gas, or mining leases, or certificates or written instruments of any interest in or under the same, receipts evidencing preorganization or reorganization subscriptions, preorganization certificates, reorganization certificates, certificates evidencing an interest in any trust or pretended trust, any investment contract, any instrument evidencing a promise or an agreement to pay money, warehouse receipts for intoxicating liquor, and the currency of any government other than those of the United States and Canada. (R.C. 1707.01(B).)

Operation of the act

The act expands the list of things that are examples of a "security" so that it also includes "any life settlement interest" (R.C. 1707.01(B)). The inclusion of "life settlement interest" within that list of examples of a security makes that type of interest subject to most, if not all, of the provisions of the Ohio Securities Law (R.C. Chapter 1707.) (see *Overview of Ohio Securities Law*," below). The act defines "life settlement interest" as meaning the entire interest or any fractional interest in an insurance policy or certificate of insurance, or in an insurance benefit under such a policy or certificate, that is the subject of a life settlement contract. For the purposes of the prior definition, "life settlement contract" means an agreement for the purchase, sale, assignment, transfer, devise, or bequest of any portion of the death benefit or ownership of any life insurance policy or contract, in return for consideration or any other thing of value that is less than the expected death benefit of the life insurance policy or contract. (R.C. 1707.01(NN).)



The act specifies that "life settlement contract" includes a "viatical settlement contract," as defined in the new chapter the act enacts to regulate viatical settlements (see "Regulation of viatical settlements," above), but does not include any of the following (R.C. 1707.01(NN)):

(1) A loan by an insurer under the terms of a life insurance policy, including, but not limited to, a loan secured by the cash value of the policy;

(2) An agreement with a bank that takes an assignment of a life insurance policy as collateral for a loan;

(3) The provision of accelerated benefits as defined in a preexisting provision of the Insurance Law;

(4) Any agreement between an insurer and a reinsurer;

(5) An agreement by an individual to purchase an existing life insurance policy or contract from the original owner of the policy or contract, if the individual does not enter into more than one life settlement contract per calendar year.

(6) The initial purchase of an insurance policy or certificate of insurance from its owner by a viatical settlement provider that is licensed under the act.

Exempt securities

Formerly

Under preexisting R.C. 1707.02, there are certain securities that are exempt from the Ohio Securities Law's registration requirements in R.C. 1707.08 to 1707.11 as well as R.C. 1707.39.

Formerly, the provision specified in R.C. 1707.02(E)(1) that one of the exempt securities was any security, whether a preliminary or final security, which, at the time of sale within Ohio was listed, or listed upon notice of issuance, on the Cincinnati Stock Exchange, the Midwest Stock Exchange, the New York Stock Exchange, or the American Stock Exchange, or was designated, or approved for designation upon notice of issuance, as a national market system security on the NASDAQ system, or was listed or designated on any other stock exchange or national quotation system approved by the Division of Securities as having listing requirements substantially equivalent to those of any one of those exchanges or systems. Any security senior to any security so listed or designated was also exempt. These exemptions applied only so long as such security remained so listed or designated pursuant to official action of such exchange or system and not

under suspension, and only so long as such exchange or system remained approved under R.C. 1707.02.

Formerly, the law permitted the Division of Securities to revoke the approval of an exchange or system approved in R.C. 1707.02 or approved by it upon a finding, after due notice, investigation, and hearing, that the practices or requirements of such exchange or system had been so changed or modified, or were, in their actual operation, such that the contemplated protection was no longer afforded. (R.C. 1707.02(E)(3).) Formerly, the law also allowed the Division of Securities to suspend the exemption of any security described above by giving notice, by certified mail, to that effect to the exchange or system upon which such security was listed or designated and to the issuer of such security. After notice and hearing, the Division could revoke such exemption if it appeared to it that sales of such security had been fraudulent or that future sales of it would be fraudulent. The Division was required to set such hearing not later than ten days from the date of the order of suspension, but for good cause could continue such hearing upon application of the exchange or system upon which such security was listed or designated or upon application of the issuer of such security. (R.C. 1707.02(E)(4).)

Operation of the act

The act replaces the above-described exemption with an exemption for a security that meets any of the following requirements (R.C. 1707.02(E)(1)):

(1) The security is listed, or authorized for listing, on the New York Stock Exchange, the American Stock Exchange, or the national market system of the NASDAQ stock market, or any successor to such entities.

(2) The security is listed, or authorized for listing, on a national securities exchange or system, or on a tier or segment of such exchange or system, designated by the Securities and Exchange Commission in rule 146(b) promulgated under section 18(b)(1) of the Securities Act of 1933.

(3) The security is listed, or authorized for listing, on a national securities exchange or system, or on a tier or segment of such exchange or system, that has listing standards that the Division of Securities, on its own initiative or on the basis of an application, determines by rule are substantially similar to the listing standards applicable to securities described in paragraph (1), above.

(4) The security is a security of the same issuer that is equal in seniority or that is a senior security to a security described in paragraph (1), (2), or (3), above.



The act modifies the Division's former ability to revoke the approval of an exchange or system approved in R.C. 1707.02 , as described above, by specifying that the Division may revoke the approval of an exchange or system of a type enumerated in (1) to (4), above, if the exchange or system is not listed in section 18(b)(1) of the Securities Act of 1933 or any rule promulgated under that Act. (R.C. 1707.02(E)(3).) The act also modifies the Division's former ability to suspend the exemption of any security described above under the listed former exemption by requiring that the security be of a type enumerated in (1) to (4), above, and that it be listed or authorized for listing on an exchange or system that is not listed in section 18(b)(1) of the Securities Act of 1933 or any rule promulgated under that Act (R.C. 1707.02(E)(4)).

Consent to service

Formerly

Formerly, R.C. 1707.11 required every applicant for registration or for claim of exemption, and every person submitting a notice filing, for the sale of securities pursuant to R.C. Chapter 1707. that was an incorporated applicant not domiciled in Ohio or licensed under Ohio law or an unincorporated applicant having the situs of its principal place of business outside Ohio to file with its application or notice filing its irrevocable written consent, executed and acknowledged by an individual duly authorized to give such consent, that actions growing out of the sale of those securities or fraud committed by an applicant in Ohio may be commenced against it, in the proper court of any Ohio county in which a cause of action for the fraud may arise or in which the plaintiff in the action may reside, by serving on the Secretary of State any proper process or pleading authorized by Ohio law. The consent was required to stipulate that the service of the process or pleading on the Secretary of State was required to be taken in all courts to be valid and binding as if service had been made upon the applicant itself.

Formerly, R.C. 1707.11 permitted service of any process or pleadings to be made on the Secretary of State by duplicate copies, of which one had to be filed in the office of the Secretary of State, and the other immediately forwarded by the Secretary of State by certified mail to the principal place of business of the applicant, or the last known address as shown on the application form filed with the Division of Securities, or if it had a principal office in this state, then to the principal office, but failure to mail such copy did not invalidate such service. (R.C. 1707.11.)



Operation of the act

The act modifies the requirements discussed above by requiring each person not organized under Ohio law, not licensed under Ohio Securities Law, or not having its principal place of business in Ohio to submit to the Division of Securities an irrevocable consent to service of process, as described below, in connection with any of the following (R.C. 1707.11(A)):

- (1) Filings to claim any of the exemptions enumerated in R.C. 1707.03(Q), (W), (X), or (Y);
- (2) Applications for registration by description, qualification, or coordination;
- (3) Notice filings pursuant to R.C. 1707.092 or 1707.141;
- (4) Applications for licensure as a securities dealer under R.C. 1707.15;
- (5) Applications for licensure as an investment adviser under R.C. 1707.151.

Under the act, the irrevocable written consent must be executed and acknowledged by an individual duly authorized to give the consent and must do all of the following (R.C. 1707.11(B)):

- (1) Designate the Secretary of State as agent for service of process or pleadings;
- (2) State that actions growing out of the sale of such securities, *the giving of investment advice* (added by act), or fraud committed by a person on whose behalf the consent is submitted may be commenced against the person, in the proper court of any Ohio county in which a cause of action may arise or in which the plaintiff in the action may reside, by serving on the Secretary of State any proper process or pleading authorized by Ohio law;
- (3) Stipulate that service of process or pleading on the Secretary of State must be taken in all courts to be as valid and binding as if service had been made upon the person on whose behalf the consent is submitted.

The act removes the requirement that the duplicate copy of service of process or pleadings made on the Secretary of State be immediately forwarded by the Secretary of State to the principal place of business of the *applicant*, or the last known address shown on the application form, or to its principal office if it has a principal office in Ohio and, instead, requires it to be immediately forwarded to the principal place of business of the *person on whose behalf the consent is*



submitted or to the last known address as shown on the filing made with the Division. As under former law, failure to mail the copy does not invalidate the service. (R.C. 1707.11(C).)

The act enacts a provision that specifies that, notwithstanding any provision of the Ohio Securities Law, or of any rule adopted by the Division of Securities under that Law, that requires the submission of a consent to service of process, the Division may provide by rule for the electronic filing or submission of a consent to service of process (R.C. 1707.11(D)).

Application for and issuance of dealer's license

Formerly, R.C. 1707.15 required that an application to act as dealer be in writing and be filed with the Division of Securities. The application was required to be in the form the Division of Securities prescribed and to be verified by oath of the applicant, the applicant's agent, or the applicant's attorney. The application was required to contain the following information:

- (1) The name and address of the applicant;
- (2) A description of the applicant;
- (3) The location and addresses of the principal office and all other offices of the applicant;
- (4) A general description of the business of the applicant done prior to the application, including a list of states in which the applicant is a licensed dealer.
- (5) The names and addresses of all salesmen of the applicant at the date of the application;
- (6) The nature of the applicant's business, and its place of business, for the period of ten years next preceding the date of application.

The act generally retains the application requirement but removes the requirement that the application contain the names and addresses of all salesmen of the applicant and the nature of the applicant's business and place of business for the prior ten years (repeal of existing R.C. 1707.15(E) and (F)). It also removes the requirement that the application be verified by oath of the applicant, his or her agent, or his or her attorney (R.C. 1707.15(A)).

Formerly, R.C. 1707.15 required every applicant not a resident of Ohio to name a person within Ohio upon whom process against the applicant could be served and to give the complete residence and business address of the person designated. Every applicant was required to also file an irrevocable consent to

service of process on the Secretary of State in the event that the applicant, if a resident of Ohio, or the person designated by the nonresident applicant, could not be found at the address given. The consent had to be given and service made as provided in R.C. 1707.11. The act replaces these requirements with a provision that requires each applicant to file an irrevocable consent to service of process as provided in R.C. 1707.11 (described above). (R.C. 1707.15(B).)

Formerly, R.C. 1707.15 provided that the Division could investigate any applicant for a license and could require such additional information as it deemed necessary to determine the applicant's business repute and qualifications to act as a dealer in securities. If the application for any license involved investigation outside of Ohio, the applicant could be required by the Division to advance sufficient funds to pay any of the actual expenses of the examination. The Division was required to furnish to the applicant an itemized statement of any expenses that the applicant must pay. If the applicant was merely renewing his or her license for the previous year, the application need contain only the information required by R.C. 1707.15 (B), (C), and (E). The act removes the limitation on the information that must be provided by an applicant renewing the applicant's license for the previous year, but it otherwise retains the provisions described in this paragraph. (R.C. 1707.15(C).)

R.C. 1707.15 formerly required the Division of Securities by rule to require an applicant to pass an examination that covered the applicant's knowledge of securities laws and practices. If the Division found that the applicant was of good business repute, appeared qualified to act as a dealer in securities, and had fully complied with R.C. Chapter 1707., the Division was required to issue to the applicant a license to act as dealer, upon payment by the applicant of the prescribed fee. The Division could, after proper hearing, refuse, as provided in R.C. 1707.19, to grant a license to the applicant. The act replaces the former requirement that an applicant pass an examination that covered the applicant's knowledge of securities law and practices with a requirement that one natural person who is a principal, officer, director, general partner, manager, or employer of a dealer pass an examination designated by the Division of Securities and further requires that each dealer that is not a natural person notify the Division of the name and relationship to the dealer of the natural person who has passed the examination on behalf of the dealer and who will serve as the designated principal on behalf of the dealer. The act condenses the preexisting provisions that refer to the issuance of a license to an applicant and clarifies that an applicant also must comply with rules the Division has adopted. (R.C. 1707.15(D) to (F).)

Application for and issuance of investment adviser's license

Formerly under R.C. 1707.151, every applicant for an investment adviser's license who was not a resident of Ohio was required to name a person within Ohio



upon whom process against such applicant could be served and was required to give the complete residence and business address or addresses of the person designated. Every applicant for such a license also could file an irrevocable consent to service of process naming the Secretary of State for service of process in the event that the applicant, if a resident of Ohio, or the person designated above, could not be found at the address given on the application. The act eliminates these specific requirements and replaces them with a requirement that each applicant for an investment adviser's license file an irrevocable consent to service of process as provided above under "Operation of the act" portion of "Consent to service." (R.C. 1707.151(B).)

Application for and issuance of salesman's license

Under preexisting R.C. 1707.16, unchanged by the act in this regard, every salesman of securities must be licensed by the Division of Securities and must be employed only by the licensed dealer specified in his or her license. If the salesman severs the connection with that licensed dealer, the salesman's license is void. The law formerly specified that the application for a salesman's license had to set forth the following information (R.C. 1707.16):

(1) The name and complete residence and business addresses of the applicant;

(2) The name of the dealer who is employing the applicant or who intends to employ him;

(3) The applicant's age and education, and the applicant's experience in the sale of securities; whether the applicant has ever been licensed by the Division, and if so, when; whether the applicant has ever been refused a license by the Division, and whether the applicant has ever been licensed or refused a license or any similar permit by any division or commissioner of securities, whatsoever name known or designated, anywhere;

(4) The nature of the employment, and the names and addresses of the employers, of the applicant for the period of ten years immediately preceding the date of the application.

The act specifies that the application is made by filing with the Division all information, materials, and forms specified in rules the Division adopts, along with the information specified above in (1) to (3). It also removes the requirement set forth in (4), above, that the application include the nature of the employment, and the names and addresses of the employers, of the applicant for the period of ten years immediately preceding the date of the application.

Formerly, R.C. 1707.16 specified that if the applicant was merely renewing his or her license for the previous year or renewing his or her license upon change of employment, the application only needed to contain the name and complete residence and business addresses of the applicant and the name of the dealer employing the applicant. The act removes this limit on the information that must be in such an application.

Formerly, R.C. 1707.16 also required that the Division, by rule, require an applicant to pass an examination that covered the applicant's knowledge of securities law and practices. The act modifies this provision by requiring that the Division by rule require an applicant to pass an examination designated by the Division. (R.C. 1707.16.)

Enforcement powers of the Division of Securities

Preexisting R.C. 1707.23, unchanged by the act in this regard, permits the Division of Securities, whenever it appears to the Division, from its files, upon complaint, or otherwise that any person has engaged in, is engaged in, or is about to engage in any practice declared to be illegal or prohibited by Ohio's Securities Law or related rules, or defined as fraudulent under that Law or related rules, or any other deceptive scheme or practice in connection with the sale of securities, or when the Division believes it to be in the best interest of the public and necessary for the protection of investors to, among other things, require the attendance of witnesses, and the production of books, records, and papers, as are required either by the Division or by any party to a hearing before the Division, and for that purpose issue a subpoena for any witness, or a subpoena duces tecum to compel the production of any books, records, or papers. Formerly, the section specified that the subpoena had to be served by certified mail, return receipt requested. The act modifies the requirement that a subpoena issued requiring the attendance of witnesses, and the production of books, records, and papers, as are required either by the Division or by any party to a hearing before the Division, be served by certified mail, by including an option that the subpoena also may be served by personal service. (R.C. 1707.23(C).)

Expedited rulemaking authority of Division of Securities

The act enacts a provision that specifies that, notwithstanding any Revised Code provision, if the federal Securities Act of 1933, the federal Securities Exchange Act of 1934, the federal Investment Company Act of 1940, the federal Investment Advisers Act of 1940, and any amendments to any of those acts, if any rule, regulation, release, statement, or position promulgated or adopted under the authority of any of those federal acts, and any amendments to those acts, or if any rule, regulation, or guideline of a self-regulatory organization registered under the federal Securities and Exchange Act of 1934, and any amendments to that act,

contains a provision that is not contained in the Ohio Securities Law or the rules adopted under that Law and that affects any matter within the scope of that Law, the Division of Securities by rule may promulgate a similar provision.

A rule adopted under the authority granted in this provision: (1) may delete, modify, or replace an existing rule of the Division, (2) becomes effective on the later of the date on which the Division issues the rule or the effective date of the federal statute or the rule, regulation, release, statement, or position on which the Division's rule is based, (3) may be revoked by the Division, upon 30 days written notice, and (4) if not revoked by the "Commissioner" (possibly, this should be a reference to the "Division" instead of to the "Commissioner"), lapses and has no further force and effect 30 months after the rule's effective date. (R.C. 1707.20.)

Clarification of a prohibition in the Ohio Securities Law

Preexisting R.C. 1707.44 contained a series of prohibitions related to the Ohio Securities Law. One of the prohibitions formerly prohibited a person from knowingly and intentionally selling, causing to be sold, offering for sale, or causing to be offered for sale any security that comes under any of the following descriptions: (1) it is not exempt under R.C. 1707.02, nor the subject matter of one of the transactions exempted in R.C. 1707.03, 1707.04, *and* 1707.34, has not been registered by description, coordination, or qualification, and is not the subject matter of a transaction that has been registered by description, (2) the prescribed fees for registering by description, by coordination, or by qualification have not been paid in respect to such security, (3) the person has been notified by the Division of Securities, or has knowledge of the notice, that the right to buy, sell, or deal in such security has been suspended or revoked, or that the registration by description, by coordination, or by qualification under which it may be sold has been suspended or revoked, or (4) the offer or sale is accompanied by a statement that the security offered or sold has been or is to be in any manner indorsed by the Division of Securities.

The act clarifies the language contained in clause (1) of the preceding paragraph to refer to the security in question not being the subject matter of one of the transactions exempted in R.C. 1707.03, 1707.04, *or* 1707.34. Under the act, that clause reads "is not exempt under R.C. 1707.02, nor the subject matter of one of the transactions exempted in R.C. 1707.03, 1707.04, *or* 1707.34, has not been registered by description, coordination, or qualification, and is not the subject matter of a transaction that has been registered by description." The act does not change any other provision under the preexisting prohibition, or any of the other preexisting prohibitions in the section. (R.C. 1707.44(C).)



Repeal of securities class action provisions

Formerly, R.C. 1707.432 through 1707.439 contained language that pertained to securities class action lawsuits. R.C. 1707.432 through 1707.438 were enacted in Am. Sub. H.B. 350 of the 121st General Assembly, effective January 27, 1997, and R.C. 1707.439 was enacted in a subsequent act, effective September 13, 1999, to limit certain aspects of the previously cited provisions. The Ohio Supreme Court, in *State, ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, declared that Am. Sub. H.B. 350 violated the one-subject rule of Article II, Section 15(D) of the Ohio Constitution and was unconstitutional in its entirety.

The act repeals R.C. 1707.432 through 1707.439 (Section 2).

Overview of Ohio Securities Law

Licensing

Ohio law, not changed by the act, generally requires any person acting as a "dealer" to be licensed as a dealer by the Division of Securities (R.C. 1707.14(A)). "Dealer," except as otherwise provided in the Ohio Securities Law, means every person, other than a salesman, who engages or professes to engage, in Ohio, for either all or part of the person's time, directly or indirectly, either in the business of the sale of securities for the person's own account, or in the business of the purchase or sale of securities for the account of others in the reasonable expectation of receiving a commission, fee, or other remuneration as a result of engaging in the purchase and sale of securities (R.C. 1707.01(E)(1), not changed by the act). "Dealer" does not mean any of the following (R.C. 1707.01(E)(1)):

(1) Any issuer, including any officer, director, employee, or trustee of, or partner in, or any general partner of, any issuer, that sells, offers for sale, or does any act in furtherance of the sale of a security that represents an economic interest in that issuer, provided no commission, fee, or other similar remuneration is paid to or received by the issuer for the sale;

(2) Any licensed attorney, public accountant, or firm of such attorneys or accountants, whose activities are incidental to the practice of the attorney's, accountant's, or firm's profession;

(3) Any person that, for the account of others, engages in the purchase or sale of securities that are issued and outstanding before such purchase and sale, if a majority or more of the equity interest of an issuer is sold in that transaction, and if, in the case of a corporation, the securities sold in that transaction represent a



majority or more of the voting power of the corporation in the election of directors;

(4) Any person that brings an issuer together with a potential investor and whose compensation is not directly or indirectly based on the sale of any securities by the issuer to the investor;

(5) Any bank, savings and loan association, savings bank, or credit union chartered under the laws of the United States or any state, provided that all transactions are consummated by or through a person licensed as a "dealer";

(6) Any person that the Division of Securities by rule exempts from the definition of "dealer."

A person does not have to be licensed as a dealer by the Division of Securities in the following cases (R.C. 1707.14(A)--not in the act):

(1) When the person is transacting business through or with a licensed dealer;

(2) When the securities are the subject matter of one or more exempt transactions enumerated in R.C. 1707.03(B) to (L), (O) to (R), and (U) to (W), or in R.C. 1707.06, except when a commission, discount, or other remuneration is paid or given in consideration with transactions enumerated in R.C. 1707.03(O), (Q), (W), (X), and (Y), or in R.C. 1707.06;

(3) When the person is an issuer selling securities issued by it or by its subsidiary, if such securities are specified under R.C. 1707.02(G) or (I), or under R.C. 1707.04. "Issuer" means every person who has issued, proposes to issue, or issues any security (R.C. 1707.01(G)).

(4) When the person is participating in transactions exempt, under R.C. 1707.34, from R.C. Chapter 1707.

Every "salesman" of securities must be licensed by the Division of Securities, and every salesman must be employed only by the licensed dealer specified in the salesman's license. "Salesman" means every natural person, other than a dealer, employed, authorized, or appointed by a dealer to sell securities within this state. The general partners of a partnership, and the executive officers of a corporation or unincorporated association, licensed as a dealer are not "salesmen" within the meaning of this definition, nor are the clerical or other employees of an issuer or dealer who are employed for work to which the sale of securities is secondary and incidental. The Division of Securities may require a license from any such partner, executive officer, or employee if it determines that

protection of the public necessitates the licensing. (R.C. 1707.16 and 1707.01(F), not changed by the act in this regard.)

Registration

Ohio law, not changed by the act, prohibits any person from offering or selling securities unless the securities or transactions in which they are offered and sold are registered or exempt. There are three methods by which a viatical settlement interest may be registered: registration by description, registration by qualification, or registration by coordination. (R.C. 1707.07--not in the act.)

Registration by description. R.C. 1707.08, not in the act, allows the securities specified in R.C. 1707.05 to be sold, and the transactions enumerated in R.C. 1707.06 to be consummated, on compliance with the following procedures. A description, verified either by the oath of the person filing it or of any person having knowledge of the facts, must be filed with the Division of Securities by the issuer, or by a majority of the incorporators of the issuer prior to election of officers if it is an incorporated issuer, or by a licensed dealer, which description must be on forms prescribed by the Division and must set forth the following information:

- (1) The name of the issuer;
- (2) A brief description of the securities;
- (3) The amount of the securities to be offered after the filing of the description for sale in this state and, if all the securities are not to be offered by the person filing the description, then the respective amounts to be offered by others, so far as the amounts are known, and the names and addresses of other offerors;
- (4) A brief statement of the facts that show that the securities fall within one of the classes specified in R.C. 1707.05 or that they are the subject matter of a transaction enumerated in R.C. 1707.06;
- (5) The price at which the securities are to be offered for sale.

Registration by description is completed when the description, together with the prescribed fee, in the form of cash, check, or United States postal money order, is delivered, or mailed by certified mail with postage prepaid, to the Division. At the time the description is filed, the person filing it must pay to the Division a fee of one-tenth of one per cent of the aggregate price at which the securities described are to be offered for sale to the public in this state, if they fall within one of the classes specified in R.C. 1707.05; but in no case can the fee be less than \$100 or more than \$1,000. If the securities are the subject matter of a transaction enumerated in R.C. 1707.06, the fee is a flat fee of \$50.



Registration by qualification. R.C. 1707.09, not in the act, requires all securities, except those enumerated in R.C. 1707.02 or 1707.05 and those that are the subject matter of a transaction permitted by R.C. 1707.03, 1707.04, or 1707.06, be qualified under R.C. 1707.09 before being sold in Ohio. R.C. 1707.09 also requires that applications for that qualification, on forms prescribed by the Division of Securities, be made in writing either by the issuer of the securities or by any licensed dealer desiring to sell them within Ohio and be signed by the applicant, sworn to by any person having knowledge of the facts stated in the application, and filed in the office of the Division.

The Division must require the applicant to submit with the application for qualification information specified in R.C. 1707.09.

If the Division finds that it is not necessary in the public interest and for the protection of investors to require all the information specified in R.C. 1707.09, it may permit the filing of applications for qualification that contain the information that it considers necessary and appropriate in the public interest and for the protection of investors; but this provision applies only in the case of applications for qualification of securities previously issued and outstanding that may not be made the subject matter of transactions exempt under R.C. 1707.03(M) by reason of the fact that those securities within one year were purchased outside this state or within one year were transported into this state.

All the statements, exhibits, and documents required by the Division under R.C. 1707.09, except properly certified public documents, must be verified by the oath of the applicant, of the issuer, or of any person having knowledge of the facts, and in the manner and form that may be required by the Division. Failure or refusal to comply with the requests of the Division is sufficient reason for a refusal by the Division to register securities. At the time of filing the information prescribed in R.C. 1707.09, the applicant must pay to the Division a filing fee of \$100.

Registration by coordination. R.C. 1707.091(A), not in the act, allows any security for which a registration statement has been filed pursuant to section 6 of the Securities Act of 1933 or for which a notification form and offering circular has been filed pursuant to Regulation A of the general rules and regulations of the Securities and Exchange Commission in connection with the same offering to be registered by coordination. A registration statement filed by or on behalf of the issuer under this section with the Division of Securities must contain the following information and be accompanied by the following items in addition to the consent to service of process required by R.C. 1707.11 (R.C. 1707.091(B)):

(1) One copy of the latest form of prospectus or offering circular and notification filed with the Securities and Exchange Commission;



(2) If the Division of Securities by rule or otherwise requires, a copy of the articles of incorporation and code of regulations or bylaws, or their substantial equivalents, as currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered, and a specimen or copy of the security;

(3) If the Division of Securities requests, any other information, or copies of any other documents, filed with the Securities and Exchange Commission;

(4) An undertaking by the issuer to forward to the Division, promptly and in any event not later than the first business day after the day they are forwarded to or thereafter are filed with the Securities and Exchange Commission, whichever occurs first, all amendments to the federal prospectus, offering circular, notification form, or other documents filed with the securities and exchange commission, other than an amendment that merely delays the effective date;

(5) A filing fee of \$100.

Exempt transactions. Under R.C. 1707.03, not in the act, there are certain circumstances under which a sale of securities may be exempt from the registration requirements. "Exempt" means that, except in the case of securities the right to buy, sell, or deal in which has been suspended or revoked under an existing order of the Division of Securities or under a cease and desist order, transactions in securities may be carried on and completed without compliance with R.C. 1707.08 to 1707.11 (R.C. 1707.03(A)--not in the act). The list of exempt transactions is extensive. Some examples are as follows:

(1) A sale of securities made by or on behalf of a bona fide owner, neither the issuer nor a dealer, is exempt if the sale is made in good faith and not for the purpose of avoiding this chapter and is not made in the course of repeated and successive transactions of a similar character.

(2) The sale of securities by executors, administrators, receivers, trustees, or anyone acting in a fiduciary capacity is exempt, if the relationship was created by law, by a will, or by judicial authority, and the sales are subject to approval by, or are made in pursuance to authority granted by, any court of competent jurisdiction or are otherwise authorized and lawfully made by such fiduciary.

(3) A sale to the issuer, to a dealer, or to an institutional investor is exempt.

(4) A sale in good faith, and not for the purpose of avoiding the Ohio Securities Law, by a pledgee of a security pledged for a bona fide debt is exempt.

(5) The sale at public auction by a corporation of shares of its stock because of delinquency in payment for the shares is exempt.



(6) The delivery of securities by the issuer on the exercise of conversion rights, the sale of securities by the issuer on exercise of subscription rights or of warrants or options to purchase securities, the delivery of voting-trust certificates for securities deposited under a voting-trust agreement, the delivery of deposited securities on surrender of voting-trust certificates, and the delivery of final certificates on surrender of interim certificates are exempt.

(7) The issuance of securities in exchange for one or more *bona fide* outstanding securities, claims, or property interests, not including securities sold for a consideration payable in whole or in part in cash, under a plan of reorganization, recapitalization, or refinancing approved by a court pursuant to the Bankruptcy Act of the United States or to any other federal act giving any federal court jurisdiction over such plan of reorganization, or under a plan of reorganization approved by a court of competent jurisdiction of any state of the United States is exempt.

(8) A sale by a licensed dealer, acting either as principal or as agent, of securities issued and outstanding before the sale is exempt, unless the sale is of one or more of a list of transactions.

(9) The sale of any security is exempt if all of the following conditions are satisfied: (a) the provisions of section 5 of the Securities Act of 1933 do not apply to the sale by reason of an exemption under section 4 (2) of that act, (b) the aggregate commission, discount, and other remuneration, excluding legal, accounting, and printing fees, paid or given directly or indirectly does not exceed ten per cent of the initial offering price, (c) any such commission, discount, or other remuneration for sales in Ohio is paid or given only to dealers or salespersons registered under the Ohio Securities Law, (d) the issuer or dealer files with the Division of Securities, not later than sixty days after the sale, a report setting forth the name and address of the issuer, the total amount of the securities sold under this provision, the number of persons to whom the securities were sold, the price at which the securities were sold, and the commissions or discounts paid or given, and (e) the issuer pays a filing fee of \$100 for the first filing and \$50 for every subsequent filing during each calendar year.

(10) The execution by a licensed dealer of orders for the purchase of any security is exempt, provided that the dealer acts only as agent for the purchaser, has made no solicitation of the order to purchase the security, has no interest in the distribution of the security, and delivers to the purchaser written confirmation of the transaction that clearly itemizes the dealer's commission.

(11) The sale of any security is exempt if the Division by rule finds that registration is not necessary or appropriate in the public interest or for the protection of investors.



Prohibitions

Preexisting R.C. 1707.44, unchanged by the act except for the change referred to in (4), below, generally prohibits any person who is subject to the securities registration, the broker-dealer registration, and the anti-fraud provisions of the Ohio Securities Law from failing to comply with those provisions. Because of the changes the act makes to other provisions of that Law, as described above, under the act, this section will apply to viatical settlement interests. The prohibitions are as follows:

(1) No person may engage in any act or practice that violates R.C. 1707.14(A), (B), or (C), and no salesperson may sell securities in Ohio without being licensed.

(2) No person may engage in any act or practice that violates R.C. 1707.141(A) or 1707.161.

(3) No person may knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, to comply with the Ohio Securities Law, in regard to registering securities by description; to secure the qualification of any securities under that Law; to procure the licensing of any dealer, salesperson, investment adviser, or investment adviser representative; to sell any securities in Ohio, or to advise for compensation, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

(4) No person may knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security that is not exempt (see "**Clarification of a prohibition in the Ohio Securities Law**," above, for a discussion of a change the act makes in this provision), is not the subject matter of an exempt transaction, has not been registered by description, coordination, or qualification, and is not the subject matter of a transaction that has been registered by description; for which the prescribed fees for registering by description, by coordination, or by qualification have not been paid in respect to such security; when the person has been notified by the Division, or has knowledge of the notice, that the right to buy, sell, or deal in such security has been suspended or revoked, or that the registration by description, by coordination, or by qualification under which it may be sold has been suspended or revoked, or when the offer or sale is accompanied by a statement that the security offered or sold has been or is to be in any manner endorsed by the Division.

(5) No person who is an officer, director, or trustee of, or a dealer for, any issuer, and who knows such issuer to be insolvent in that the liabilities of the



issuer exceed its assets, may sell any securities of or for any such issuer, without disclosing the fact of the insolvency to the purchaser.

(6) No person with intent to aid in the sale of any securities on behalf of the issuer may knowingly make any representation not authorized by such issuer or at material variance with statements and documents filed with the Division by such issuer.

(7) No person, with intent to deceive, may sell, cause to be sold, offer for sale, or cause to be offered for sale, any securities of an insolvent issuer, with knowledge that such issuer is insolvent in that the liabilities of the issuer exceed its assets, taken at their fair market value.

(8) No person in purchasing or selling securities may knowingly engage in any act or practice that is declared illegal, defined as fraudulent, or prohibited under the Ohio Securities Law.

(9) No licensed dealer may refuse to buy from, sell to, or trade with any person because the person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity, nor sell any securities of or for any issuer who is known in relation to the issuance or sale of such securities to have engaged in such practices.

(10) No dealer in securities, knowing that the dealer's liabilities exceed the reasonable value of the dealer's assets, may accept money or securities, except in payment of or as security for an existing debt, from a customer who is ignorant of the dealer's insolvency, and thereby cause the customer to lose any part of the customer's securities or the value of those securities, by pledging, selling, or otherwise disposing of such securities, when the dealer has no lien on or any special property in such securities; or by pledging such securities for more than the amount due; or otherwise disposing of such securities for the dealer's own benefit, when the dealer has a lien or indebtedness on such securities.

(11) No person, with purpose to deceive, may make, issue, publish, or cause to be made, issued, or published any statement or advertisement as to the value of securities, or as to alleged facts affecting the value of securities, or as to the financial condition of any issuer of securities, when the person knows that such statement or advertisement is false in any material respect.

(12) No person, with purpose to deceive, may make, record, or publish or cause to be made, recorded, or published, a report of any transaction in securities that is false in any material respect.



(13) No dealer may engage in any act that violates the provisions of section 15(c) or 15(g) of the "Securities Exchange Act of 1934" or any rule or regulation promulgated by the Securities and Exchange Commission.

(14) No investment adviser or investment adviser representative may employ any device, scheme, or artifice to defraud any person; engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person; in acting as principal for the investment adviser's or investment adviser representative's own account, knowingly sell any security to or purchase any security from a client, or in acting as salesperson for a person other than such client, knowingly effect any sale or purchase of any security for the account of such client, without disclosing to the client in writing before the completion of the transaction the capacity in which the investment adviser or investment adviser representative is acting and obtaining the consent of the client to the transaction; or engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(15) No investment adviser or investment adviser representative may take or have custody of any securities or funds of any person, except as provided in rules adopted by the Division.

(16) In the solicitation of clients or prospective clients, no person may make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading in light of the circumstances under which the statements were made.

Delayed effective date

The act specifies that all of its provisions described above take effect six months after its effective date (Section 3).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-20-00	p. 1536
Reported, H. Civil & Commercial Law	05-09-00	p. 1902
Passed House (96-0)	05-17-00	pp. 1985-1986
Reported, S. Judiciary	11-16-00	p. 2250
Passed Senate (33-0)	11-16-00	pp. 2266-2268
House concurred in Senate amendments (93-0)	12-05-00	pp. 2414, and 2416 to 2417
00-hb551.123/bc		

