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***Final Analysis***  
*Legislative Service Commission*

**Am. Sub. H.B. 404**  
127th General Assembly  
(As Passed by the General Assembly)

- Reps.** Hottinger and Barrett, Koziura, Driehaus, DeBose, Fende, Celeste, Aslanides, Bacon, Batchelder, Beatty, Bolon, Boyd, Brown, Budish, Collier, DeGeeter, Dodd, Domenick, Dyer, Evans, Flowers, Foley, Garrison, Gerberry, Huffman, Hughes, Letson, Luckie, Lundy, Mallory, J. McGregor, Mecklenborg, Patton, Sayre, Schindel, Sears, Setzer, D. Stewart, Szollosi, S. Williams, Wolpert, Yates, Yuko, Zehringer
- Sens.** Amstutz, Stivers, D. Miller, Austria, Buehrer, Faber, Fedor, Goodman, Harris, Kearney, Morano, Mumper, Niehaus, Padgett, Sawyer, Schuler, Seitz, Spada, Jacobson, Mason

**Effective date:** September 11, 2008; certain provisions effective December 10, 2008

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**ACT SUMMARY**

- Requires viatical settlement providers, as a condition of licensure, to provide information concerning their use of life expectancy information and to meet financial responsibility requirements for licensure.
- Requires a business that is licensed as a viatical settlement broker to maintain at least one individual who individually is licensed as a viatical settlement broker.
- Requires individuals who are licensed as viatical settlement brokers to complete continuing education requirements.
- Exempts certain attorneys, certified public accountants, financial planners, and insurance agents from viatical settlement provider or broker licensure requirements.

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\* This version uses the correct act number, Am. Sub. H.B. 404. The previous version used Sub. H.B. 404. It also changes December 11, 2008, to December 10, 2008, in the effective date statement.

- Allows a viatical settlement provider or viatical settlement broker to assign, transfer, or pledge a viaticated policy to a viatical settlement purchaser or a qualified institutional buyer.
- Allows the Superintendent of Insurance to refuse to issue, suspend, revoke, or refuse to renew a license because the licensee was the subject of administrative action by the Department of Commerce, Division of Securities.
- Revises the definition of "viatical settlement contract" and identifies ten specific situations or arrangements that are not viatical settlement contracts.
- Requires viatical settlement providers or viatical settlement brokers to disclose additional information to a viator.
- Requires the Superintendent to disapprove a contract or disclosure form if it does not meet the specified requirements for disclosures.
- Requires all premium finance companies to disclose premium finance agreements relating to life insurance policies to the insurer.
- Under specified situations, prohibits a viator from entering into a viatical settlement contract within five years, rather than two years, of the date of issuance of the insurance policy.
- Specifies that a viator is prohibited from entering into a viatical settlement contract prior to the application for or issuance of the policy and from promoting a policy for the purpose of selling the policy.
- Redefines the possible situations (exceptions) under which a viator could enter into a viatical settlement contract within the required waiting period after the issuance of the insurance policy.
- Allows the Superintendent to develop or approve a form requesting verification of coverage of a viator by an insurer and requires insurers to accept an original or facsimile or electronic copy of that form.
- Allows a viatical settlement broker, in addition to a viatical settlement provider, to request verification of coverage from an insurer and allows an insurer to indicate in its response to such a request that it intends to investigate possible fraud.

- Redefines the escrow agent's role in the process of viaticating a policy.
- Prohibits, in advertisements, the use of certain words indicating that a life insurance policy is "free" unless true.
- Adds additional fraudulent viatical settlement acts including actions regarding stranger-originated life insurance (STOLI) and defines STOLI.
- Requires life insurance companies to adopt procedures to detect and prevent stranger-originated life insurance.
- Specifies that a prevailing party in a civil action is not entitled to attorney's fees if the prevailing party provided information of the party's own fraudulent viatical settlement acts.
- Requires antifraud initiatives to include a description of the procedures used to review the accuracy of life expectancies.
- Relieves an insurer that issued a policy being viaticated from liability for any act or omission of a viatical settlement broker or viatical settlement provider unless the insurer receives compensation for the placement of a viatical settlement contract.
- Requires the Superintendent to consider certain factors in determining the nature, scope, and frequency of examinations of licensees.
- Removes the authority of the Superintendent to conduct a market examination of an insurer.
- Requires the Superintendent to cooperate with an official from another state for the examination of a foreign or alien licensee as far as is practical.
- Revises the requirements for annual reports by viatical settlement providers.
- Requires the Superintendent to keep confidential and not a matter of public record all individual transaction data regarding the business of viatical settlements and data that could compromise the privacy of personal, financial, and health information of the viator or insured.

- Allows persons with knowledge of an insured's identity to disclose that identity if the disclosure is required to purchase financial guarantee insurance.
- Makes certain other conforming changes.

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## CONTENT AND OPERATION

### *Licensure requirements for viatical settlement providers and viatical settlement brokers*

Continuing law (R.C. Chapter 3916.) prohibits individuals and businesses from operating as viatical settlement providers or viatical settlement brokers without obtaining a license from the Superintendent of Insurance. Law largely unchanged by the act requires the viatical settlement broker or viatical settlement provider to obtain a license from the state of residency of the owner of the policy if that residency is not Ohio. The act maintains the out of state licensure requirement if the owner of the policy to be viaticated is not a resident of Ohio, rather than the viator, and only if the state of residency issues licenses for viatical settlement providers and viatical settlement brokers. These changes take effect 90 days after the effective date of the rest of the act. (R.C. 3916.02 and Section 3.)

The act requires the Superintendent to issue a license to an applicant for licensure if the applicant meets specified requirements including demonstrating competency and trustworthiness, having a good business reputation and providing a certificate of good standing from the person's state of domicile. The act requires the certificate of good standing from the state of organization rather than domicile (R.C. 3916.03).

Prior law allowed the Superintendent to require a bond or other mechanism for insuring the financial accountability of viatical settlement providers and viatical settlement brokers (R.C. 3916.20). Instead, the act requires an applicant for licensure as a viatical settlement provider to provide proof of financial responsibility through either of the following means:

(1) Submitting audited financial statements that show a minimum equity of not less than \$250,000 in cash or cash equivalents;

(2) Submitting both audited annual financial statements that show positive equity and either of the following: (a) a surety bond in the amount of \$250,000 in favor of Ohio issued by an insurer authorized to issue surety bonds in Ohio, (b) an unconditional and irrevocable letter of credit, deposit of cash, or securities, in any combination, in the aggregate amount of \$250,000. (R.C. 3916.03.)

The act additionally authorizes the Superintendent to request proof of financial responsibility from a viatical settlement provider licensee at any time the Superintendent considers necessary. If an applicant that is licensed as a viatical settlement provider in another state already has filed similar proof of financial responsibility in the other state, the Superintendent may accept that proof of financial responsibility as valid. (R.C. 3916.03.)

The act also requires applicants for licensure as a viatical settlement provider to submit a general description of the method the applicant will use to determine life expectancies, including a description of the applicant's intended receipt of life expectancies, the applicant's intended use of life expectancies, the applicant's intended use of life expectancy providers, and a written plan of policies and procedures used to determine life expectancies. (R.C. 3916.03.)

### **Requirement to maintain individual licensed as a viatical settlement broker**

Under continuing law, both individuals and businesses may be licensed as viatical settlement brokers. The act requires corporations, partnerships, or other businesses that are licensed as viatical settlement brokers to maintain at least one designated individual who is individually licensed as a viatical settlement broker. Under the act, that individual is responsible for the business's compliance with the Viatical Settlement Law. (R.C. 3916.031.)

### **Continuing education**

The act requires individuals who are licensed as viatical settlement brokers to complete at least 15 hours of continuing education every two years. The act also requires the Superintendent to approve continuing education courses and adopt rules to enforce compliance with this requirement. (R.C. 3916.03.)

### **Exceptions to licensure requirements**

The act exempts both of the following from the Viatical Settlement Law licensure requirements effective 90 days after the effective date of the rest of the act:

(1) A person who represents the viator and is not compensated directly or indirectly by the viatical settlement provider or viatical settlement purchaser, who is licensed as an attorney, certified public accountant, or financial planner accredited by a nationally recognized accreditation agency;

(2) An individual insurance agent, in good standing, who has been licensed as a resident or nonresident insurance agent with a life line of authority in Ohio for at least five years if the viatical settlement activities of the insurance agent are incidental to the insurance agent's insurance business activities. (R.C. 3916.02 and Section 3.)

### **Grounds for refusal to issue, suspension, revocation, or refusal to renew a license**

Under law largely unchanged by the act, the Superintendent of Insurance may refuse to issue or may suspend, revoke, or refuse to renew the license of a

person licensed under the Viatical Settlement Law if the Superintendent finds that the licensee commits specified offenses including if the viatical settlement provider licensee has assigned, transferred, or pledged a viaticated policy to a person that is not a viatical settlement provider licensed in this state, a financing entity, a special purpose entity, or a related provider trust.

The act adds to that offense if the licensee *knew or should have known* that the person was not one of the listed entities and adds the following two entities: a viatical settlement purchaser and qualified institutional buyer (R.C. 3916.15).

Additionally, the act adds to the list of offenses for which the Superintendent may refuse to issue, suspend, revoke, or refuse to renew a license, failing to maintain copies of the required materials (R.C. 3916.11) and having been the subject of an administrative action brought by the Department of Commerce, Division of Securities (R.C. 3916.15).

Continuing law requires the Superintendent to conduct a hearing under the Administrative Procedure Act (R.C. Chapter 119.) in order to suspend, revoke, deny, or refuse to renew the license issued to any person under the Viatical Settlement Law. The Superintendent must send a notice of opportunity for hearing and the hearing officer's findings and recommendations via certified mail. If the certified mail envelope is returned, the Superintendent may serve all subsequent notices by ordinary mail. If the service by ordinary mail fails, prior law *allows* the Superintendent to cause a summary of the substantive provisions to the notice to be published once a week for three consecutive weeks in a newspaper. The act requires, rather than allows the Superintendent to follow this third step. (R.C. 3916.15.)

### **Viatical settlement contracts**

#### **Definition**

Under law retained in part by the act, a viatical settlement contract means any of the following three things:

- (1) 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 (policy holder/owner) assignment, transfer, sale, devise, or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance;

(2) 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;

(3) 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. (R.C. 3916.01.)

The act specifies that the written agreement must be between a viator and a viatical settlement provider and that the compensation may be *present or future* compensation for the viator's *present or future* action including *release* of the death benefit or ownership of any portion of the insurance policy *or any beneficial interest in the policy or its ownership*. Additionally, the act removes the second and third options for what constitutes a viatical settlement contract and adds the following three options:

(1) A premium finance loan made for a life insurance policy by a lender to a viator on, before, or after the date of issuance of the policy in either of the following situations: (a) The viator or the insured receives a guarantee of the viatical settlement value of the policy. (b) The viator or the insured agrees to sell the policy or any portion of the policy's death benefit on any date before or after the issuance of the policy;

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

(3) A premium finance loan made for a policy by a lender to a viator on, before, or after the date of issuance of the policy in either of the following situations: (a) The viator or the insured receives a guarantee of the viatical settlement value of the policy. (b) The viator or the insured agrees on, before, or after the issuance of the policy to sell the policy or any portion of the policy's death benefit. (R.C. 3916.01.)

Additionally, the act clarifies that, for the purposes of the Viatical Settlement Law, "viatical settlement contracts" include but are not limited to contracts that are commonly termed "life settlement contracts" and "senior settlement contracts."

The act identifies ten situations or arrangements that are not to be considered viatical settlement contracts and are therefore not governed by the Viatical Settlement Law unless they are part of a plan to avoid the application of the Viatical Settlement Law:

(1) A policy loan or accelerated death benefit made by the insurer pursuant to the policy's terms whether issued with the original policy or a "rider";

(2) Loan proceeds that are used solely to pay premiums for the policy and the costs of the loan including interest, arrangement fees, utilization fees and similar fees, closing costs, legal fees and expenses, trustee fees and expenses, and third-party collateral provider fees and expenses, including fees payable to letter-of-credit issuers;

(3) A loan made by a regulated financial institution in which the lender takes an interest in a life insurance policy solely to secure repayment of a loan or, if there is a default on the loan and the policy is transferred, the transfer of such a policy by the lender, provided that neither the default itself nor the transfer is pursuant to an agreement or understanding with any other person for the purpose of evading regulation under the Viatical Settlement Law;

(4) A premium finance loan made by a lender that does not violate Ohio's law governing premium finance loans (R.C. 1321.71 to 1321.83, not in the act) if the loan is not specifically included in the definition of a "viatical settlement contract";

(5) An agreement where all parties are closely related to the insured by blood or law or have a lawful substantial economic interest in the continued life, health, and bodily safety of the person insured, or are persons or trusts established primarily for the benefit of such parties;

(6) Any designation, consent, or agreement by an insured who is an employee of an employer in connection with the purchase by the employer, or trust established by the employer, of life insurance on the life of the employee (R.C. 3911.091, not in the act);

(7) Any business succession planning arrangement including, but not limited to all of the following if the arrangements are bona fide arrangements: an arrangement between one or more shareholders in a corporation or between a

corporation and one or more of its shareholders or one or more persons or trusts established by its shareholders; an arrangement between one or more partners in a partnership or between a partnership and one or more of its partners or one or more trusts established by its partners; or an arrangement between one or more members in a limited liability company or between a limited liability company and one or more of its members or one or more trusts established by its members;

(8) An agreement entered into by a service recipient, a trust established by the service recipient and a service provider, or a trust established by the service provider who performs significant services for the service recipient's trade or business;

(9) Any arrangement or agreement with a special purpose entity;

(10) Any other contract, transaction, or arrangement exempted from the definition of "viatical settlement contract" by rule adopted by the Superintendent based on the Superintendent's determination that the contract, transaction, or arrangement is not of the type regulated by the law governing viatical settlement contracts. (R.C. 3916.01.)

### **Disclosure requirements**

Prior to entering into a viatical settlement contract, continuing law requires a viatical settlement provider or viatical settlement broker to provide certain disclosures to the viator (R.C. 3916.06). The act adds to that disclosure a further required disclosure regarding contact with the insured after the execution of the viatical settlement. The act limits that contact by allowing only the viatical settlement provider or an authorized representative of the viatical settlement provider and not the viatical settlement broker to contact the insured for the purpose of determining the insured's health status not more than once every three months if the insured has a life expectancy of more than one year or to once every month if the insured has a life expectancy of one year or less. Continuing law also specifies that viatical settlement providers are responsible for the actions for their authorized representatives in regards to contacting the insured. The act clarifies that viatical settlement providers are not responsible for the actions of subsequent purchasers of the policy. (R.C. 3916.10.) Under the act, a viatical settlement provider must disclose that the viatical settlement provider or viatical settlement provider's representative may contact the insured as described above and for the additional purpose of confirming the insured's residential or business address and telephone number or for other purposes permitted by law. (R.C. 3916.06.)

Along with the previously mentioned disclosures, continuing law requires the viatical settlement provider or viatical settlement broker to give the viator a brochure that describes the process of viatical settlements. The brochure must be

in the form developed by the National Association of Insurance Commissioners (hereafter, NAIC) unless another one is developed by the Superintendent. The act allows the Superintendent to develop an alternate form or to approve one. (R.C. 3916.06.)

Prior to entering into a viatical settlement contract, law largely unchanged by the act specifically requires the viatical settlement provider to disclose information including any affiliation between the viatical settlement provider and the insurer of the policy to be viaticated, the viatical settlement provider's contact information, the contact information of the escrow agent, and the amount and method of calculating the viatical settlement broker's compensation. The act adds that the viatical settlement provider must disclose any affiliations or contractual arrangements between the viatical settlement provider and the viatical settlement broker, the extent to which the viator's interest in the benefits of the life insurance policy will be transferred as a result of the viatical settlement, and whether the funds will be in escrow during the transfer process.

Rather than disclosing the contact information of the escrow agent, the act requires the viatical settlement provider to disclose the following concerning the role of the escrow agent in the viatical settlement transaction (1) an escrow agent will provide escrow services to the parties pursuant to a written agreement, signed by the viatical settlement provider, the viatical settlement broker, and the viator, (2) at the close of escrow, the escrow agent will distribute the proceeds of the sale to the viator, minus any compensation to be paid to any other persons who provided services and to whom the viator has agreed to compensate out of the gross amount offered by the viatical settlement purchaser, (3) all persons receiving any form of compensation under the escrow agreement will be clearly identified, including name, business address, telephone number, and tax identification number. (R.C. 3916.06.)

Under the act, the viatical settlement broker must additionally disclose the following information prior to the execution of the viatical settlement contract: (1) the viatical settlement broker's contact information, (2) the amount and method of calculating the broker's compensation, (3) a full, complete, and accurate description of all offers, counter-offers, acceptances, and rejections relating to the proposed viatical settlement contract, (4) any affiliations or contractual agreements between the viatical settlement broker and any person making an offer in connection with the proposed viatical settlement contract, and (5) if any portion of the viatical settlement broker's compensation is taken from the viatical settlement offer, the total amount of the viatical settlement offer and the viatical settlement broker's compensation as a percentage of that total including as compensation anything of value paid or given to a viatical settlement broker for the placement of a policy. (R.C. 3916.06.)

### **Approval of contracts and disclosure forms**

Continuing law prohibits individuals or businesses that use viatical settlement contracts and disclosure forms to use those contracts and forms unless they are filed with and approved by the Superintendent and additionally allows the Superintendent to require submission of advertising material. The Superintendent must disapprove a contract or disclosure form if it or any part of it is unreasonable, contrary to the interests of the public or otherwise misleading or unfair to the viator. The act also requires the Superintendent to disapprove a contract or disclosure form if it does not meet the previously discussed requirements for disclosure prior to entering into a contract and specifies that if not disapproved within 45 days of filing, a contract, disclosure, or advertisement is considered approved. (R.C. 3916.05.)

### **Premium finance agreements**

Under continuing law, all premium finance companies except banks, savings banks, trust companies, savings and loan associations, and licensed small loan lenders must give notice of the financing of insurance policy premiums to the insurer not later than the 30th day after the date on which the premium financing agreement is accepted by the premium finance company if the interest rate exceeds a specified maximum rate. The act adds that in the case of life insurance policies all lenders (including, in this case, the various types of financial institutions otherwise excepted as mentioned in the prior sentence) must give notice of their financing of policies regardless of the interest rate either (1) prior to the issuance of the life insurance policy if the financing agreement is accepted prior to the issuance of the policy or (2) prior to the completion of the premium financing transaction if the financing agreement is accepted after the issuance of the policy. If a premium financing agreement is not disclosed as required, the agreement is unenforceable as a matter of public policy. It should be noted that this provision applies generally to the financing of any life insurance policy premium and not just to policies that may become the object of a viatical settlement. (R.C. 1321.72 and 1321.78.)

### **Trusts**

The act specifies that trusts or other persons that are created to give the appearance of insurable interest and are used to initiate one or more policies for investors violate insurable interest laws and the prohibition against wagering on life (R.C. 3916.173).

### *Time between entering into an insurance policy and viaticating that policy*

Law partially retained by the act prohibits a viator from entering into a viatical settlement contract within two years of the date of issuance of an insurance policy unless the viator submits independent evidence to the viatical settlement provider that one of several conditions have been met including: the viator or insured is terminally or chronically ill, the viator's spouse dies, and the viator divorces the viator's spouse. The act adds the following possible condition: the sole beneficiary of the policy is a family member of the viator and the beneficiary dies. The act also requires the viator to both certify and submit independent evidence that the conditions arose after the issuance of the policy and removes the following three possible conditions:

(1) The viator was the insured's employer at the time the policy or certificate was issued and the employment relationship terminated.

(2) The viator experiences a significant decrease in income that is unexpected and that impairs the viator's reasonable ability to pay the policy premium.

(3) The viator or insured disposes of the viator's or insured's ownership interests in a closely held corporation. (R.C. 3916.16.)

Additionally, the act extends the two-year waiting period to a five-year waiting period and specifies that a viator is prohibited both from entering into a viatical settlement contract prior to the application for or issuance of the policy and from issuing, soliciting, marketing, or otherwise promoting the purchase of a life insurance policy for the purpose of or with an emphasis on selling the policy. (R.C. 3916.16.) However, the act still allows a viator to enter into a viatical settlement contract two years after the issuance of the policy if the viator certifies that all of the following are true:

(1) Either the viator has funded the policy using personal assets, which may include an interest in the life insurance policy being viaticated up to the cash surrender value of the policy, or any financing agreement to fund the policy premiums entered into prior to policy issuance or within two years of policy issuance was provided to the insurer within 30 days of the date the agreement was executed and the financing agreement was secured with personal assets.

(2) The viator had no agreement or understanding with any other person to viaticate the policy or transfer the benefits of the policy, including through an assumption or forgiveness of a premium finance loan at any time prior to issuance of the policy or during the two years after the date of issuance of the policy.

(3) If requested by the insurer, the viator both disclosed to the insurer whether a person other than the insurer obtained a life expectancy evaluation for settlement purposes in connection with the application, underwriting, and issuance of the policy and provided a copy of any such life expectancy evaluation to the insurer at the time of application.

(4) The viator disclosed any financial arrangement, trust, or other arrangement, transaction, or device that conceals the ownership or beneficial interest of the policy to the insurer prior to the issuance of the policy.

Under the act, a viatical settlement provider or viatical settlement broker must disclose to the Superintendent, any plan, transaction, or series of transactions to originate, review, continue, or finance a life insurance policy with the insurer for the purpose of engaging in the business of viatical settlements prior to or during the first five years after the insurer issues the policy. (R.C. 3916.16.)

### **Verification of coverage**

Under continuing law, the viatical settlement provider must give written notice to the insurer that issues the insurance policy within 20 days after a viator executes the documents necessary to transfer any rights under that insurance policy or within 20 days of entering any expressed or implied agreement, option promise, or other form of understanding to viaticate that policy. The notice must be accompanied by a copy of the required 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, the insured's written consent to the release of the insured's medical records, and a request for verification of coverage. The viatical settlement provider's request for verification of coverage must be on a form prescribed by the NAIC unless another one is developed by the Superintendent. The act allows the Superintendent to develop an alternate form or to approve one. The act also requires the insurer to accept an original or facsimile or electronic copy of such request and any accompanying authorization signed by the viator. (R.C. 3916.07.) The act additionally prohibits insurers from requiring, as a condition of responding to a request for verification of coverage or effecting the transfer of a policy pursuant to a viatical settlement contract, that the viator, insured, viatical settlement provider, or viatical settlement broker sign any form, disclosure, consent, or waiver form that has not been approved by the superintendent of insurance for use in connection with viatical settlement contracts. (R.C. 3916.16.)

Continuing law requires the insurer to respond to the request for verification of coverage from a viatical settlement provider within 30 days of receiving the request and indicate whether the insurer intends to pursue an investigation regarding the validity of the life insurance policy. The act adds that

the request also may be from the viatical settlement broker and that the insurer also may indicate in the insurer's response that the insurer intends to investigate possible fraud. (R.C. 3916.07 and 3916.16.)

### **Transfer of ownership**

In order to complete the transfer of ownership of a viaticated policy under continuing law, the viatical settlement provider must instruct the viator to send the executed documents required to effect the change in ownership, assignment, or beneficiary directly to the escrow agent. Within three days after the escrow agent receives the documents, prior law required the viatical settlement provider to pay the proceeds of the viatical settlement into an escrow account.<sup>1</sup> Under the act the viatical settlement provider must pay to the escrow account the gross amount to be paid by the viatical settlement provider. The escrow agent must then deposit the money in a trust or escrow account set up for that purpose (R.C. 3916.09). Once the proceeds are transferred into the escrow or trust account, continuing law requires the escrow agent to deliver the original documents to the viatical settlement provider, related provider trust, or, under the act, a representative of the viatical settlement provider.

Under law largely unchanged by the act, once the viatical settlement provider receives acknowledgement of the properly completed transfer of ownership, assignment, or designation of beneficiary of the insurance company, the viatical settlement provider must instruct the escrow agent to pay the settlement proceeds to the viator. The escrow agent must pay the proceeds to the viator and any other person pursuant to the viatical settlement contract and the escrow agreement once the escrow agent under the act, rather than the viatical settlement provider as in prior law, receives acknowledgement of the properly completed transfer of ownership, assignment, or designation of beneficiary of the insurance company. The act specifies that the funds are considered sent by a viatical settlement provider to a viator as of the date that the escrow agent either releases the funds for wire transfer to the viator or places a check for delivery to the viator via the United States postal service or other nationally recognized delivery service. (R.C. 3916.09.)

The act additionally requires insurers to respond in writing within thirty calendar days of receipt of a properly completed request for change of ownership or beneficiary of a policy to confirm that the insurer has made the change or

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<sup>1</sup> Or, if the viator erroneously gives the documents directly to the viatical settlement provider, the viatical settlement provider must pay the proceeds of the viatical settlement to an escrow account on the day the viatical settlement provider receives the documents (R.C. 3916.09).

specify reasons that the change cannot be processed. The act prohibits insurers from unreasonably delaying effecting changes in ownership or beneficiary or seeking to interfere with any viatical settlement contract lawfully entered into in Ohio. (R.C. 3916.16.)

### **Restrictions on advertising**

Continuing law places restrictions on the content of the advertisements including prohibiting the use of the words "free," "no cost," "without cost," "no additional cost," "at no extra cost," or similar words with respect to any benefit or service unless true. The act adds to that requirement a prohibition from using those words in relation to a life insurance policy unless true. (R.C. 3916.17.)

### **Fraudulent viatical settlement acts**

Under law largely unchanged by the act, the acts listed as fraudulent viatical settlement acts must be committed by a person knowingly *or* with intent to defraud and for the purpose of depriving another of property or for pecuniary gain. The act specifies that they must be committing knowingly *and* with intent to defraud. The act also removes from the list of acts that constitute fraudulent viatical settlement acts the act of 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. In its place, the act includes the act of recklessly entering into, negotiating, brokering, or otherwise dealing in a viatical settlement contract involving a life insurance policy that was obtained by presenting false information of any fact material to the policy, or by concealing information concerning any fact material to the policy for the purpose of misleading and with the intent to defraud the insurer of the policy, the viatical settlement provider, or the viator.

The act moves the list of acts that constitute fraudulent viatical settlement acts to another nondefinitional section, and the act adds to that list the following 11 acts:

- (1) Presenting misleading information concerning any application for or the existence of or any payments related to a loan secured directly or indirectly by any interest in a life insurance policy;

(2) Failing to disclose to the insurer, where the insurer has requested such disclosure, that the prospective insured has undergone a life expectancy evaluation by any person or entity other than the insurer or its authorized representatives in connection with the application, underwriting, and issuance of the policy;

(3) Employing any plan, financial structure, device, scheme, or artifice to defraud in relation to a viaticated policy;

(4) Misrepresenting the state of residence or facilitating the change of the state in which a person owns a policy or the state of residency of a viator to a state or jurisdiction that does not have laws similar to Ohio for the express purposes of evading or avoiding the provisions of the Viatical Settlement Law;

(5) In the solicitation, application, or issuance of a life insurance policy, employing any device, scheme, or artifice in violation of sections 3911.09 or 3911.091 of the Revised Code;

(6) Engaging in any conduct related to a viatical settlement contract if the person knows or reasonably should have known that the intent of the transaction was to avoid the disclosure and notice requirements of Ohio's viatical settlement law;

(7) Entering into a premium finance agreement with any person pursuant to which the person will receive, directly or indirectly, any proceeds, fees, or other considerations from the insurance policy, the owner of the insurance policy, or from any other person with respect to the premium finance agreement or any viatical settlement contract, or from any transaction related to the insurance policy, that are in addition to the amount required to pay the principal, interest, costs and expenses related to the policy premiums pursuant to the premium finance agreement or subsequent sale of the agreement. Any payments, charges, fees, or other amounts in addition to the amounts required to pay the principal, interest, costs and expenses related to policy premiums paid under the premium finance

agreement shall be remitted to the original owner of the policy or, if the owner is not living at the time of the determination of the overpayment, to the estate of the owner.

(8) With respect to any viatical settlement contract or insurance policy, for a viatical settlement broker or an agent registered under Ohio's viatical settlement law as operating as a viatical settlement broker to knowingly solicit an offer from, effectuate a viatical settlement with, or make a sale to any viatical settlement provider, viatical settlement purchaser, financing entity, or related provider trust that is controlling, controlled by, or under common control with such viatical settlement broker or registered agent unless both of the following are true: (a) The viatical settlement broker or agent disclosed that affiliation to the viator. (b) The viatical settlement broker or agent is controlled by or under common control with a person that is regulated under the federal Securities Act of 1933 or the Securities Act of 1934. (15 U.S.C. 77a et seq.);

(9) With respect to any viatical settlement contract or insurance policy, for a viatical settlement provider to knowingly enter into a viatical settlement contract with a viator if, in connection with such viatical settlement contract, anything of value will be paid to a viatical settlement broker or an agent registered under this chapter as operating as a viatical settlement broker that is controlling, controlled by, or under common control with such viatical settlement provider or the viatical settlement purchaser, financing entity, or related provider trust that is involved in such viatical settlement contract unless both of the following are true: (a) The viatical settlement broker or agent disclosed that affiliation to the viator. (b) The viatical settlement broker or agent is controlled by or under common control with a person that is regulated under the federal Securities Act of 1933 or the Securities Act of 1934. (15 U.S.C. 77a et seq.);

(10) Issuing or using a pattern of false, misleading, or deceptive life expectancies;

(11) Issuing, soliciting, marketing, or otherwise promoting stranger-originated life insurance (STOLI). (R.C. 3916.171 of the act.)

The act defines "stranger-originated life insurance" or "STOLI" as

A practice, arrangement, or agreement initiated at or prior to the issuance of a policy that includes both of the following:

(1) The purchase or acquisition of a policy primarily benefiting one or more persons who, at the time of the issuance of the policy, lack insurable interest in the person insured under the policy;

(2) The transfer at any time of the legal or beneficial ownership of the policy or benefits of the policy or both, in whole or in part, including through an assumption or forgiveness of a premium finance loan. (R.C. 3916.01.)

The act also specifies that "stranger-originated life insurance" includes trusts or other persons that are created to give the appearance of insurable interest and are used to initiate one or more policies for investors but violate insurable interest laws and the prohibition against wagering on life (R.C. 3916.01). Under the act, "stranger-originated life insurance" does not include transactions exempted from the definition of viatical settlement contract (R.C. 3916.01).

Law largely unchanged by the act allows any person who has knowledge or a *reasonable belief* that a fraudulent viatical settlement act is being, will be, or has been committed to provide that information to the Superintendent. Under the act, the person must have a "reasonable suspicion" of a fraudulent viatical settlement act rather than a "reasonable belief." (R.C. 3916.18.)

Law largely unchanged by the act protects from civil liability a person who furnishes information concerning suspected, anticipated, or completed fraudulent viatical settlement acts or fraudulent insurance acts if the information is provided from certain sources including the NAIC and the National Association of Securities Dealers. The act removes the National Association of Securities Dealers and inserts the Financial Industry Regulatory Authority (FINRA). (R.C. 3916.18.)

Additionally, under law largely unchanged by the act, if the person who furnishes the information above is the prevailing party in a tort action for libel, slander, or other relevant torts arising out of activities, and the person who brought the action was not substantially justified in doing so, the prevailing party is entitled to an award of attorney's fees and costs arising out of the act. However, the act clarifies that the prevailing party is not entitled to attorney's fees if the prevailing party provided information about the party's own fraudulent viatical settlement acts. (R.C. 3916.18.)

### **Detecting and preventing STOLI**

The act requires insurance companies that issue life insurance policies in Ohio to amend their applications or life insurance to include questions that are reasonably structured to identify and prevent stranger-originated life insurance. The act allows the Superintendent to adopt rules under the Administrative Procedure Act (R.C. Chapter 119.) to implement this requirement and allows insurers 12 months from the effective date of the Superintendent's rules to amend their applications. (R.C. 3916.05.) The act also requires any insurance company that issues life insurance policies in Ohio to file electronically, in a format prescribed by the Superintendent, on or before June 1 of each year, a description of the measures taken by the insurance company to detect and prevent stranger-originated life insurance. The description also must be attested to by an officer of the company. The Superintendent must maintain this report as confidential and not a matter of public record. (R.C. 3911.021.)

Under the act, any life insurer that has a good faith belief that a person is participating or has participated in a stranger-originated life insurance transaction must report the person to the Superintendent in a form and manner prescribed by the Superintendent. Upon receipt of the insurer's report, the Superintendent must conduct an investigation to determine whether there is probable cause, based on the totality of the facts and circumstances, that the person has or had engaged in a stranger-originated life insurance transaction. If the Superintendent finds probable cause, the Superintendent's action must be based upon the profession of the person.

If the person is not licensed or regulated by the Department of Insurance, the Superintendent must provide the Superintendent's findings to the appropriate licensing or regulatory authority. If the person is licensed or regulated by the Department, the Superintendent must provide the person an opportunity for notice and hearing pursuant to the Administrative Procedure Act (R.C. Chapter 119.). If the person waives or does not request a hearing, or a hearing is held and the person is found to have participated in one or more stranger-originated life insurance transactions, the Superintendent must publish the order on the Department's web site and notify each insurance company licensed in Ohio that the person has been

adjudicated as having participated in one or more stranger-originated life insurance transactions. (R.C. 3916.18.)

Lastly, the act specifies that any contract, agreement, arrangement, or transaction including, but not limited to, any financing agreement or arrangement identified entered into for the furtherance or aid of a stranger-originated life insurance act, practice, arrangement, or agreement is void and unenforceable (R.C. 3916.172).

### **Antifraud initiatives**

Continuing law 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. The act adds to that list of required anti-fraud initiatives, a description of the procedures used to perform initial and continuing review of the accuracy of life expectancies used in connection with a viatical settlement contract. (R.C. 3916.18.)

### **Liability of insurer**

Under the act, an insurer that issued a life insurance policy being viaticated may not be held responsible, under the Viatical Settlement Law, for any act or omission of a viatical settlement broker or viatical settlement provider arising out of or in connection with the viatical settlement transaction unless the insurer receives compensation for the placement of a viatical settlement contract from the viatical settlement provider or viatical settlement broker in connection with the viatical settlement contract.

### **Examination of viatical settlement providers and viatical settlement brokers**

Continuing law allows the Superintendent to conduct examinations of licensees as often as the Superintendent considers appropriate. The act additionally requires the Superintendent to consider the following factors when determining the nature, scope, and frequency of examinations: (1) consumer complaints, (2) the results of financial statement analyses and ratios, (3) any changes in ownership, officers, or directors, (4) any report of independent certified public accountants, and (5) any other criteria the Superintendent determines to be appropriate. (R.C. 3916.14.)

Law partially retained by the act allows the Superintendent to appoint examiners to perform the examinations of licensees and insurers and requires the licensee or insurer to bear the cost of any examination of which they are the subject. If a licensee refuses to submit to an examination or does not comply with

any responsible request for information, the Superintendent may suspend, revoke, deny, or refuse to renew the license of the licensee or the certificate of authority of an insurer. The Superintendent also may request that the Attorney General 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.)

The act removes the specific reference to the Superintendent conducting a market conduct examination of an insurer, the requirement that that insurer pay the expenses of such a market conduct examination, and the authority of the Superintendent to revoke, suspend, or refuse to renew the certificate of authority of an insurer that fails to comply with such an examination. (R.C. 3916.11.)

In addition to allowing the Superintendent to appoint examiners to perform the examinations, continuing law allows the Superintendent to accept an examination report on a licensee that was prepared by the official who is comparable to the Superintendent in another state if that state is the licensee's state of domicile or port-of-entry state. Conversely, the act requires the Superintendent to cooperate with that official for any examination of a foreign or alien licensee as far as is practical. (R.C. 3916.14.)

### **Annual statement**

Under prior law, on or before the first day of March every year, each viatical settlement provider must file a statement with the Superintendent that contains the information the Superintendent requires by rule. The act requires all licensees to file an annual statement, verified under oath by two officers in the form prescribed by the Superintendent. However, the act requires that the viatical settlement provider's annual statement to include all of the following information:

(1) Aggregate total of the value of "unsettled" (contracts for which ownership has not yet been transferred) viatical settlement contracts that have been signed by the viator but have not been settled as of the date of the report categorized by the number of days since the viator signed the contract;

(2) Number of policies purchased, total amount of settlement paid for policies purchased, total face value of policies purchased beginning with the reporting year and most recent five years;

(3) Number of settlements paid in the preceding calendar year, allocated by state or territory;

(4) Any other information required by the Superintendent. (R.C. 3916.12.)

Additionally, the act requires viatical settlement providers to file with the Superintendent audited and unaudited financial statements. The viatical settlement providers must file financial statement, audited by an independent certified public accountant along with a letter stating whether any significant deficiencies or material weaknesses were detected during the audit pursuant to statement on auditing standards number 112 or as amended or superseded on or before the first day of May of each year. (R.C. 3916.12.)

Each viatical settlement provider must file interim unaudited financial statements, including comparative results and footnotes to the financial statements, on a quarterly basis within 45 days after the end of each quarter. The interim financial statements shall meet both of the following requirements:

(1) Be certified by the chief executive officer and chief financial officer as to the accuracy and fair presentation;

(2) Include disclosures either on the face of the financial statements or in accompanying footnotes sufficient so as to make the interim information not misleading. (R.C. 3916.12.)

The act allows viatical settlement providers to assume that the users of the interim financial statements have access to the prior fiscal year-end audited financial statements and that the adequacy of additional disclosure needed for a fair presentation, except in regard to material contingencies, may be determined in that context. A footnote disclosure that would substantially duplicate the disclosure contained in the audited financial statements for the preceding fiscal year may be omitted. A footnote disclosure must be provided if events subsequent to the fiscal year end have a material impact on the viatical settlement provider. (R.C. 3916.12.)

A viatical settlement provider that willfully fails to file the annual statements required by this section, or willfully fails to reply within 30 calendar days to a written inquiry from the Superintendent or the Superintendent's designee, may be subject to a penalty of up to \$250 per day in addition to other penalties provided by the Viatical Settlement Law, not to exceed \$25,000 in the aggregate for each such failure. (R.C. 3916.12.)

### **Confidentiality**

The act specifies that the Superintendent must keep confidential and not a matter of public record all proprietary information of the licensee, all individual transaction data regarding the business of viatical settlements, and data that could compromise the privacy of personal, financial, and health information of the viator or insured. (R.C. 3916.12.)

Continuing law prohibits 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, from disclosing that identity, including the insured's name and individual identification data, or the insured's financial or medical information except in specified circumstances. The act adds to the information necessary to be kept confidential the same information concerning the viator. The act also adds to the exceptions when it is necessary to effect a viatical settlement whether or not it is between a viator and a viatical settlement provider and when the disclosure is required to purchase financial guarantee insurance. (R.C. 3916.13.)

### **Jurisdiction**

Law largely unchanged by the act specifies that if there is more than one viator on a single policy and the viators are residents of different states, the viatical settlement will be governed by the law of the state in which the viator having the largest percentage ownership of the policy 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).

The act clarifies that the previously mentioned "viator" is actually the owner of the policy. The act also specifies that if the viator is a resident of Ohio, all agreements to be signed by the viator must provide exclusive jurisdiction to courts of Ohio, and the laws of Ohio must govern all agreements. Additionally, the act specifies that nothing in the agreements may abrogate the viator's right to a trial by jury.

### **Application of the Securities Act**

The act clarifies that any transaction related to the sale or financing of an interest or investment in a viatical settlement is subject to the Ohio Securities Act (R.C. Chapter 1707.) and the rules adopted thereunder. Nothing in Ohio's viatical settlement law preempts, supercedes, or limits the application of the Securities Act and the rules adopted thereunder. (R.C. 3916.19.)

### **Incontestability period**

Under continuing law, except under specified circumstances, a life insurer cannot contest the validity of a policy of life insurance after two years after the issuance of the policy. The act specifies that nothing in the Viatical Settlement Law as amended by the act may be construed to affect that incontestability period. (Section. 4.)

## Other changes

The act makes conforming changes to several sections that make certain requirements and terminology consistent throughout the Viatical Settlement Law.

## Other definitions

### Revised definitions

The act revises current law definitions governing the Viatical Settlement Law as follows:

Adds to the definition of "advertising" that the communication is published, disseminated, circulated, or placed directly or indirectly before the public in this state for the purpose of inducing a person to purchase, assign, devise, bequest, or transfer a death benefit or ownership of a life insurance policy in addition to selling such a policy. (R.C. 3916.01.)

Adds to the definition of "business of viatical settlements" a statement that includes acquiring an interest in a life insurance policy in any manner and clarifies that the business of viatical settlements is not limited to the activities listed. (R.C. 3916.01.)

Adds to the definition of "chronically ill" a specification that the person must be certified, at least annually, by a licensed health professional as having the conditions listed. The act also adds to the currently imposed condition of being unable to perform at least two activities of daily life, the further condition that the person must have been unable to perform those activities for at least 90 days without substantial assistance from another individual due to a loss of functional capacity. (R.C. 3916.01.)

Adds to the definition of "person" limited liability partnerships, and business trusts.

Adds to the definition of "special purpose entity." Continuing law defines "special purpose entity" as corporations, partnerships, trusts, limited liability companies, or other similar entities formed solely to provide access, directly or indirectly, to institutional capital markets. The act adds that such may be in connection with a transaction in which the securities in the special purpose entity are acquired by qualified institutional buyers. (R.C. 3916.01.)

Adds to continuing law's exemptions from the definition of "viatical settlement provider." Included in current law's exemptions from the definition of "viatical settlement provider" are financial institutions and the issuer of a life insurance policy or certificate providing accelerated benefits pursuant to the

contract. The act specifies that the financial institution must be a regulated financial institution (see the act's new definition of "regulated financial institution") and it must take an assignment of a life insurance policy solely as collateral for a loan. The act also removes the specification that the exempted policy or certificate must provide accelerated benefits. The act adds to the exceptions from the definition of "viatical settlement provider" an authorized or eligible insurer that provides financial guarantee insurance to specified entities, a premium finance company exempted from the licensure requirements of Ohio's law governing premium finance companies that takes an assignment of a life insurance policy or certificate solely as collateral for a premium finance loan, and any other person the Superintendent determines is not consistent with the definition of viatical settlement provider. (R.C. 3916.01.)

Adds to the definition of "viatical settlement broker" that the person may negotiate viatical settlements between a viator and another viatical settlement broker.

Adds to the definition of "viator" a specific requirement the policy being viaticated has not been previously viaticated and adds "releases" to the methods by which the person may give up a policy for compensation. The act also removes accredited investors from the exceptions to the definition of viator.

Adds to the definition of "viatical settlement purchaser" the requirement that life insurance policy or interest in death benefits of a life insurance policy purchased must be from the viatical settlement provider and must be the subject of a viatical settlement contract. The act also removes accredited investors from the exceptions to the definition of viatical settlement purchaser.

### **New definitions**

The act adds the following new definitions to the law governing viatical settlements:

"Escrow agent" means an independent third-party person who, pursuant to a written agreement signed by the viatical settlement provider and viator, provides escrow services related to the acquisition of a policy pursuant to a viatical settlement contract. "Escrow agent" does not include any person associated with, affiliated with, or under the control of a person licensed as a viatical settlement provider, viatical settlement broker, or any person specifically exempted from the licensure requirements of the Viatical Settlement Law. (R.C. 3916.01.)

For the purposes of defining "recklessly" the act refers to the Ohio Criminal Code which specifies that "a person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his

conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist" (R.C. 2901.22). For the purposes of defining "defraud," the act also refers to the Criminal Code which defines defraud as "to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another" (R.C. 2913.01). (R.C. 3916.01.)

"Life expectancy" means an opinion or evaluation as to how long a particular person will live.

"Regulated financial institution" means a bank, a savings association, or credit union operating under authority granted by the Superintendent of Financial Institutions, the regulatory authority of any other state of the United States, the Office of Thrift Supervision, the National Credit Union Administration, or the Office of the Comptroller of the Currency (all federal agencies). (R.C. 3916.01.)

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## HISTORY

ACTION	DATE
Introduced	11-29-07
Reported, H. Insurance	01-30-08
Passed House (89-0)	01-30-08
Reported, S. Insurance, Commerce & Labor	05-28-08
Passed Senate (32-0)	05-28-08
House concurred in Senate amendments (95-0)	05-29-08

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