

LISA and LSI PROPOSED AMENDMENTS TO NAIC Viatical Settlements Model Act

The following are proposed amendments and supporting comments to the NAIC Viatical Settlements Model Act, dated, March 16, 2007 submitted by the Life Insurance Settlement Association (LISA) and the Life Settlement Institute (LSI). Each comment and proposed amendment is presented section-by-section. Where amendments are offered, they are highlighted in **yellow**. New text is **underlined** and deleted text is **stricken**.

Section 2. Definitions

1. Amend Subsection F(1)(c), as follows:

F. “Fraudulent viatical settlement act” includes:

- (1) Acts or omissions committed by any person who, knowingly or with intent to defraud, for the purpose of depriving another of property or for pecuniary gain, commits, or permits its employees or its agents to engage in acts including:
 - (a) Presenting, causing to be presented or preparing with knowledge or belief that it will be presented to or by a viatical settlement provider, viatical settlement broker, viatical settlement purchaser, [viatical settlement investment agent,] financing entity, insurer, insurance producer or any other person, false material information, or concealing material information, as part of, in support of or concerning a fact material to one or more of the following:
 - (i) An application for the issuance of a viatical settlement contract or insurance policy;
 - (ii) The underwriting of a viatical settlement contract or insurance policy;
 - (iii) A claim for payment or benefit pursuant to a viatical settlement contract or insurance policy;
 - (iv) Premiums paid on an insurance policy[, or as a result of a viatical settlement purchase agreement];
 - (v) Payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract, [viatical settlement purchase agreement] or insurance policy;
 - (vi) The reinstatement or conversion of an insurance policy;
 - (vii) In the solicitation, offer, effectuation or sale of a viatical settlement contract, insurance policy [or viatical settlement purchase agreement];
 - (viii) The issuance of written evidence of viatical settlement contract, [viatical settlement purchase agreement] or insurance; or

- (ix) A financing transaction;
- (b) Employing any plan, financial structure, device, scheme, or artifice to defraud related to viaticated policies; and
- ~~(c) Failing to disclose to an insurer a plan, transaction or series of transactions as required pursuant to Section 9 of this Act.~~

Justification: The new subdivision (1)(c) should be deleted. As is proposed herein, the new Section 9 should be deleted as it is both unnecessary and duplicative (a detailed explanation is provided below at Section 9). This identical proposal was stricken from a bill in North Dakota, pursuant to an agreement by all parties.

2. Amend Subsection K, as follows:

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

~~(1) For a financing entity or licensed viatical settlement provider; or~~

~~(2) (i) In connection with a transaction in which the securities in the special purposes entity are acquired by the viator or by “qualified institutional buyers” as defined in Rule 144 promulgated under the Securities Act of 1933, as amended; or~~

~~(ii) The securities pay a fixed rate of return commensurate with established asset backed institutional capital markets.~~

Justification: These amendments to the definition of special purpose entity, which appear to expand the uses of special purpose entities, appeared for the very first time in the December 1, 2006 draft. No explanation or justification has ever been offered. It should be rejected as it was included in the final draft without any previous discussion or discussion to explain its purpose and, therefore, no opportunity for regulators or interested parties to respond to it.

3. Amend Subsection N, as follows:

a. Amend Section N(2), as follows:

- (2) “Viatical settlement contract” includes 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 where:
 - (a) The viator or the insured receives on the date of the premium finance loan a guarantee of a future viatical settlement value of the policy; or
 - (b) The viator or the insured agrees on the date of the premium finance loan to sell the policy or any portion of its death benefit on any date following the issuance of the policy.

Justification: Subsection 2N(2) should be amended to delete the words “or after” to the sentence. This provision expands the scope of the definition of viatical settlement contract as to impair the lawful ability of a person to enter into a premium finance loan after the policy has been issued. It would prohibit a person from entering into a premium finance loan after the policy had been issued if, as pursuant to subdivision 2(b), that person agrees on the date of such loan to otherwise lawfully sell the policy. This circumstance does not, in any way, involve the initiation of the life insurance policy and, therefore does not address STOLI. It merely would act to prohibit an otherwise legitimate agreement to sell the policy after the policy had been issued.

b. Add a new subsection N(3) (and renumber the succeeding sections accordingly) to read as follows:

- (3) **Viatical settlement contract also includes any transaction involving a life insurance policy or a life insurance policy and an annuity where a person or entity which is not closely related to the insured by blood or law, funds premium payments and, at policy inception, takes a guaranteed interest, or arranges to take a guaranteed interest, other than a collateral assignment or other mechanism which guarantees repayment of a loan principal and interest, in any of the proceeds of the life insurance policy or annuity.**

Justification: This new subsection N(3) would address true STOLI transactions that have been the subject of condemnation by the NAIC, NCOIL and most interested parties for the past two years. This provision would define as a viatical settlement contract those transactions involving an insurance policy and an annuity where a person or entity which is not closely related by blood or law and which funds premium payments, at policy inception, takes a guaranteed interest or arranges an interest, other than a collateral assignment or other mechanism which guarantees repayment of a loan, in any of the proceeds of the life insurance policy or annuity.

At the June 12, 2005 meeting of the Life (A) Committee, Lilacs counsel and minority owner of the company, J. Leigh Griffith, who now is the registered agent for InsCap,¹ explained how Lilacs work:

A trust with an independent financial institution trustee acquires and owns the life insurance. Capital market institutional investors with fixed yield equity securities and the charities with the common interests are the owners of the trust. LILAC® simply takes advantage of a historical pricing disparity between life insurance and annuities... The insured’s only motive is to benefit the charity he or she designates.

The Lilacs program advocated by Mr. Griffith was roundly condemned by the members of the Life (A) Committee. Alabama Commissioner Walter Bell, according to the minutes of the meeting, “opined that the scheme explained by Mr. Griffith is really an arbitrage

¹ J. Leigh Griffith, a minority owner of Lilac’s ultimate parent who represented Lilac at the June 12, 2005 NAIC Life Insurance and Annuity Committee (A) hearing, is listed as the registered agent for InsCap, LLC.

between the pricing of two different products. Commissioner Poolman added that this is the specific debate before the A Committee: “Were the insurable interest laws set up to facilitate arbitrage?”

Following public comment at the meeting, the Life (A) Committee resolved that it would oppose efforts to change state insurable interest laws to permit the use of charities to allow private investors to purchase life insurance on individuals with whom the investors have no relationship because:

although these types of transactions are promoted as a way to provide money to charities, in reality the charity ends up with a small percentage, if any, of the life insurance death benefit proceeds and the majority of the benefits goes to private investors

Similarly, in part because “existing insurable interest laws which limit the purchase of life insurance to those with a relationship to the insured for the benefit of families, businesses and charities constitute sound public policy,” the National Conference of Insurance Legislators itself enacted a Resolution Opposing the Expansion of State Insurable Interest Laws to Permit Private Investors to Purchase Life Insurance on the Lives of Unrelated Individuals.

This amendment addresses these types of transactions and should be adopted as a measure to address true STOLI transactions.

c. Amend subsection N(3)(b) (renumbered as N(4)(b)) to read as follows:

(4) “Viatical settlement contract” does not include:

- (a) A policy loan or accelerated death benefit made by the insurer pursuant to the policy’s terms;
- (b) **A premium finance loan in which loan Loan** proceeds ~~that~~ are used solely to pay:
 - (i) Premiums for the policy;
 - (ii) The costs of the loan, including, without limitation, interest, arrangement fees, utilization fees and similar fees, closing costs, legal fees and expenses, trustee fees and expenses, and third party collateral provider fees and expenses, including fees payable to letter of credit issuers;

Justification: *This amendment is necessary to be consistent with and to clarify that the type of loan transactions governed by this act are premium finance loans, and not other types of loans.*

4. Amend Subsection P(2)(a), as follows:

P. (2) “Viatical settlement provider” does not include:

- (a) A bank, savings bank, savings and loan association, credit union or other licensed lending institution that takes an assignment of a life insurance policy **solely** as collateral for a loan;
- (b) A **licensed** premium finance company making premium finance loans **and exempted by** ~~the commissioner from the licensing requirement under the premium finance laws;~~

***Justification:** The amendments to this section would restore the definition of viatical settlement provider back to the proposed definition that was proposed by Commissioner Poolman prior to the December 1, 2007 draft of amendments. The amendments would remove the provision which would illegally interfere with the activities of a bank or other lenders, by improperly defining them as a viatical settlement provider.*

5. Amend Subsection T(2)(b), at follows:

- (2) “Viator” does not include:
 - (b) **Qualified An accredited investor or qualified** institutional buyer as defined, respectively, in Rule 144A promulgated under the Federal Securities Act of 1933, as amended;

***Justification:** This amendment would restore Subsection T(2)(b) back to the original model act language and which was proposed by Commissioner Poolman in all drafts prior to the December 1, 2007 draft. Under most state and federal laws involving securities and other investment products, accredited investors are deemed to be qualified to make their own financial decisions with the help of whatever advisors they choose. It is clear that this law may be changed by Congress to protect individuals in new classes at any time, but most securities regulators and others deem this class to be adequately advised and protected and “able to fend for themselves” without the additional oversight of state insurance department employees.*

Section 3. License and Bond Requirements

1. Amend Subsection F(4), as follows:

- (4) (a) If a viatical settlement provider, has demonstrated evidence of financial responsibility in a format prescribed by the commissioner through **either** a surety bond executed and issued by an insurer authorized to issue surety bonds in this state, **a policy of errors and omissions insurance** or a deposit of cash, certificates of deposit or securities or any combination thereof in **the an** amount **of \$250,000 not to exceed \$150,000.**
- (b) If a viatical settlement broker, has demonstrated evidence of financial responsibility in a format prescribed by the commissioner through either a surety bond executed and issued by an insurer authorized to issue surety bonds in this state, **a policy of errors and omissions insurance** or a deposit of cash, certificates of deposit or securities or

any combination thereof in ~~the an~~ amount ~~of \$250,000~~ not to exceed \$150,000.

Justification: *Subsection(F)(4)(a) should be amended to include a policy of errors and omissions insurance as an acceptable form of evidence of financial accountability for viatical settlement providers, and to require that such evidence be in an amount “not to exceed” \$150,000. Such changes reflect the vast majority of states that already regulate viatical and life settlements. At least 10 states have laws that specifically grants the Insurance Commissioner the authority to promulgate regulation requiring financial accountability; however, the Insurance Commissioner in each state voluntarily chose to not implement such regulation including Arkansas, Delaware, Kansas, Maine, Mississippi, Nevada, New Mexico, North Carolina, Tennessee, and Wisconsin.²*

Other states which have a financial responsibility requirement do not impose such a high standard as proposed herein. Consider that Alaska requires an “unimpaired bond in a sum of not less than \$200,000 aggregate liability”³; Florida requires a provider to “deposit and maintain deposited in trust with the department [of insurance] securities” not having the value of less than \$100,000⁴; Montana requires a bond “in the amount of \$50,000”⁵; Nebraska has a bond requirement of \$50,000⁶; New Jersey has a bond requirement of \$100,000⁷; Ohio has a \$250,000 bond requirement if a provider’s balance sheet shows less than a minimum capital of \$250,000⁸; Oklahoma has a separate bond requirement for life settlement providers (\$100,000) and viatical settlement providers (\$50,000)⁹; Oregon’s bond requirement compels a provider to maintain accountability in the amount \$100,000¹⁰; Pennsylvania requires a bond of \$100,000¹¹; Utah requires a bond in the amount of \$50,000 in the form of a surety bond¹²; Vermont has a bond requirement in the amount of \$50,000¹³; and Virginia has a bond requirement in the amount of \$100,000.¹⁴ All of these states have considered this issue since initiating settlement regulation of Life Settlement, except for Oregon and Vermont who had particular concerns at the time of passage with the circumstances of terminally ill policy sellers and have not sought to further regulate this consumer market.

² (1) A.C.A. § 23-81-615(4); (2) 18 Del. C. § 7509(3); (3) K.S.A. § 40-5015(d); (4) 24-A M.R.S. § 6810(3); (5) Miss. Code Ann §83-7-219(d); (6) NRS § 688C. 170(2); (7) N.M. Stat. Ann. § 59A-20A-10(D); (8) N.C. Gen. Stat. § 58-58-300(4); (9) Tenn. Code Ann. § 56-50-110(4); and (10) Wis. Stat. § 632.68(11)(a). Furthermore, Alabama, Arizona, Hawaii, Idaho, Minnesota, Missouri, New Hampshire, North Dakota, Rhode Island, South Carolina, South Dakota, Washington, West Virginia, and Wyoming have no viatical or life settlement laws.

³ 3 AAC 31.315(a).

⁴ Fla. Stat. Section 626.9913(3).

⁵ Mont. Admin. R. 6.6.8502(3).

⁶ Neb. Admin. Code Title 210, CH. 76 (003.05B).

⁷ N.J. Stat. Section 11:4-35(c).

⁸ Ohio Department of Insurance.

⁹ O.A.C. Section 365:25-13-2(2).

¹⁰ Or. Admin. R. 836-014-0220(2)(b).

¹¹ 40 P.S. Section 626.3(f).

¹² U.A.C. R590-222-5(1)(c)(v).

¹³ CVR 21-020-047 Section 4(D).

¹⁴ 14 VAC 5-71-31(J)(1)(i).

Furthermore, Subsection (F)(4)(b) should be amended to include a deposit of cash, certificates of deposit or securities or any combination thereof as an acceptable form of evidence of financial accountability for viatical settlement brokers, and to require that such evidence be in an amount “not to exceed \$150,000”. Such amendments would permit viatical settlement brokers to satisfy the financial accountability requirements through several means and would impose a ceiling of \$100,000 for the financial accountability requirement. A limit of \$100,000 is consistent with the vast majority of states that require such financial accountability for viatical and life settlement brokers. Consider that Montana requires only a \$50,000 bond for brokers¹⁵; Nebraska requires its brokers to carry an insurance policy of with a minimum limit of \$100,000¹⁶; and, Kentucky’s recently amended statute limits the brokers’ financial accountability standard to \$100,000.¹⁷

Section 6. Reporting Requirements and Privacy

1. Amend Subsection A, as follows:

- A. Each viatical settlement provider shall file with the commissioner on or before March 1 of each year an annual statement containing such information as the commissioner may prescribe by regulation. Such information shall be limited to only those transactions where the viator is a resident of this state. **Individual and shall not include individual** transaction data regarding the business of viatical settlements or data that could compromise the privacy of personal, financial and health information of the viator or insured **shall be filed with the commissioner on a confidential basis.**

Justification: This section should be amended to protect the privacy of individual transaction data. We know of no other insurance regulation that requires case specific data to be reported in an annual report, which is public. Privacy protection demands that this information be statutorily protected. This language, as proposed here, has been adopted by a number of states, including Colorado, Georgia, Maine, and New Jersey.

Section 8. Disclosure to Viator

1. Amend Subsection A(6), as follows:

- (6) The viator has the right to rescind a viatical settlement contract before the earlier of **sixty (60) thirty (30)** calendar days after the date upon which the viatical settlement contract is executed by all parties or **thirty (30) fifteen (15)** calendar days after the **receipt of the** viatical settlement proceeds **have been paid to by** the viator, as provided in Section 10F. Rescission, if exercised by the viator, is effective only if both notice of the rescission is given, and the viator repays all proceeds and any premiums, loans and loan interest paid on account of the viatical settlement **provider** within the rescission period. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment by the viator or the viator’s estate of

¹⁵ Mont. Admin. R. 6.6.8502(4).

¹⁶ Nebraska Admin. Code Title 210, Ch. 76 (003.05A).

¹⁷ KRS Section 304.15-700(5).

all viatical settlement proceeds and any premiums, loans and loan interest the viatical settlement within sixty (60) days of the insured's death.

Justification: *Subdivision (6) should be amended to establish that the rescission period is tolled from the earlier of either 30 days from the date of execution of the contract by all parties or 15 days from the receipt of funds by the viator. This provision has nothing to do with STOLI and was never discussed by the Life (A) Committee. This disclosure, as amended, would be consistent with the provisions found in numerous states, including Colorado¹⁸, Georgia¹⁹, Kentucky²⁰, Maine²¹, Montana²², and New Jersey²³.*

2. Amend Subsection A(11), as follows:

- (11) Following execution of a viatical contract, the insured may be contacted for the purpose of determining the insured's health status and to confirm the insured's residential or business street address and telephone number, or as otherwise provided in this Act. This contact shall be limited to once every three (3) months if the insured has a life expectancy of more than one year, and no more than once per month if the insured has a life expectancy of one year or less. All such ~~contracts~~ **contacts** shall be made only by a viatical settlement provider licensed in the state in which the viator resided at the time of the viatical settlement, or by the authorized representative of a duly licensed viatical settlement provider.

Justification: *This technical amendment replaces the word "contract" with the term "contact". This is necessary to correct an obvious error in the term.*

3. Amend Subsection B(3) and (6), as follows:

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

...

- (3) ~~Any affiliations or contractual arrangements between the viatical settlement provider and the viatical settlement purchaser, including the amount and method of calculating the provider's compensation. The term "compensation" includes anything of value paid or given to a viatical settlement provider for the placement of a policy.~~

...

- (6) State ~~whether the funds will be escrowed with an independent third party during the transfer process, and if so, provide~~ the name, business address, and telephone number of the independent third party escrow agent, and the fact

¹⁸ 10-7-609 C.R.S.(3)
¹⁹ O.C.G.A.33-59-9(c)
²⁰ KRS §304.15-710(5)
²¹ 24-A M.R.S.A. § 6809(3)
²² MCA 33-20-1308(3)
²³ NJ ST 17B:30B-10(3)

that the viator or owner may inspect or receive copies of the relevant escrow or trust agreements or documents.

Justification: *Subdivision (3) is a new provision which was never seen prior to the December 1, 2006 draft. It does not address STOLI. It should be deleted as it is an unprecedented and extraordinary intrusion on a business's internal workings. There is no business in a competitive market which is forced to calculate its potential profit on a transaction and disclose it to the consumer with whom it has a contract, involving a mutual exchange of consideration, to either sell or buy an asset.*

The changes made to subdivision (5) are also new and never seen prior to the December 1, 2006 draft. It does not address STOLI. It would place consumers at risk of not receiving the funds after they have signed over ownership of their life insurance policy. It would change the current model law requirement that funds be escrowed following execution of the viatical settlement contract. The amendment inexplicably would make optional the requirement to escrow settlement proceeds.

4. Amend Subdivision C, as follows:

- C. (1) A viatical settlement broker shall submit to the viator all written offers, counter-offers, acceptances and rejections from viatical settlement providers relating to the placement of the viator's policy within forty-eight (48) hours after receipt by the viatical settlement broker.
- (2) A viatical settlement broker shall provide the viator with at least the following disclosures no later than the date the viatical settlement contract is signed by all parties. The disclosures shall be conspicuously displayed in the viatical settlement contract or in a separate document signed by the viator and provide the following information:
- (1) The name, business address and telephone number of the viatical settlement broker;
 - (2) A full, complete and accurate description of all offers, counter offers, acceptances and rejections relating to the proposed viatical settlement contract;
 - (3) A written disclosure of any affiliations or contractual arrangements between the viatical settlement broker and any person making an offer in connection with the proposed viatical settlement contracts;
 - (4) (3) The amount and method of calculating the broker's compensation, which term "compensation" includes anything of value paid or given to a viatical settlement broker for the placement of a policy; and
 - (5) Where any portion of the viatical settlement broker's compensation, as defined in Paragraph (3) of this subsection, is taken from a proposed viatical settlement offer, the broker shall disclose the total amount of the viatical settlement offer and the percentage of the viatical settlement offer comprised by the viatical settlement broker's compensation.

Justification: *Much of Subdivision (C) had never been seen prior to the December 1, 2006 draft. It does not address STOLI and exceeds the scope of the Committee's 2006 charge to address STOLI. No explanation has ever been provided.*

The requirement that brokers disclose settlement offers should be amended to add a new subdivision (1) which follows the 2006 law adopted in Maryland in 2006 to require disclosure of all written offers, counter-offers, acceptances and rejections within 48 hours of receipt by the broker. This is a stronger protection that is proposed by the Poolman Amendment.

The new subdivision (5) should be deleted as there has been no explanation or justification for this provision. Nonetheless, it is unnecessary, since the provisions of Subsection (3) require that the viator receive disclosures regarding the compensation, settlement offer and any relationships between the broker and the provider.

5. Amend Subsection E(1), as follows:

- E. A viatical settlement provider or its viatical settlement investment agent shall provide the viatical settlement purchaser with at least the following disclosures prior to the date the viatical settlement purchase agreement is signed by all parties. The disclosures shall be conspicuously displayed in any viatical purchase contract or in a separate document signed by the viatical settlement purchaser and viatical settlement provider or viatical settlement investment agent, and shall make the following disclosure to the viatical settlement purchaser:
- (1) The purchaser will receive no returns (i.e., dividends and interest) until the insured dies **and a death claim payment is made.**

***Justification:** This provision was added and never seen prior to the December 1, 2007 draft. No explanation has been given for this change and the interested parties have not had the opportunity to examine or respond. It does not address STOLI.*

This new language should be deleted, as it appears that the effect of the provision is to delay the accrual of interest from the time of the insured's death until the payment of the claim, which would be unprecedented, as nearly uniform public policy provides for the accrual of interest during this period.

Section 9. Disclosure to Insurer

1. Section 9 should be deleted in its entirety and a new Section 9 should be added, as follows:

~~Section 9. Disclosure to Insurer~~

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

Drafting Note: This language pertaining to premium finance arrangements and disclosures may be inserted into a state's premium finance law. If so, it is recommended that the disclosures be made to

the borrower and/or insured by a lender which takes the policy as collateral for a premium finance loan.

Insurance carriers may determine in the application for insurance if the proposed owner intends to pay premiums with the assistance of a loan by a lending institution which uses the policy as collateral for the loan as follows:

(A) If, as described in Section 2N, the loan provides funds which can be used for a purpose other than paying for the premiums, costs, and expenses associated with obtaining and maintaining the life insurance policy and loan, the application shall be rejected as a violation of the Prohibited Practices in Section 10 of this Act.

(B) If the loan does not violate Section 10 in this manner, the insurance carrier:

(1) may not reject the application based on this method of payment;

(2) may make the following disclosure to the applicant and the insured, either on the application or an amendment to the application to be completed no later than the delivery of the policy:

“If you have entered into a loan arrangement where the policy is used as collateral, and the policy does change ownership at some point in the future in satisfaction of the loan, the following may be true:

(a) a change of ownership could lead to a stranger owning an interest in the insured’s life;

(b) a change of ownership could in the future limit your ability to purchase future insurance on the insured’s life because there is a limit to how much coverage insurers will issue on one life;

(c) should there be a change of ownership and you wish to obtain more insurance coverage on the insured’s life in the future, the insured’s higher issue age, a change in health status, and/or other factors may reduce the ability to obtain coverage and/or may result in significantly higher premiums;

(d) you should consult a professional advisor, since a change in ownership in satisfaction of the loan may result in tax consequences to the owner, depending on the structure of the loan.”; and

(3) may require the following certification from the applicant and/or the insured:

“(i) This policy is being purchased in order to meet a need for death benefit coverage determined in consultation with financial and/or legal advisors;

(ii) I have not entered into any agreement or arrangement providing for the future sale of this life insurance policy;

(iii) My loan arrangement for this policy provides funds sufficient to pay for some or all of the premiums, costs, and expenses associated with obtaining and maintaining my life insurance policy, but I have not entered into any agreement by which I am to receive consideration in exchange for procuring this policy; and

(iv) the borrower has an insurable interest in the insured.”

Justification: Section 9, Disclosure to Insurers, should be deleted, as it is overly broad and unnecessary. Section 9 would require viatical settlement providers and

brokers disclose “to an insurer a plan, transaction or series of transactions, to which the viatical broker or viatical settlement provider is a party, to originate, renew, continue or finance a life insurance policy with the insurer for the purpose of engaging in the business of viatical settlements”. First, it is a regulatory trap, as a provider does not know, prior to receiving a policy for evaluation, which carriers it would have to make such a disclosure.

Furthermore, most of what is described as the plans or transactions are not the business of viatical settlements, as defined in Section 2A of the Model Act. Additionally, insurance carriers are already notified each time a policy is the subject of a viatical settlement transaction. Pursuant to Section 10(A)(2), a viatical settlement provider must “give written notice to the insurer that issued that insurance policy that the policy has or will become a viaticated policy”.

The Model Act, however, should be amended to authorize insurers to issue a distinct set of consumer disclosures to, and to require a set of affirmations from, applicants for life insurance, where the applicant intends to pay premiums with the assistance of a loan by a licensed lending institution which uses the policy as collateral for the loan.

The disclosures, which have been suggested by Kansas Insurance Commissioner Praeger, would alert consumers to specific risks associated with such premium financing in order to dispel improper and misleading promotional techniques whereby consumers are told that acquiring life insurance through premium financing is “free insurance” which presents little or no risk to the applicant. These disclosures warn the consumer that, if the policy is used as collateral, a change of ownership could result, and that such change of ownership may produce a transaction that, far from being a “freebie,” has important consequences as it could result in:

- a stranger owning an interest in the insured’s life;
- diminished insurance capacity on the insured;
- higher rates or non-insurability even if capacity is still available; and
- tax consequences upon the transfer.

Further, the proposed amendment authorizes life insurers to require an applicant for new life insurance to certify that she:

- has not been induced to take out an unneeded policy by an offer of consideration;
- has not entered into an arrangement to sell the policy; and
- that the borrower has an insurable interest in the insured.

The disclosures help an informed consumer understand the possible ramifications of a legitimate premium finance program, and the affirmations help ensure that improper financing arrangements which involve inducements to consumers to sell their insurance capacity from policy inception can be identified by insurers and prevented in accord with their public statements and desire to eliminate such programs. Both the disclosures and

the affirmation properly focus the issue on violations of existing insurance laws and/or sound public policy at the inception of a life insurance policy, where consumers who are financing premiums should be well informed as to certain risks and where carriers are and should be necessarily focused on underwriting and protecting against fraudulent procurement of life insurance.

The use of disclosures to insureds should not be discounted since the NAIC Life (A) Committee, under Chairman Poolman’s leadership, has relied on disclosure remedies to resolve difficult public policy debates. For instance, when consumer complaints, regulatory inquiries, and massive lawsuits all demonstrated that vulnerable working class consumers were at risk in purchasing small face amount insurance, the Life (A) Committee studied the issue for years and produced a disclosure-only remedy based on the understanding of all parties that such disclosures would be effective in a class of consumers far less educated than those engaged in the settlement of larger policies.

The disclosure-only remedy to small face amount insurance problems was lauded by the ACLI, which thanked Chairman Poolman for choosing a disclosure-only remedy: “While the amendments will impose additional compliance and cost burdens on the companies, the ACLI is most appreciative of the flexibility you have afforded them in allowing the company to design the required disclosure as best suited to the company’s particular delivery system and technological architecture.”

Further support for the use of consumer disclosures in premium financing transaction is provided by the fact that at least two life insurance companies, Pacific Life and American General, have initiated the use of such disclosures which alert applicants for new life insurance who are premium financing of certain risks in such transactions.

Section 10. General Rules

1. Amend Subsection A(1)(b) as follows:

- A. (1) A viatical settlement provider entering into a viatical settlement contract shall first obtain:
 - (b) A document in which the insured consents to the release of his or her medical records to a licensed viatical settlement provider, viatical settlement broker and **if the policy was issued less than two years from the date of application for a viatical settlement contract**, the insurance company that issued the life insurance policy covering the life of the insured.

Justification: *Subdivision (1)(b) should be amended to provide that a viatical settlement provider obtain an insured’s consent to release his or her medical records to the insured only if the policy was issued less than two years from the date of application for a viatical settlement contract. The two-year period proposed herein is established law in several states, including Colorado²⁴, Georgia²⁵, Kentucky²⁶, New Jersey²⁷ and*

²⁴ 10-7-609(1)(a)(II) C.R.S.

Virginia²⁸. Louisiana's viatical settlement statute does not include insurance companies in the requirement that an insured consent to the release of medical records.²⁹ New Jersey's viatical settlement law limits the consent requirement to a period of three years after the issuance of the policy.

The two year period is also consistent with the current Model Act provision during which time the policy cannot be the subject of a viatical settlement contract, except in limited circumstances and with the contestable period of a life insurance policy, during which time the insurer is both authorized and bound to investigate suspected fraud related to the application and issuance of the policy. If an exception to the general prohibition against the sale of a policy during the first two years is exercised, it is, of course, important that the carrier be provided the opportunity to review the facts and circumstances surrounding the initial issuance of the policy so as to recognize and prosecute fraud in the initiation of the policy.

If, however, a policyowner is lawfully exercising her right under the policy to enter into a viatical settlement contract beyond the two-year period, such a requirement would act only to interfere with her right. Without such a proper two-year limitation on the required consent, it would subject the policyowner to unfair interference with the settlement contract and possible underwriting by insurers after the contestable period. The fact that this interference and late underwriting could occur with a policy holder holding a policy for many year simply because of the exercise of the option of settlement is a drastic over-reaching and interference in the privacy rights of legitimate consumers for no demonstrated reason of public policy other than to allow insurers to further their own interests at the expense of the public.

2. Amend Subsection C as follows:

- C. All viatical settlement contracts entered into in this state shall provide the viator with **an absolute a** right to rescind the contract before the earlier of **sixty (60) thirty (30)** calendar days after the date upon which the viatical settlement contract is executed by all parties or **thirty (30) fifteen (15)** calendar days after the **receipt of the** viatical settlement proceeds **have been send to by** the viator as provided in Section 10F. Rescission, **if exercised** by the viator **may be conditioned upon the viator both giving notice and repaying to the viatical settlement provider is effective only if both notice of the rescission is given and the viator repays all proceeds and any premiums, loans and loan interest paid on account of the viatical settlement provider** within the rescission period **all proceeds of the settlement and any premiums, loans and loan interest paid by or on behalf of the viatical settlement provider in connection with or as a consequence of the viatical settlement.** If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment to the viatical settlement provider or purchaser of all viatical settlement proceeds, and any premiums, loans and loan interest that have been paid by the viatical

²⁵ O.C.G.A 33-59-9 (a)(1)(B)

²⁶ KRS 304.15-715(1)(B)

²⁷ NJ ST 17B:30B-9(a)(1)(b)

²⁸ Va Code Ann §38.2-6008(A)(1)(b)

²⁹ LRS §1941(A)(1)(c)

settlement provider or purchaser, ~~which shall be paid~~ within sixty (60) calendar days of the death of the insured. In the event of any rescission ~~of a viatical settlement contract~~, if the viatical settlement provider has paid commissions or other compensation to a viatical settlement broker in connection with the rescinded transaction, the viatical settlement broker shall refund all such commissions and compensation to the viatical settlement provider within five business days following receipt of written demand from the viatical settlement provider, which demand shall be accompanied by either the viator's notice of rescission if rescinded at the election of the viator, or notice of the death of the insured if rescinded by reason of the death of the insured ~~within the applicable rescission period~~.

***Justification:** Subsection (C) should be amended to conform the notice and repayment requirements for rescission to those found in Section 8 (Disclosure to Viators). Specifically, the amendments to this subsection make clear that the rescission is only effective upon both notice AND repayment of proceeds to the viatical settlement provider. This provision for rescission was established as an extra layer of protection for individuals with terminal illness in circumstances of desperation, and is totally inappropriate for modification and extension to seniors who have chosen to receive compensation above that offered by insurers. If rescission is to be expanded in a manner which would allow for insurer interference in the transaction after the insurer may have been informed of the change of ownership, it is clearly tilting the table toward one side not simply allowing for an open market. No other asset, once sold, allows for a consideration period so extensive as that now applied to a settlement. Expanding this period without a full vetting of the reasons is clearly for purposes beyond public policy or good market reasoning and will damage the market due to the buyers withdrawing from a market of unending closure.*

3. Amend Subsection F as follows:

- F. Failure to tender consideration to the viator for the viatical settlement contract within the time set forth in the disclosure pursuant to Section 8A(7) renders the viatical settlement contract voidable by the viator for lack of consideration until the time consideration is tendered to and accepted by the viator. Funds shall be deemed ~~sent by a viatical settlement provider to by~~ a viator ~~from a viatical settlement provider~~ as of the date that the escrow agent either releases funds for wire transfer to the viator or places a check for delivery to the viator via United States Postal Service or other nationally recognized delivery service.

***Justification:** The changes to this section were never seen prior to the December 1, 2006 draft of amendments to the Model Act. There is no justification to this change. Subsection F should be amended to clarify that viatical settlement proceeds sent to a viator shall be deemed received by a viator, from a viatical settlement provider, as of the date that the escrow agent releases the funds. It is unprecedented in the Model Act to qualify when certain items are sent.*

4. Amend Subsection G as follows:

- G. Contacts with the insured for the purpose of determining the health status of the insured by the viatical settlement provider ~~or viatical settlement broker~~ after the viatical

settlement has occurred shall only be made by the viatical settlement provider ~~or broker licensed in this state~~ or its authorized representatives and shall be limited to once every three (3) months for insureds with a life expectancy of more than one year, and to no more than once per month for insureds with a life expectancy of one year or less. The provider or ~~broker its authorized representative~~ shall explain the procedure for these contacts at the time the viatical settlement contract is entered into. The limitations set forth in this subsection shall not apply to any contacts with an insured for reasons other than determining the insured's health status. Viatical settlement providers ~~and viatical settlement brokers~~ shall be responsible for the actions of their authorized representatives.

Justification: Subsection G should be amended to clarify that only the viatical settlement provider or an authorized representative of the provider may have contact with the insured. Since the viatical settlement contract is between a viator and a viatical settlement provider, a broker should never contact the insured for purposes of tracking after completion of the settlement contract.

Section 11. Prohibited Practices

1. Amend Section 11A, as follows:

- A. It is a violation of this Act for any person to enter into a viatical settlement contract at any time prior to the application or issuance of a policy which is the subject of viatical settlement contract or within a ~~five-year~~ **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 the ~~five-year~~ **two year** period:
- (1) The policy was issued upon the viator's exercise of conversion rights arising out of a group or individual policy, provided the total of the time covered under the conversion policy plus the time covered under the prior policy is at least ~~sixty (60)~~ **twenty-four (24)** months. The time covered under a group policy shall be calculated without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship;
 - (2) The viator submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within the ~~five-year~~ **two year** period:
 - (a) The viator or insured is terminally or chronically ill;
 - (b) The viator's spouse dies;
 - (c) The viator divorces his or her spouse;
 - (d) The viator retires from full-time employment;
 - (e) The viator becomes physically or mentally disabled and a physician determines that the disability prevents the viator from maintaining full-time employment; ~~or~~
 - (f) **The viator experiences a significant decrease in income that is unexpected and that impairs the viator's reasonable ability to pay the policy premium;**

- (g) A final order, judgment or decree is entered by a court of competent jurisdiction, on the application of a creditor of the viator, adjudicating the viator bankrupt or insolvent, or approving a petition seeking reorganization of the viator or appointing a receiver, trustee or liquidator to all or a substantial part of the viator's assets; or

Justification: *The December 1, 2006 amendments deleted the current Model Act's two-year prohibition on life settlements after policy inception and replaced it with a five-year ban. Despite the convoluted attempt to provide in subdivision (3) the ability to enter into a viatical settlement contract if premiums were paid with so-called "unencumbered assets" or using only carrier promoted premium financing, the fact is that the five year ban remains. Furthermore, without explanation, the December 1 amendments prohibited a person from entering into a viatical settlement contract during this period even where the policyowner experiences a significant decrease in income. This provision should be reinstated as it identifies a true hardship condition for which policyowners would seek to sell their assets via a settlement contract.*

The change from two years to five years should be rejected, for the following reasons:

- 1. The 5 year ban does not respond to the concerns about investor-initiated life insurance;*
- 2. Instead, by expanding the settled two year period by 250%, it sweeps in many traditional life settlements – since 40% of policies lapse in the first five years -- and would deprive consumers of well established property rights whereby consumers receive hundreds of millions of dollars a year above cash surrender value.*
- 3. The NAIC Model's current two year prohibition on settlements was extensively debated along with other proposals six years ago, as the NAIC Proceedings reflect in detail. In fact, the ACLI, now an advocate of five years, was the original supporter of tying the "wet ink" period to the policy's two-year contestability period.*

The five-year prohibition on life settlements is similar to the ACLI's proposal at the federal level to impose a 100% excise tax on all life settlements in the first five years. Both bills are an attack on the secondary market which would eliminate a wide swath of the existing settlement market.

The NAIC's Well-Established Two Year Prohibition On Settlements

The two year wet ink provision is a cornerstone of the NAIC Viatical Settlements Model Act and was adopted after extensive debate, as reflected in the NAIC Proceedings. The Proceedings demonstrate that:

- *The NAIC made a considered policy choice to choose a two year prohibition;*³⁰
- *Other periods of time were considered and rejected in lieu of an affirmative choice of the two year period;*³¹
- *The two year period was originally proposed by the ACLI and a policy choice was made to tie the wet ink period to a policy's contestability period;*³² and
- *The NAIC made its policy decision to impose a two year wet ink period while wrestling with the same basic concerns about creating and selling insurance for investment purposes that are at issue today.*³³

The Effects Of A Five-Year Ban On Property Rights

Expanding the wet ink period by 250%, from two years to five years, would greatly impair the property rights of policyowners, and take away hundreds of millions of dollars of potential gain for those many consumers who let their policies lapse during the third through fifth years of a policy. A recent LIMRA/Society of Actuaries study found that about 40% of policyowners let their policies lapse in the first five years. Under the punitive five-year moratorium on settlements, all of these policyowners would be forced to settle for their issuing carriers' "take-it-or-leave-it" cash surrender offer, even though the market value of policies in a life settlement is typically 300-400% of cash surrender value.

Under the five-year moratorium, 40% of policyowners would have their property rights drastically impaired. This is contrary to the bedrock property rights which have been repeatedly upheld by the U.S. Supreme Court and numerous state supreme courts have used broad and categorical language in holding that preventing a policyowner from selling his asset on the market is unfair, anti-competitive, and a substantial economic detriment to consumers:

- *"To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands."*³⁴

³⁰ "Mr. [Roger] Strauss said Iowa had introduced a bill that does not allow sale of a policy during the first two years except that a rebuttable presumption exists so that an individual could prove that he was not sick when he got the policy but the situation had now changed..... [Working Group Chair] Mr. [Lester] Dunlap said the working group could include a two-year exclusion on sale of policies and beyond that transfer of policies obtained by fraud could be prohibited." 2000 NAIC Proc. 1st Q. at 80-81.

³¹ "Mr. McNerney [representing a settlement provider] said the two-year limit would cause a problem for people who get group insurance but do not need it and want to sell it. He said no fraud was involved in this situation. Mr. [Paul] DeAngelo [New Jersey] recommended a two-year period across the board." Id.

³² "[Florida then-Deputy Commissioner] Mr. [Kevin] McCarty reminded the group that [ACLI representative] Ms. [Julie] Spiezio had suggested limiting transfer during the contestability period." Id.

³³ "Insurance is issued for certain purposes, and selling the policy for financial gain is not one of them." 2000 NAIC Proc. 3rd Q. at 113.

³⁴ Grigsby v. Russell, 222 U.S. 149 (1911).

- “One who has obtained a valid insurance upon his own life, may dispose of it as he sees fit.”³⁵
- “It has been said, that without the right to assign, insurances on lives lose half their usefulness.”³⁶
- “It would substantially confine him to such terms as the company issuing the policy should choose to make with him, if he should be limited in his choice of a purchaser to the party having an interest in the continuance of the life of the assured.”³⁷
- “[W]ithout the right to assign, insurances on lives lose half their usefulness; a fact that should not be lost sight of in this day, when almost every person carries life insurance of some character, the commercial value and usefulness of which should be fostered, rather than crippled or minified.”³⁸
- “We can see no reasonable basis for public policy forbidding the owner of the insurance policy to sell it and assign it to any one who would pay more than the cash surrender value which the company was willing to pay.”³⁹

The ACLI’s Flip Flop; Its Previous Pledges Regarding Settlements

The ACLI’s support for a five year prohibition on settlements is directly contrary to its numerous public statements that it supports the settled two year wet ink period, and that it seeks a public policy solution to the problem of premium finance abuses without impairing life settlements.

- In May, the ACLI put out a fact sheet, entitled “Key Points On Stranger-Owned Life Insurance,” regarding its proposal to the Life (A) Committee. One of the fact sheet’s lead points was: “**The legislation pursued by ACLI will not affect life settlements entered into more than two years after policy issuance.**” This flat statement has been excised from the revised fact sheet currently available on the ACLI website, now entitled “Key Points On Amending NAIC Viatical Settlements Model.”
- At the May hearing of the Life (A) Committee, ACLI President Frank Keating said: “allow me to say up front that we have no quarrel with traditional, legitimate viatical settlements or life settlements.”
- The ACLI press release regarding Governor Keating’s testimony said that: “**Keating asked the NAIC to amend its model act on viatical settlements to**

³⁵ Eckel v. Renner, 41 Ohio St. 232 (Ohio 1884).

³⁶ St. John v. American Mutual, 13 N.Y. 31 (1855).

³⁷ Steinback v. Diepenbrock, 158 N.Y. 24 (1899).

³⁸ Chamberlain v. Butler, 61 Neb. 730 (1901).

³⁹ Hawley v. Aetna, 125 N.E. 707 (Ill. 1919).

prohibit such transactions if they are entered into at any time prior to or within two years after issuance of the life insurance policy.

- *In coordinated testimony at the Life (A) Committee hearing, NAIFA President David Woods said: “Because of our insurable interest-related concerns, NAIFA, AALU, the ACLI and NAILBA have drafted proposed revisions to the viatical model.... At the outset, let me emphasize that the concerns of NAIFA, AALU and NAILBA currently do not include situations where there is ... a valid life settlement motivated by circumstances arising after the policy issuance.”*

2. Amend Subsection A(3), as follows:

- (3) The viator enters into a viatical settlement contract more than two (2) years after the date of issuance of a policy and, with respect to the policy, at all times prior to the date that is two (2) years after policy issuance, the following conditions are met:
- (a) Policy premiums have been funded exclusively with unencumbered assets, including an interest in the life insurance policy being financed ~~only to the extent of its net cash surrender value, provided by, or fully recourse liability incurred by, the insured or a person as described in Section 2N(3)(e) (a), (b), (c) and (d); and~~
 - (b) There is no agreement or understanding with any other person to guarantee any such liability or to purchase, or stand ready to purchase, the policy, ~~including through an assumption or forgiveness of the loan;~~ and
 - ~~(c) Neither the insured nor the policy has been evaluated for settlement.~~

Justification: *This proposal was added, for the first time, in the December 1, 2006 draft. It has no justification and impairs the property rights of life insurance policyowners. These amendments fail to address STOLI.*

Rather, this provision would harm a policyowner who chooses to utilize legitimate premium financing by prohibiting that policyowner from selling that policy for the first five years of the policy – this is unjustified and unnecessary.

The proposed amendments to Subsection (3)(a) are consistent with the concerns addressed in Section 2N of the Model Act, definition of viatical settlement contract, in that a policyowner who chooses a lawful form of premium financing where the lender accepts the market value of the policy as collateral should not be singled out and prevented from selling their policy as any other lawful policyowner would be permitted.

Subsection (3)(b) should be amended to eliminate the restriction on an otherwise legitimate term of the loan, consistent with other premium finance programs. As drafted, if that loan provision were in a premium finance transaction, it would merely prohibit the policyowner from selling her policy in the first five years.

Subdivision (3)(c) prohibits any settlement within 5 years if “the policy has been evaluated for settlement.” The effect of this provision is to prohibit any settlements for a full five year period. This subdivision (c) is amended to eliminate this unjustified and onerous provision as it does not address the illegal or illegitimate initiation of life insurance by strangers, disinterested third parties, or investors.

3. Amend Subsection B as follows:

- B. Copies of the independent evidence described in Subsection A(2) and documents required by Section 10A shall be submitted to the insurer when the viatical settlement provider ~~or other party entering into a viatical settlement contract with a viator~~ submits a request to the insurer for verification of coverage. The copies shall be accompanied by a letter of attestation from the viatical settlement provider that the copies are true and correct copies of the documents received by the viatical settlement provider.

***Justification:** This Subsection B should be amended to clarify that the evidence required by this subsection may only be submitted by a viatical settlement provider, as the only parties entering into a viatical settlement contract are the viator and the provider.*

Section 12. Prohibited Practices and Conflicts of Interest

1. Amend Subsection B as follows:

- B. With respect to any viatical settlement contract or insurance policy, no viatical settlement provider knowingly may enter into a viatical settlement contract with a viator, if, in connection with such viatical settlement contract, anything of value will be paid to a viatical settlement broker that is controlling, controlled by, or under common control with such viatical settlement provider or the viatical settlement purchaser, [viatical settlement investment agent], financing entity or related provider trust that is involved in such viatical settlement contract without making the disclosure provided for in Section 8(C)(3).

***Justification:** Subsection B should be amended to give effect to both this subdivision and the disclosure required in Section 8(B)(3)(b), which requires disclosure to a viator any controlling relationship between a viator and a viatical settlement provider or other defined entities. In order to give effect to both provisions, it is necessary to clarify that such a relationship is only prohibited if it is not disclosed to the viator. Without such a change, the provisions of this section and Section 8 are in conflict.*

2. Add a new Subsection C (and renumber the succeeding subsections) as follows:

- C. It is unlawful for an insurance company to (i) prohibit, restrict, limit or impair a life insurance producer from lawfully negotiating a viatical settlement on behalf of a viator, aiding and assisting a seller with a viatical settlement, or otherwise participating in a viatical settlement transaction under this Act, (ii) engage in or permit any discrimination between individuals of the same class, same policy amount, and equal expectation of life in the rates charged for any life insurance

policy or annuity contract based upon an individual's having entered into a viatical settlement contract or being insured under a viaticated policy, (iii) make any false or misleading statement as to the business of viatical settlements or financing premiums due for a policy or to any policyholder or insured for the purpose of inducing or tending to induce the policyholder or insured not to enter into a viatical settlement contract, or (iv) engage in any transaction, act, practice or course of business or dealing which restricts, limits or impairs in any way the lawful transfer of ownership, change of beneficiary, or assignment of a policy to effectuate a viatical settlement contract.

- D.** A violation of Subsection A or Subsection B shall be deemed a fraudulent viatical settlement act. **A violation of Subsection C shall be deemed to be a violation of Section 14 of this Act and a violation of [cite corresponding provision to the NAIC Model Unfair Trade Practices Act, Section 4(G)(9).**

Justification: A new subdivision C should be added in order to protect policyowners who seek to enter into a viatical settlement contract by prohibiting interference in such transactions by insurance companies. Most life insurance companies prohibit licensed life insurance agents from advising or assisting policyowners with settlements. Similarly, carriers are engaging in market conduct which is interfering with the lawful assignment of life insurance policies that are the subject of a viatical settlement contract.

3. Amend Subsection E, as follows:

- E. F.** No life insurance producer, insurance company, viatical settlement broker, viatical settlement provider or viatical settlement investment agent shall make any statement or representation to the applicant or policyholder in connection with the sale or financing of a life insurance policy to the effect that the insurance is free or without cost to the policyholder for any period of time **unless provided in the policy.**

Justification: This is a new provision which should be amended to delete an obvious attempt to permit life insurance companies to promote free insurance or insurance without cost to the policyholder. As drafted, so long as such statement is provided in the policy, it is permitted, which is anomalous to the intent of the proposal to prohibit solicitations of free insurance.