

[First Reprint]

SENATE, No. 1940

STATE OF NEW JERSEY
211th LEGISLATURE

INTRODUCED OCTOBER 4, 2004

Sponsored by:

Senator RAYMOND J. LESNIAK

District 20 (Union)

Senator JOSEPH M. KYRILLOS, JR.

District 13 (Middlesex and Monmouth)

Assemblyman NEIL M. COHEN

District 20 (Union)

Assemblyman CHRISTOPHER "KIP" BATEMAN

District 16 (Morris and Somerset)

Co-Sponsored by:

Assemblyman Connors

SYNOPSIS

Regulates life insurance viatical settlement practices; repeals existing law regulating viatical settlements.

CURRENT VERSION OF TEXT

As reported by the Senate Commerce Committee on November 15, 2004, with amendments.

(Sponsorship Updated As Of: 6/24/2005)

1 AN ACT concerning certain viatical settlements, ¹supplementing
2 Title 17B of the New Jersey Statutes, ¹amending P.L.1967, c.93 and
3 repealing P.L.1999, c.211.

4

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

7

8 1. (New section) This act shall be known and may be cited as the
9 "Viatical Settlements Act."

10

11 2. (New section) As used in this act:

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

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

25 "Chronically ill" means:

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

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

31 (3) Having a level of disability similar to that described in
32 paragraph (1) of this subsection as determined by the United States
33 Secretary of Health and Human Services.

34 "Commissioner" means the Commissioner of Banking and
35 Insurance.

36 "Department" means the Department of Banking and Insurance.

37 "Financing entity" means:

38 (1) an underwriter, placement agent, lender, purchaser of
39 securities, purchaser of a policy from a viatical settlement provider,
40 credit enhancer, or any entity that has a direct ownership in a policy
41 that is the subject of a viatical settlement contract but:

42 (a) whose principal activity related to the transaction is providing

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Senate SCM committee amendments adopted November 15, 2004.

- 1 funds to effect the viatical settlement contract or purchase of one or
2 more viaticated policies; and
- 3 (b) who has an agreement in writing with one or more licensed
4 viatical settlement providers to finance the acquisition of viatical
5 settlement contracts.
- 6 (2) "Financing entity" does not include a non-accredited investor
7 or purchaser of a policy from a viatical settlement provider.
- 8 "Fraudulent viatical settlement act" means and includes:
- 9 (1) Acts or omissions committed by any person who, knowingly or
10 with intent to defraud, for the purpose of depriving another of
11 property or for pecuniary gain, commits, or permits its employees or
12 its agents to engage in acts including:
- 13 (a) Presenting, causing to be presented or preparing with
14 knowledge or belief that it will be presented to or by a viatical
15 settlement provider, life insurance producer, financing entity, insurer
16 or any other person, false material information, or concealing material
17 information, as part of, in support of or concerning a fact material to
18 one or more of the following:
- 19 (i) An application for the issuance of a viatical settlement contract
20 or insurance policy;
- 21 (ii) The underwriting of a viatical settlement contract or insurance
22 policy;
- 23 (iii) A claim for payment or benefit pursuant to a viatical settlement
24 contract or insurance policy;
- 25 (iv) Premiums paid on an insurance policy;
- 26 (v) Payments and changes in ownership or beneficiary made in
27 accordance with the terms of a viatical settlement contract or
28 insurance policy;
- 29 (vi) The reinstatement or conversion of an insurance policy;
- 30 (vii) The solicitation, offer, effectuation or sale of a settlement
31 contract or insurance policy;
- 32 (viii) The issuance of written evidence of a viatical settlement
33 contract or insurance; or
- 34 (ix) A financing transaction;
- 35 (b) Employing any device, scheme, or artifice to defraud related to
36 viaticated policies;
- 37 (2) In the furtherance of a fraud or to prevent the detection of a
38 fraud any person commits or permits its employees or its agents to:
- 39 (a) Remove, conceal, alter, destroy or sequester from the
40 commissioner the assets or records of a viatical settlement provider
41 licensee or other person engaged in the business of viatical
42 settlements;
- 43 (b) Misrepresent or conceal the financial condition of a licensee,
44 financing entity, insurer or other person;
- 45 (c) Transact the business of viatical settlements in violation of laws
46 requiring a license, certificate of authority or other legal authority for

1 the transaction of the business of viatical settlements; or

2 (d) File with the commissioner or the chief insurance regulatory
3 official of another jurisdiction a document containing false information
4 or otherwise concealing information about a material fact from the
5 commissioner;

6 (3) Embezzlement, theft, misappropriation or conversion of
7 monies, funds, premiums, credits or other property of a viatical
8 settlement provider, insurer, insured, viator, insurance policy owner or
9 any other person engaged in the business of viatical settlements or
10 insurance;

11 (4) Recklessly entering into, brokering or otherwise dealing in a
12 viatical settlement contract, the subject of which is a life insurance
13 policy that was obtained by presenting false information concerning
14 any fact material to the policy or by concealing, for the purpose of
15 misleading another, information concerning any fact material to the
16 policy, where the viator or the viator's agent intended to defraud the
17 policy's issuer. For the purposes of this paragraph, "recklessly" means
18 engaging in the conduct in conscious and clearly unjustifiable disregard
19 of a substantial likelihood of the existence of the relevant facts or
20 risks, such disregard involving a gross deviation from acceptable
21 standards of conduct; or

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

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

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

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

36 "Related provider trust" means a titling trust or other trust
37 established by a licensed viatical settlement provider or a financing
38 entity for the sole purpose of holding the ownership or beneficial
39 interest in viaticated policies in connection with a financing
40 transaction. The trust shall have a written agreement with the licensed
41 viatical settlement provider under which the licensed viatical
42 settlement provider is responsible for ensuring compliance with all
43 statutory and regulatory requirements and under which the trust agrees
44 to make all records and files related to viatical settlement transactions
45 available to the commissioner as if those records and files were
46 maintained directly by the licensed viatical settlement provider.

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

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

7 "Viatical settlement contract" means a written agreement
8 establishing the terms under which compensation or anything of value
9 will be paid, which compensation or value is less than the expected
10 death benefit of the policy, in return for the viator's assignment,
11 transfer, sale, devise or bequest of the death benefit or ownership of
12 any portion of the policy. A viatical settlement contract also includes
13 a contract for a loan or other financing transaction with a viator
14 secured primarily by an individual or group life insurance policy, other
15 than a loan by a life insurance company pursuant to the terms of the
16 life insurance contract, or a loan secured by the cash value of a policy.
17 A viatical settlement contract includes an agreement with a viator to
18 transfer ownership or change the beneficiary designation at a later date
19 regardless of the date that compensation is paid to the viator. A
20 viatical settlement contract does not mean or include a written
21 agreement between a viator and a person having an insurable interest
22 in the insured's life. ¹A viatical settlement contract shall not include
23 any accelerated benefit pursuant to the terms of a life insurance policy
24 issued in accordance with Title 17B of the New Jersey Statutes.¹

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

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

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

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

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

40 (5) A financing entity;

41 (6) A special purpose entity;

42 (7) A related provider trust; or

43 (8) An accredited investor or qualified institutional buyer as defined
44 respectively in Regulation D, Rule 501 (17 C.F.R. 230.501 through
45 230.508) or Rule 144A (17 C.F.R. 230.144A) of the ¹[Federal
46 Securities Act of 1933]federal "Securities Act of 1933"¹ (15 U.S.C.

1 s.77a et seq.) as amended, and who purchases a viaticated policy from
2 a viatical settlement provider.

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

6 "Viator" means the owner of a policy who enters or seeks to enter
7 into a viatical settlement contract. For the purposes of this act, a
8 viator shall not be limited to an owner of a policy insuring the life of
9 an individual with a terminal or chronic illness or condition except
10 where specifically addressed. If there is more than one viator on a
11 single policy and the viators are residents of different states, the
12 transaction shall be governed by the law of the state in which the
13 viator having the largest percentage ownership resides or, if the viators
14 hold equal ownership, the state of residence of one viator agreed upon
15 in writing by all viators. Viator shall not include:

- 16 (1) A viatical settlement provider licensed under this act;
17 (2) An accredited investor or qualified institutional buyer as defined
18 respectively in Regulation D, Rule 501 (17 C.F.R. 230.501 through
19 230.508) or Rule 144A (17 C.F.R. 230.144A) of the ¹[Federal
20 Securities Act of 1933] federal "Securities Act of 1933"¹ (15 U.S.C.
21 s.77a et seq.), as amended;
22 (3) A financing entity;
23 (4) A special purpose entity; or
24 (5) A related provider trust.

25
26 3. (New section) a. ¹[(1)]¹ A person shall not operate as a
27 viatical settlement provider without first obtaining a license from the
28 commissioner of the state of residence of the viator. ¹[No person
29 shall act on behalf of a viator residing in this State unless that person
30 is licensed pursuant to this act or is a life insurance producer operating
31 pursuant to subsection b. of this section.]¹

32 b. ¹[A life insurance producer shall be permitted to] (1) No
33 person shall act on behalf of a viator residing in this State, or
34 otherwise¹ negotiate, as that term is defined in section 3 of P.L.2001,
35 c.210 (C.17:22A-28), viatical settlement contracts between a viator
36 ¹residing in this State¹ and one or more viatical settlement providers
37 ¹unless that person is licensed as a life insurance producer¹ pursuant
38 to ¹[that producer license] the "New Jersey Insurance Producer
39 Licensing Act of 2001," P.L.2001, c.210 (C.17:22A-26 et seq.) and
40 has been licensed as a resident insurance producer in his home state for
41 not less than one year¹.

42 ¹(2)¹ Irrespective of the manner in which the life insurance
43 producer is compensated, a life insurance producer is deemed to
44 represent only the viator ¹and not the viatical settlement provider or
45 any insurer,¹ and owes a fiduciary duty to the viator to act according
46 to the viator's instructions and in the best interest of the viator.

1 ¹(3)¹ Not later than 30 days from the first day of negotiating a
2 viatical settlement ¹[conducted] contract¹ on behalf of a viator, such
3 producer shall notify the commissioner of that activity on a form or in
4 a manner that may be prescribed by, and shall pay any applicable fees
5 determined by, the commissioner by regulation. The notification shall
6 include an acknowledgment by the producer that he will operate in
7 accordance with the provisions of this act.

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

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

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

25 e. The applicant for a license pursuant to subsection a. of this
26 section shall provide information on forms required by the
27 commissioner. The commissioner shall have the authority, at any time,
28 to require the applicant to fully disclose the identity of all stockholders
29 except those owning fewer than five percent of the shares of an
30 applicant whose shares are publicly traded, partners, officers, members
31 and employees, and the commissioner may, in his discretion, refuse to
32 issue a license in the name of a legal entity if not satisfied that any
33 officer, employee, stockholder, partner or member thereof who may
34 materially influence the applicant's conduct meets the standards of this
35 act.

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

41 g. Upon the filing of an application and the payment of the license
42 fee, the commissioner shall make an investigation of each applicant
43 and issue a license if the commissioner finds that the applicant:

44 (1) Has provided a detailed plan of operation;

45 (2) Is competent and trustworthy and intends to act in good faith
46 in the capacity involved by the license applied for;

1 (3) Has a good business reputation and has had experience,
2 training or education so as to be qualified in the business for which the
3 license is applied for;

4 (4) If a legal entity, provides a certificate of good standing from
5 the state of its domicile; and

6 (5) Has provided an anti-fraud plan that meets the requirements of
7 section 12 of this act.

8 h. The commissioner shall not issue a license to a nonresident
9 applicant unless a written designation of an agent for service of
10 process is filed and maintained with the commissioner, or the applicant
11 has filed with the commissioner, the applicant's written irrevocable
12 consent that any action against the applicant may be commenced
13 against the applicant by service of process on the commissioner.

14 i. A viatical settlement provider shall provide to the commissioner
15 any new or revised information about officers, stockholders holding
16 10% or more of the outstanding shares, partners, directors, members
17 or designated employees within 30 days of the change.

18 ¹[j. A person licensed as an attorney, or a certified public
19 accountant, who is retained to represent the viator whose
20 compensation is not paid directly or indirectly by the viatical
21 settlement provider may negotiate viatical settlement contracts without
22 having to obtain a license as a life insurance producer.]¹

23

24 4. (New section) a. The commissioner may refuse to issue,
25 suspend, revoke or refuse to renew the license of a viatical settlement
26 provider, if the commissioner finds that:

27 (1) There was any material misrepresentation in the application for
28 the license;

29 (2) The licensee or any officer, partner, member or key
30 management personnel has been convicted of fraudulent or dishonest
31 practices, is subject to a final administrative action or is otherwise
32 shown to be untrustworthy or incompetent to act as a licensee;

33 (3) The licensee demonstrates a pattern of unreasonable payments
34 to viators;

35 (4) The licensee or any officer, partner, member or key
36 management personnel has been found guilty of, or has pleaded guilty
37 or nolo contendere to, any felony, or to a misdemeanor involving fraud
38 or moral turpitude, regardless of whether a judgment of conviction has
39 been entered by the court;

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

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

44 (7) The licensee no longer meets the requirements for initial
45 licensure;

46 (8) The licensee has assigned, transferred or pledged a viaticated

1 policy to a person other than a viatical settlement provider licensed in
2 this State, an accredited investor or qualified institutional buyer as
3 defined respectively in Regulation D, Rule 501 (17 C.F.R. 230.501
4 through 230.508) or Rule 144A (17 C.F.R. 230.144A) of the
5 ¹[Federal Securities Act of 1933] federal "Securities Act of 1933"¹ (15
6 U.S.C. s.77a et seq.), as amended, financing entity, special purpose
7 entity or related provider trust; or

8 (9) The licensee or any officer, partner, member or key
9 management personnel has violated any provision of this act.

10 b. ¹The commissioner may suspend, revoke or refuse to renew the
11 license of a life insurance producer if the commissioner finds that the
12 life insurance producer has violated the provisions of this act.

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

20
21 5. (New section) A person shall not use a viatical settlement
22 contract form or provide a disclosure statement or application form to
23 a viator in this State unless it has been filed with and approved by the
24 commissioner. The commissioner shall disapprove a viatical settlement
25 contract form or disclosure statement form if, in the commissioner's
26 opinion, the contract form, disclosure form, or provisions contained
27 therein are unreasonable, contrary to the interests of the public, or
28 otherwise misleading or unfair to the viator. The commissioner may
29 require the submission of advertising material used in connection with
30 a viatical settlement contract.

31
32 6. (New section) a. Each viatical settlement provider licensee shall
33 file with the commissioner on or before March 1 of each year an
34 annual statement containing that information which the commissioner
35 by regulation may prescribe. This information is limited to only those
36 transactions in which the viator is a resident of this State and shall not
37 include individual transaction data or data which compromises the
38 privacy of personal, financial, and health information of the viator or
39 insured.

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

46 (1) Is necessary to effect a viatical settlement contract between the

1 viator and a viatical settlement provider and the viator and insured
2 have provided prior written consent to the disclosure;

3 (2) Is provided in response to an investigation or examination by
4 the commissioner or any other governmental officer or agency or
5 pursuant to the requirements of subsection e. of section 12 of this act;

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

8 (4) Is necessary to permit a financing entity, related provider trust
9 or special purpose entity to finance the purchase of policies by a
10 viatical settlement provider and the viator and insured have provided
11 prior written consent to the disclosure;

12 (5) Is necessary to allow the viatical settlement provider or its
13 authorized representative to make contacts for the purpose of
14 determining health status; or

15 (6) Is required to purchase stop loss coverage.

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

23

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

27 (2) For purposes of completing an examination of a licensee under
28 this act, the commissioner may examine or investigate any person, or
29 the business of any person, insofar as the examination or investigation
30 is, in the sole discretion of the commissioner, necessary or material to
31 the examination of the licensee.

32 (3) In lieu of an examination under this act of any foreign or alien
33 licensee licensed in this State, the commissioner may, at the
34 commissioner's discretion, accept an examination report on the
35 licensee as prepared by the commissioner or other regulator for the
36 licensee's state of domicile or port-of-entry state.

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

39 (a) Proposed, offered or executed viatical settlement contracts,
40 underwriting documents, policy forms and applications from the date
41 of the proposal, offer, or execution of the viatical settlement contract,
42 whichever is later;

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

46 (c) All other records and documents related to the requirements of

1 this act.

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

5 (3) Records required to be retained pursuant to this subsection
6 shall be legible and complete and may be retained in paper,
7 photograph, microprocess, magnetic, mechanical or electronic media,
8 or by any process that accurately reproduces or forms a durable
9 medium for the reproduction of a record.

10 c. (1) Upon determining that an examination should be conducted,
11 the commissioner shall issue an examination warrant appointing one or
12 more examiners to perform the examination and instructing them as to
13 the scope of the examination. In conducting the examination, the
14 examiner shall observe those guidelines and procedures set forth in the
15 Examiners' Handbook adopted by the National Association of
16 Insurance Commissioners (NAIC). The commissioner may also employ
17 other guidelines or procedures as the commissioner deems appropriate.

18 (2) Every licensee or person from whom information is sought, its
19 officers, directors and agents shall provide to the examiners timely,
20 convenient and free access at all reasonable hours at its offices to all
21 books, records, accounts, papers, documents, assets and computer or
22 other recordings relating to the property, assets, business and affairs
23 of the licensee being examined. The officers, directors, employees and
24 agents of the licensee or person shall facilitate the examination and aid
25 in the examination so far as it is in their power to do so. The refusal
26 of a licensee, by its officers, directors, employees or agents, to submit
27 to examination or to comply with any reasonable written request of the
28 commissioner shall be grounds for suspension or refusal of, or
29 nonrenewal of any license or authority held by the licensee to engage
30 in the business of viatical settlements or other business subject to the
31 commissioner's jurisdiction. Any proceedings for suspension,
32 revocation or refusal of any license or authority shall be conducted
33 pursuant to the "Administrative Procedure Act," P.L.1968, c.410
34 (C.52:14B-1 et seq.).

35 (3) The commissioner shall have the power to issue subpoenas, to
36 administer oaths and to examine under oath any person as to any
37 matter pertinent to the examination. Upon the failure or refusal of a
38 person to obey a subpoena, the commissioner may petition a court of
39 competent jurisdiction, and upon proper showing, the court may enter
40 an order compelling the witness to appear and testify or produce
41 documentary evidence. Failure to obey the court order shall be
42 punishable as contempt of court.

43 (4) When making an examination under this act, the commissioner
44 may retain attorneys, appraisers, independent actuaries, independent
45 certified public accountants or other professionals and specialists as
46 examiners, the reasonable cost of which shall be borne by the licensee

1 that is the subject of the examination.

2 (5) Nothing contained in this act shall be construed to limit the
3 commissioner's authority to terminate or suspend an examination in
4 order to pursue other legal or regulatory action pursuant to the
5 insurance laws of this State. Findings of fact and conclusions made
6 pursuant to any examination shall be prima facie evidence in any legal
7 or regulatory action.

8 (6) Nothing contained in this act shall be construed to limit the
9 commissioner's authority to use and, if appropriate, to make public any
10 final or preliminary examination report, any examiner or licensee work
11 papers or other documents, or any other information discovered or
12 developed during the course of any examination in the furtherance of
13 any legal or regulatory action which the commissioner may, in his or
14 her sole discretion, deem appropriate.

15 d. (1) Examination reports shall be comprised of only facts
16 appearing upon the books, records or other documents of the licensee,
17 its agents or other persons examined, or as ascertained from the
18 testimony of its officers or agents or other persons examined
19 concerning its affairs, and such conclusions and recommendations as
20 the examiners find reasonably warranted from the facts.

21 (2) No later than 60 days following completion of the examination,
22 the examiner in charge shall file with the commissioner a verified
23 written report of examination under oath. Upon receipt of the verified
24 report, the commissioner shall transmit the report to the licensee
25 examined, together with a notice that shall afford the licensee
26 examined a reasonable opportunity of not more than 30 days to make
27 a written submission or rebuttal with respect to any matters contained
28 in the examination report.

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

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

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

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

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

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

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

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

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

44 (6) If the commissioner determines that regulatory action is
45 appropriate as a result of an examination, the commissioner may
46 initiate any proceedings or actions provided by law.

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

4 (2) Except as otherwise provided in this act, all examination
5 reports, working papers, recorded information, documents and copies
6 thereof produced by, obtained by or disclosed to the commissioner or
7 any other person in the course of an examination made under this act,
8 or in the course of analysis or investigation by the commissioner of the
9 financial condition or market conduct of a licensee shall be confidential
10 by law and privileged, shall not be subject to any State or federal
11 freedom of information law, shall not be subject to subpoena, and shall
12 not be subject to discovery or admissible in evidence in any private
13 civil action. The commissioner is authorized to use the documents,
14 materials or other information in the furtherance of any regulatory or
15 legal action brought as part of the commissioner's official duties.

16 (3) Documents, materials or other information, including, but not
17 limited to, all working papers, and copies thereof, in the possession or
18 control of the NAIC and its affiliates and subsidiaries shall be
19 confidential by law and privileged, shall not be subject to subpoena,
20 and shall not be subject to discovery or admissible in evidence in any
21 private civil action if they are:

22 (a) Created, produced or obtained by or disclosed to the NAIC and
23 its affiliates and subsidiaries in the course of assisting an examination
24 made under this act, or assisting the commissioner in the analysis or
25 investigation of the financial condition or market conduct of a licensee;
26 or

27 (b) Disclosed to the NAIC and its affiliates and subsidiaries under
28 paragraph (4) of this subsection by the commissioner.

29 (c) For the purposes of paragraph (2) of this subsection, "act"
30 includes the law of another state or jurisdiction that is substantially
31 similar to this act.

32 (4) Neither the commissioner nor any person that received the
33 documents, material or other information while acting under the
34 authority of the commissioner, including the NAIC and its affiliates
35 and subsidiaries, shall be permitted to testify in any private civil action
36 concerning any confidential documents, materials or information
37 subject to paragraph (1) of this subsection.

38 (5) In order to assist in the performance of the commissioner's
39 duties, the commissioner:

40 (a) May share documents, materials or other information, including
41 the confidential and privileged documents, materials or information
42 subject to paragraph (1) of this subsection, with other state, federal
43 and international regulatory agencies, with the NAIC and its affiliates
44 and subsidiaries, and with state, federal and international law
45 enforcement authorities, provided that the recipient agrees to maintain
46 the confidentiality and privileged status of the document, material,

1 communication or other information; and

2 (b) May receive documents, materials, communications or
3 information, including otherwise confidential and privileged
4 documents, materials or information, from the NAIC and its affiliates
5 and subsidiaries, and from regulatory and law enforcement officials of
6 other foreign or domestic jurisdictions, and shall maintain as
7 confidential or privileged any document, material or information
8 received with notice or the understanding that it is confidential or
9 privileged under the laws of the jurisdiction that is the source of the
10 document, material or information.

11 (6) No waiver of any applicable privilege or claim of confidentiality
12 in the documents, materials or information shall occur as a result of
13 disclosure to the commissioner under this section or as a result of
14 sharing as authorized in paragraph (5) of this subsection.

15 (7) A privilege established under the law of any state or jurisdiction
16 that is substantially similar to the privilege established under this
17 subsection shall be available and enforced in any proceeding in, and in
18 any court of, this State.

19 (8) Nothing contained in this act shall prevent or be construed as
20 prohibiting the commissioner from disclosing the content of an
21 examination report, preliminary examination report or results, or any
22 matter relating thereto, to the commissioner of any other state or
23 country, or to law enforcement officials of this or any other state or
24 agency of the federal government at any time or to the NAIC, so long
25 as that agency or office receiving the report or matters relating thereto
26 agrees in writing to hold it confidential and in a manner consistent with
27 this act.

28 f. (1) An examiner may not be appointed by the commissioner if
29 the examiner, either directly or indirectly, has a conflict of interest or
30 is affiliated with the management of or owns a pecuniary interest in
31 any person subject to examination under this act. This subsection shall
32 not be construed to automatically preclude an examiner from being:

33 (a) A viator;

34 (b) An insured in a viaticated insurance policy; or

35 (c) A beneficiary in an insurance policy that is proposed to be
36 viaticated.

37 (2) Notwithstanding the requirements of this subsection, the
38 commissioner may retain from time to time, on an individual basis,
39 qualified actuaries, certified public accountants, or other similar
40 individuals who are independently practicing their professions, even
41 though these persons may from time to time be similarly employed or
42 retained by persons subject to examination under this act.

43 g. (1) No cause of action shall arise nor shall any liability be
44 imposed against the commissioner, the commissioner's authorized
45 representatives or any examiner appointed by the commissioner for any
46 statements made or conduct performed in good faith while carrying

1 out the provisions of this act.

2 (2) No cause of action shall arise nor shall any liability be imposed
3 against any person for the act of communicating or delivering
4 information or data to the commissioner or the commissioner's
5 authorized representative or examiner pursuant to an examination
6 made under this act, if the act of communication or delivery was
7 performed in good faith and without fraudulent intent or the intent to
8 deceive. This paragraph shall not abrogate or modify in any way any
9 common law or statutory privilege or immunity heretofore enjoyed by
10 any person identified in paragraph (1) of this subsection.

11 (3) A person identified in paragraph (1) or (2) of this subsection
12 shall be entitled to an award of attorney's fees and costs if that person
13 is the prevailing party in a civil cause of action for libel, slander or any
14 other relevant tort arising out of activities in carrying out the
15 provisions of this act and the party bringing the action was not
16 substantially justified in doing so. For purposes of this section, a
17 proceeding is "substantially justified" if it had a reasonable basis in law
18 or fact at the time that it was initiated.

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

22

23 8. (New section) a. With each application for a viatical settlement,
24 a viatical settlement provider ¹or life insurance producer¹ shall provide
25 the viator with at least the following disclosures no later than the time
26 the application for the viatical settlement contract is signed by all
27 parties. The disclosures shall be provided in a separate document that
28 is signed by the viator and the viatical settlement provider, and shall
29 provide the following information:

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

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

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

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

43 (5) The viator has the right to rescind a viatical settlement contract
44 before the earlier of 30 calendar days after the date upon which the
45 settlement contract is executed by all parties or 15 calendar days after
46 the receipt of the viatical settlement proceeds by the viator, as

1 provided in subsection c. of section 9 of this act. If exercised by the
2 viator, rescission is effective only if both notice of the rescission is
3 given and repayment of all proceeds and any premiums, loans and loan
4 interest to the settlement provider is made within the rescission period.
5 If the insured dies during the rescission period, the viatical settlement
6 contract shall be deemed to have been rescinded, subject to repayment
7 of all viatical settlement proceeds and any premiums, loans and loan
8 interest to the viatical settlement provider;

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

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

18 (8) Disclosure to a viator shall include distribution of a brochure,
19 describing the process of viatical settlements approved by the
20 commissioner. The National Association of Insurance
21 ¹[Commissioner]Commissioners¹ (NAIC) form for the brochure shall
22 be used unless one is developed by the commissioner;

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

24 "All medical, financial or personal information solicited or obtained
25 by a viatical settlement provider or life insurance producer about an
26 insured, including the insured's identity or the identity of family
27 members, a spouse or a significant other, may be disclosed as
28 necessary to effect the viatical settlement between the viator and the
29 viatical settlement provider. If you are asked to provide this
30 information, you will be asked to consent to the disclosure. The
31 information may be provided to someone who buys the policy or
32 provides funds for the purchase. You may be asked to renew your
33 permission to share information every two years."; and

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

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

46 (1) State the affiliation, if any, between the viatical settlement

1 provider and the issuer of the insurance policy to be acquired pursuant
2 to a viatical settlement contract;

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

5 (3) If the policy to be acquired pursuant to a viatical settlement
6 contract has been issued as a joint policy or involves family riders or
7 any coverage of a life other than the insured under the policy to be
8 acquired pursuant to a viatical settlement contract, the viator shall be
9 informed of the possible loss of coverage on the other lives ¹[and shall
10 be advised to consult with his insurance producer or the company
11 issuing the policy for advice on the proposed viatical settlement
12 contract]¹;

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

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

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

27

28 9. (New section) a. (1) A viatical settlement provider entering into
29 a viatical settlement contract shall first obtain:

30 (a) If the viator is the insured, a written statement from a licensed
31 attending physician that the viator is of sound mind and under no
32 constraint or undue influence to enter into a viatical settlement
33 contract; and

34 (b) A document in which the insured consents to the release of his
35 medical records to a viatical settlement provider, life insurance
36 producer and, if the policy was issued less than two years from the
37 date of application for a viatical settlement contract, to the insurance
38 company that issued the policy covering the life of the insured.

39 (2) The insurer shall respond to a request for verification of
40 coverage submitted by a viatical settlement provider not later than 30
41 calendar days after the date the request is received. The request for
42 verification of coverage shall be made on a form approved by the
43 commissioner. The insurer shall complete and issue the verification of
44 coverage or indicate in which respects it is unable to respond. In its
45 response, the insurer shall indicate whether, based on the medical
46 evidence and documents provided, the insurer intends to pursue an

1 investigation at that time regarding the validity of the insurance
2 contract.

3 (3) Prior to or at the time of execution of the viatical settlement
4 contract, the viatical settlement provider shall obtain a witnessed
5 document in which the viator consents to the viatical settlement
6 contract, represents that the viator has a full and complete
7 understanding of the viatical settlement contract, that the viator has a
8 full and complete understanding of the benefits of the life insurance
9 policy, acknowledges that the viator is entering into the viatical
10 settlement contract freely and voluntarily and, for persons with a
11 terminal or chronic illness or condition, acknowledges that the insured
12 has a terminal or chronic illness and that the terminal or chronic illness
13 was diagnosed after the life insurance policy was issued.

14 (4) If a life insurance producer performs any of the activities
15 required of the viatical settlement provider, the ¹[life insurance
16 producer]viatical settlement provider¹ is deemed to have fulfilled the
17 requirements of this section.

18 b. All medical information solicited or obtained by any licensee
19 shall be subject to the applicable provisions of State law relating to
20 confidentiality of medical information.

21 c. All viatical settlement contracts entered into in this State shall
22 provide the viator with an unconditional right to rescind the contract
23 before the earlier of 30 calendar days after the date upon which the
24 settlement contract is executed by all parties or 15 calendar days after
25 the receipt of the viatical settlement proceeds by the viator. If
26 exercised by the viator, rescission is effective only if both notice of the
27 rescission is given and a full repayment of all proceeds and any
28 premiums, loans and loan interest to the settlement provider is made
29 within the rescission period. If the insured dies during the rescission
30 period, the viatical settlement contract shall be deemed to have been
31 rescinded, subject to repayment to the viatical settlement provider or
32 purchaser of all viatical settlement proceeds, and any premiums, loans
33 and loan interest that have been paid by the settlement provider.

34 d. The viatical settlement provider shall instruct the viator to send
35 the executed documents required to effect the change in ownership,
36 assignment or change in beneficiary directly to the independent escrow
37 agent. Within three business days after the date the escrow agent
38 receives the documents (or from the date the viatical settlement
39 provider receives the documents, if the viator erroneously provides the
40 documents directly to the provider), the provider shall pay or transfer
41 the proceeds of the viatical settlement into an escrow or trust account
42 maintained in a State or federally-chartered financial institution whose
43 deposits are insured by the Federal Deposit Insurance Corporation
44 (FDIC). Upon payment of the settlement proceeds into the escrow
45 account, the escrow agent shall deliver the original change in
46 ownership, assignment or change in beneficiary forms to the viatical

1 settlement provider or related provider trust. Upon the escrow agent's
2 receipt of the acknowledgment of the properly completed transfer of
3 ownership or designation of beneficiary from the insurance company,
4 the escrow agent shall pay the viatical settlement proceeds to the
5 viator.

6 e. Failure to tender consideration to the viator for the viatical
7 settlement contract within the time disclosed pursuant to paragraph (6)
8 of subsection a. of section 8 of this act renders the viatical settlement
9 contract voidable by the viator for lack of consideration until the time
10 consideration is tendered to and accepted by the viator.

11 f. Contacts with the insured for the purpose of determining the
12 health status of the insured by the viatical settlement provider after the
13 viatical settlement has occurred shall only be made by the settlement
14 provider licensed in this State or its authorized representatives and
15 shall be limited to once every three months for insureds with a life
16 expectancy of more than one year, and to no more than once per
17 month for insureds with a life expectancy of one year or less. The
18 provider shall explain to the insured the procedure for these contacts
19 at the time the viatical settlement contract is entered into. The
20 limitations set forth in this subsection shall not apply to any contacts
21 with an insured for reasons other than determining the insured's health
22 status. Viatical settlement providers shall be responsible for the
23 actions of their authorized representatives.

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

27

28 10. (New section) a. ¹It is a violation of this act for an insurance
29 company to prohibit, restrict, limit or impair a life insurance producer
30 from lawfully negotiating a viatical settlement contract on behalf of a
31 viator, aiding and assisting a viator with a settlement, or otherwise
32 participating in a viatical settlement transaction under this act or to
33 engage in any transaction, act, practice or course of business or
34 dealing which restricts, limits or impairs in any way the lawful transfer
35 of ownership, change of beneficiary, or assignment of a policy to
36 effectuate a viatical settlement contract.

37 b.]¹ It is a violation of this act for any person to enter into a
38 viatical settlement contract within a two-year period commencing with
39 the date of issuance of the insurance policy unless the viator certifies
40 to the viatical settlement provider that one or more of the following
41 conditions have been met within the two-year period:

42 (1) The policy was issued upon the viator's exercise of conversion
43 rights arising out of a group or individual life insurance policy, so long
44 as the total amount of time covered under the conversion policy plus
45 the time covered under the prior policy is at least 24 months. The time
46 covered under a group policy shall be calculated without regard to any

1 change in insurance carriers, provided the coverage has been
2 continuous and under the same group sponsorship;

3 (2) ¹[(a)]¹ The viator submits independent evidence to the viatical
4 settlement provider that within the two-year period¹: (a)¹ the viator or
5 insured was terminally ill or chronically ill; or ¹(b)¹ the viator or
6 insured disposed of his ownership interests in a closely held
7 corporation pursuant to a buyout or other similar agreement in effect
8 at the time the insurance policy was initially issued; or ¹(c)¹ both.

9 ¹[(b)]b.¹ Copies of the independent evidence described in
10 paragraph ¹[(1)](2)¹ of ¹[this]¹ subsection ¹a. of this section¹ and
11 documents required by subsection a. of section 9 of this act shall be
12 submitted to the insurer when the viatical settlement provider submits
13 a request to the insurer for verification of coverage. The copies shall
14 be accompanied by a letter of attestation from the viatical settlement
15 provider that the copies are true and correct copies of the documents
16 received by the viatical settlement provider.

17 ¹[(c)]c.¹ If the viatical settlement provider submits to the insurer
18 a copy of the owner or insured's certification described in
19 ¹[subparagraph (a) of this paragraph]subsection a. of this section¹
20 when the provider submits a request to the insurer to effect the
21 transfer of the policy to the viatical settlement provider, the copy shall
22 be deemed to conclusively establish that the viatical settlement
23 contract satisfies the requirements of this section and the insurer shall
24 timely respond to the request.

25

26 11. (New section) The purpose of this section is to provide
27 prospective viators with clear and unambiguous statements in the
28 advertisement of viatical settlement contracts and to assure the clear,
29 truthful and adequate disclosure of the benefits, risks, limitations and
30 exclusions of any viatical settlement contract. This purpose is
31 intended to be accomplished by the establishment of guidelines and
32 standards of permissible and impermissible conduct in the advertising
33 of viatical settlement contracts to assure that product descriptions are
34 presented in a manner that prevents unfair, deceptive or misleading
35 advertising and is conducive to accurate presentation and description
36 of viatical settlements through the advertising media and material used
37 by licensees under this act.

38 a. This section shall apply to any advertising of viatical settlement
39 contracts or related products or services intended for dissemination in
40 this State, including Internet advertising viewed by persons located in
41 this State. Where disclosure requirements are established pursuant to
42 federal regulation, this section shall be interpreted so as to minimize
43 or eliminate conflict with federal regulation wherever possible.

44 b. Every viatical settlement provider licensee shall establish and at
45 all times maintain a system of control over the content, form and
46 method of dissemination of all advertisements of its contracts,

1 products and services. All advertisements, regardless of by whom
2 written, created, designed or presented, shall be the responsibility of
3 the viatical settlement provider licensee, as well as the individual who
4 created or presented the advertisement. A system of control shall
5 include regular, routine notification, at least once a year, to life
6 insurance producers and others authorized by the viatical settlement
7 provider who disseminates advertisements, of the requirements and
8 procedures for approval prior to the use of any advertisements not
9 furnished by the viatical settlement provider.

10 c. Advertisements shall be truthful and not misleading in fact or by
11 implication. The form and content of an advertisement of a viatical
12 settlement contract, product or service shall be sufficiently complete
13 and clear so as to avoid deception. It shall not have the capacity or
14 tendency to mislead or deceive. Whether an advertisement has the
15 capacity or tendency to mislead or deceive shall be determined by the
16 commissioner from the overall impression that the advertisement may
17 be reasonably expected to create upon a person of average education
18 or intelligence within the segment of the public to which it is directed.

19 d. Certain advertisements are deemed false and misleading on their
20 face and are prohibited. False and misleading advertisements include,
21 but are not limited to, the following representations:

22 (1) "Guaranteed," "fully secured," "100 percent secured," "fully
23 insured," "secure," "safe," "backed by rated insurance companies,"
24 "backed by federal law," "backed by state law," or "state guaranty
25 funds," or similar representations;

26 (2) "No risk," "minimal risk," "low risk," "no speculation," "no
27 fluctuation," or similar representations;

28 (3) "Qualified or approved for individual retirement accounts
29 (IRAs), Roth IRAs, 401(k) plans, simplified employee pensions (SEP),
30 403(b), Keogh plans, TSA, other retirement account rollovers," "tax
31 deferred," or similar representations;

32 (4) Utilization of the word "guaranteed" to describe the fixed
33 return, annual return, principal, earnings, profits, investment, or similar
34 representations;

35 (5) "No sales charges or fees" or similar representations; and

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

38 (7) Purported favorable representations or testimonials about the
39 benefits of viatical settlement contracts taken out of context from
40 newspapers, trade papers, journals, radio and television programs, and
41 all other forms of print and electronic media.

42 e. The information required to be disclosed under this section shall
43 not be minimized, rendered obscure, or presented in an ambiguous
44 fashion or intermingled with the text of the advertisement so as to be
45 confusing or misleading.

46 (1) An advertisement shall not omit material information or use

1 words, phrases, statements, references or illustrations if the omission
2 or use has the capacity, tendency or effect of misleading or deceiving
3 viators as to the nature or extent of any benefit, loss covered, premium
4 payable, or state or federal tax consequence. The fact that the viatical
5 settlement contract offered is made available for inspection prior to
6 consummation of the sale, or an offer is made to refund the payment
7 if the viator is not satisfied or that the viatical settlement contract
8 includes a "free look" period that satisfies or exceeds legal
9 requirements, does not remedy misleading statements.

10 (2) An advertisement shall not use the name or title of a life
11 insurance company or a life insurance policy unless the advertisement
12 has been approved by the insurer.

13 (3) An advertisement shall not represent that premium payments
14 will not be required to be paid on the life insurance policy that is the
15 subject of a viatical settlement contract in order to maintain that
16 policy, unless that is the fact.

17 (4) An advertisement shall not state or imply that interest charged
18 on an accelerated death benefit or a policy loan is unfair, inequitable
19 or in any manner an incorrect or improper practice.

20 (5) The words "free," "no cost," "without cost," "no additional
21 cost," "at no extra cost," or words of similar import shall not be used
22 with respect to any benefit or service unless true. An advertisement
23 may specify the charge for a benefit or a service or may state that a
24 charge is included in the payment or use other appropriate language.

25 (6) Testimonials, appraisals or analysis used in advertisements must
26 be genuine; represent the current opinion of the author; be applicable
27 to the viatical settlement contract, product or service advertised, if
28 any, and be accurately reproduced with sufficient completeness to
29 avoid misleading or deceiving prospective viators as to the nature or
30 scope of the testimonials, appraisal, analysis or endorsement. In using
31 testimonials, appraisals or analysis, the viatical settlement provider
32 licensee makes as its own all the statements contained therein, and the
33 statements are subject to all the provisions of this section.

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

40 (b) An advertisement shall not state or imply that a viatical
41 settlement contract, benefit or service has been approved or endorsed
42 by a group of individuals, society, association or other organization
43 unless that is the fact and unless any relationship between an
44 organization and the licensee is disclosed. If the entity making the
45 endorsement or testimonial is owned, controlled or managed by the
46 licensee, or receives any payment or other consideration from the

1 licensee for making an endorsement or testimonial, that fact shall be
2 disclosed in the advertisement.

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

6 f. An advertisement shall not contain statistical information unless
7 it accurately reflects recent and relevant facts. The source of all
8 statistics used in an advertisement shall be identified.

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

12 h. The name of the licensee shall be clearly identified in all
13 advertisements about the licensee or its viatical settlement contract,
14 products or services, and if any specific viatical settlement contract is
15 advertised, the viatical settlement contract shall be identified either by
16 form number or some other appropriate description. If an application
17 is part of the advertisement, the name of the viatical settlement
18 provider shall be shown on the application.

19 i. An advertisement shall not use a trade name, group designation,
20 name of the parent company of a licensee, name of a particular division
21 of the licensee, service mark, slogan, symbol or other device or
22 reference without disclosing the name of the licensee, if the
23 advertisement would have the capacity or tendency to mislead or
24 deceive as to the true identity of the licensee, or to create the
25 impression that a company other than the licensee would have any
26 responsibility for the financial obligation under a viatical settlement
27 contract.

28 j. An advertisement shall not use any combination of words,
29 symbols or physical materials that by their content, phraseology,
30 shape, color or other characteristics are so similar to a combination of
31 words, symbols or physical materials used by a government program
32 or agency or otherwise appear to be of such a nature that they tend to
33 mislead prospective viators into believing that the solicitation is in
34 some manner connected with a government program or agency.

35 k. An advertisement may state that a licensee is licensed in the state
36 where the advertisement appears so long as it does not exaggerate that
37 fact or suggest or imply that competing licensees may not be so
38 licensed. The advertisement may ask the audience to consult the
39 licensee's website or contact the department to find out if the state
40 requires licensing and, if so, whether the viatical settlement provider,
41 or life insurance producer is licensed.

42 l. An advertisement shall not create the impression that the viatical
43 settlement provider, its financial condition or status, the payment of its
44 claims or the merits, desirability, or advisability of its viatical
45 settlement contracts forms are recommended or endorsed by any
46 government entity.

1 m. The name of the actual licensee shall be stated in all of its
2 advertisements. An advertisement shall not use a trade name, any
3 group designation, name of any affiliate or controlling entity of the
4 licensee, service mark, slogan, symbol or other device in a manner that
5 would have the capacity or tendency to mislead or deceive as to the
6 true identity of the actual licensee or create the false impression that
7 an affiliate or controlling entity would have any responsibility for the
8 financial obligation of the licensee.

9 n. An advertisement shall not directly or indirectly create the
10 impression that any division or agency of the State or of the federal
11 government endorses, approves or favors:

12 (1) Any viatical settlement provider licensee or its business
13 practices or methods of operation;

14 (2) The merits, desirability or advisability of any viatical settlement
15 contract;

16 (3) Any viatical settlement contract; or

17 (4) Any life insurance policy or life insurance company.

18 o. If the advertiser emphasizes the speed with which the viatication
19 will occur, the advertising shall disclose the average time from the date
20 of the completed application to the date of offer and from acceptance
21 of the offer to receipt of the funds by the viator.

22 p. If the advertising emphasizes the dollar amounts available to
23 viators, the advertising shall disclose the average purchase price as a
24 percent of face value obtained by viators contracting with the licensee
25 during the past six months.

26

27 12. (New section) a. A person shall not commit a fraudulent
28 viatical settlement act as defined in section 2 of this act.

29 b. A person shall not knowingly or intentionally interfere with the
30 enforcement of the provisions of this act or investigations of suspected
31 or actual violations of this act.

32 c. A person in the business of viatical settlements shall not
33 knowingly or intentionally permit any person convicted of a felony
34 involving dishonesty or breach of trust to participate in the business of
35 viatical settlements.

36 d. (1) Viatical settlement contracts and applications for viatical
37 settlement contracts, regardless of the form of transmission, shall
38 contain the following statement or a substantially similar statement:
39 "Any person who knowingly presents false information in an
40 application for insurance or viatical settlement contract is guilty of a
41 crime and may be subject to fines and confinement in prison."

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

45 e. (1) Any person engaged in the business of viatical settlements
46 having knowledge or a reasonable belief that a fraudulent viatical

1 settlement act is being, will be or has been committed shall provide to
2 the commissioner the information required by, and in a manner
3 prescribed by, the commissioner.

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

8 f. (1) No civil liability shall be imposed on and no cause of action
9 shall arise from the furnishing of information concerning suspected,
10 anticipated or completed fraudulent viatical settlement acts or
11 suspected or completed fraudulent insurance acts, if the information
12 is provided to or received from:

13 (a) The commissioner or the commissioner's employees, agents or
14 representatives;

15 (b) Federal, state or local law enforcement or regulatory officials
16 or their employees, agents or representatives;

17 (c) A person involved in the prevention and detection of fraudulent
18 viatical settlement acts or that person's agents, employees or
19 representatives;

20 (d) The National Association of Insurance Commissioners (NAIC),
21 National Association of Securities Dealers (NASD), the North
22 American Securities Administration Association or their employees,
23 agents or representatives, or other regulatory body overseeing life
24 insurance, viatical settlements, securities or investment fraud; or

25 (e) The life insurer ¹, including its agents and employees.¹ that
26 issued the life insurance policy covering the life of the insured.

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

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

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

45 g. (1) The documents and evidence provided pursuant to
46 subsection e. of this section or obtained by the commissioner in an

1 investigation of suspected or actual fraudulent viatical settlement acts
2 shall be privileged and confidential and shall not be a public record and
3 shall not be subject to discovery or subpoena in a civil or criminal
4 action.

5 (2) The provisions of paragraph (1) of this subsection shall not
6 prohibit release by the commissioner of documents and evidence
7 obtained in an investigation of suspected or actual fraudulent viatical
8 settlement acts:

9 (a) In administrative or judicial proceedings to enforce laws
10 administered by the commissioner;

11 (b) To federal, state or local law enforcement or regulatory
12 agencies, to an organization established for the purpose of detecting
13 and preventing fraudulent viatical settlement acts or to the National
14 Association of Insurance Commissioners (NAIC); or

15 (c) At the discretion of the commissioner, to a person in the
16 business of viatical settlements¹ or the business of life insurance¹ that
17 is aggrieved by a fraudulent viatical settlement act.

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

21 h. This act shall not:

22 (1) Preempt the authority or relieve the duty of other law
23 enforcement or regulatory agencies to investigate, examine and
24 prosecute suspected violations of law;

25 (2) Prevent or prohibit a person from disclosing voluntarily
26 information concerning ¹a¹ fraudulent viatical settlement act to a law
27 enforcement or regulatory agency other than the department; or

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

32 i. Viatical settlement providers shall have in place antifraud
33 initiatives reasonably calculated to detect, prosecute and prevent
34 fraudulent viatical settlement acts. At the discretion of the
35 commissioner, the commissioner may order, or a licensee may request
36 and the commissioner may grant, modifications of the following
37 required initiatives as necessary to ensure an effective antifraud
38 program. The modifications may be more or less restrictive than the
39 required initiatives so long as the modifications may reasonably be
40 expected to accomplish the purpose of this section. Antifraud
41 initiatives shall include:

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

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

46 (a) A description of the procedures for detecting and investigating

1 possible fraudulent viatical settlement acts and procedures for
2 resolving material inconsistencies between medical records and
3 insurance applications;

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

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

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

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

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

21

22 13. (New section) a. In addition to the penalties and other
23 enforcement provisions of this act, if any person violates this act or
24 any regulation implementing this act, the commissioner may seek an
25 injunction in a court of competent jurisdiction and may apply for
26 temporary and permanent orders that the commissioner determines are
27 necessary to restrain the person from committing the violation.

28 b. Any person damaged by the acts of a person in violation of this
29 act may bring a civil action against the person committing the violation
30 in a court of competent jurisdiction.

31 c. The commissioner may issue, in accordance with the
32 "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et
33 seq.), a cease and desist order upon a person that violates any
34 provision of this act, any regulation or order adopted by the
35 commissioner, or any written agreement entered into with the
36 commissioner.

37 d. When the commissioner finds that an activity in violation of this
38 act presents an immediate danger to the public that requires an
39 immediate final order, the commissioner may issue an emergency cease
40 and desist order reciting with particularity the facts underlying the
41 findings. The emergency cease and desist order is effective
42 immediately upon service of a copy of the order on the respondent and
43 remains effective for 90 days. If the commissioner begins non-
44 emergency cease and desist proceedings, the emergency cease and
45 desist order remains effective, absent an order by a court of competent
46 jurisdiction pursuant to the "Administrative Procedure Act," P.L.1968,
47 c.410 (C.52:14B-1 et seq.).

1 e. In addition to the penalties and other enforcement provisions of
2 this act, any person who violates this act shall be subject to civil
3 penalties of up to \$10,000 per violation which may be collected in a
4 summary proceeding pursuant to the "Penalty Enforcement Law of
5 1999," P.L.1999, c.274 (C.2A:58-10 et seq.). The commissioner's
6 order may require a person found to be in violation of this act to make
7 restitution to persons aggrieved by violations of this act.

8 f. A person convicted of a violation of this act shall be ordered to
9 pay restitution to persons aggrieved by the violation of this act.
10 Restitution shall be ordered in addition to a fine or imprisonment, but
11 not in lieu of a fine or imprisonment.

12 g. A person convicted of a violation of this act may be sentenced
13 in accordance with paragraphs (1), (2), (3) or (4) of this subsection
14 based on the greater of: the value of property, services, or other
15 benefit wrongfully obtained or attempted to be obtained; or the
16 aggregate economic loss suffered by any person as a result of the
17 violation. A person convicted of a fraudulent viatical settlement act
18 shall be ordered to pay restitution to persons aggrieved by the
19 fraudulent viatical settlement act. Restitution shall be ordered in
20 addition to a fine or imprisonment but not in lieu of a fine or
21 imprisonment.

22 (1) Imprisonment for not more than 20 years or payment of a fine
23 of not more than \$100,000, or both, if the value of the viatical
24 settlement contract is more than \$35,000;

25 (2) Imprisonment for not more than 10 years or payment of a fine
26 of not more than \$20,000, or both, if the value of the viatical
27 settlement contract is more than \$2,500 but not more than \$35,000;

28 (3) Imprisonment for not more than five years or payment of a fine
29 of not more than \$10,000, or both, if the value of the viatical
30 settlement contract is more than \$500 but not more than \$2,500; or

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

34 h. In any prosecution under paragraphs (1), (2), (3) and (4) of
35 subsection g. of this section the value of the viatical settlement
36 contracts within any six-month period may be aggregated and the
37 defendant charged accordingly in applying the provisions of this
38 section; provided that, when two or more offenses are committed by
39 the same person in two or more counties, the accused may be
40 prosecuted in any county in which one of the offenses was committed
41 for all of the offenses aggregated under this section. The applicable
42 statute of limitations provision shall not begin to run until the
43 insurance company or law enforcement agency is aware of the fraud,
44 but in no event may the prosecution be commenced later than seven
45 years after the act has occurred.

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

4
5 15. (New section) The commissioner shall have the authority to
6 promulgate regulations implementing the provisions of this act
7 pursuant to the "Administration Procedure Act," P.L.1968 c.410
8 (C.52:14B-1 et seq.) including, but not limited to, the following:

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

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

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

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

20
21 16. (New section) Nothing in this act shall be construed to
22 preempt or otherwise limit the provisions of the "Uniform Securities
23 Law (1967)," P.L.1967, c.93 (C.49:3-47 et seq.) or any regulations,
24 orders, policy statements, notices, bulletins, or other interpretations
25 issued by or through the Attorney General or his designee acting
26 pursuant thereto. Compliance with the provisions of this act does not
27 constitute compliance with any applicable provisions of the "Uniform
28 Securities Law (1967)."

29
30 17. (New section) a. Notwithstanding the provisions of sections
31 1 through 16 of this act, a person who has lawfully negotiated viatical
32 settlement contracts between a viator and one or more viatical
33 settlement providers for at least one year immediately prior to the
34 effective date of this act may continue to negotiate viatical settlements
35 in this State for a period of one year from the effective date of this act,
36 provided that person registers with the department on a form
37 prescribed by the department. The registration form shall be published
38 by the department not later than 30 days from the effective date of
39 this act and shall require a person registering to evidence that he has
40 lawfully negotiated viatical settlement contracts and include an
41 acknowledgment by that person that he will operate in accordance
42 with and comply with this act.

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

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

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

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

6 (b) "Agent" means any individual other than a broker-dealer, who
7 represents a broker-dealer or issuer in effecting or attempting to effect
8 purchases or sales of securities. "Agent" does not include an
9 individual who represents an issuer in (1) effecting transactions in a
10 security exempted by paragraph (1), (2), (3), or (11) of subsection (a)
11 of section 3 of P.L.1967, c.93 (C.49:3-50); (2) effecting transactions
12 exempted by subsection (b) of section 3 of P.L.1967, c.93
13 (C.49:3-50); (3) effecting transactions with existing employees,
14 partners, or directors of the issuer, if no commission or other
15 remuneration is paid or given directly or indirectly for soliciting any
16 person in this State; or (4) a broker-dealer in effecting transactions in
17 this State limited to those transactions described in paragraph (2) of
18 subsection (h) of section 15 of the "Securities Exchange Act of 1934,"
19 15 U.S.C. s.78o(h)(2); or (5) such other persons not otherwise within
20 the intent of this subsection (b), as the bureau chief may by rule or
21 order designate. A partner, officer, or director of a broker-dealer or
22 issuer, or a person occupying a similar status or performing similar
23 functions, is an agent only if he otherwise comes within this definition.
24 The bureau chief may by rule or order, as to any transaction, waive the
25 requirement of agent registration. The bureau chief may by rule define
26 classes of persons as "agents," if those persons are regulated as
27 "agents" by the Securities and Exchange Commission or any
28 self-regulatory organization established pursuant to the laws of the
29 United States;

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

46 (d) "Capital" shall mean net capital, as defined and adjusted under
47 the formula established by the Securities and Exchange Commission

1 in Rule 15c3-1, 17 C.F.R. s.240.15c3-1, made pursuant to the
2 "Securities Exchange Act of 1934," prescribing a minimum permissible
3 ratio of aggregate indebtedness to net capital as such formula presently
4 exists or as it may hereafter be amended;

5 (e) "Fraud," "deceit," and "defraud" are not limited to common-law
6 fraud or deceit. "Fraud," "deceit" and "defraud" in addition to the
7 usual construction placed on these terms and accepted in courts of
8 law and equity, shall include the following, provided, however, that
9 any promise, representation, misrepresentation or omission be made
10 with knowledge and with intent to deceive or with reckless disregard
11 for the truth and results in a detriment to the purchaser ¹[, including
12 a purchase of a policy from a viatical settlement provider,]¹ or client
13 of an investment adviser:

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

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

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

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

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

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

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

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

47 (ii) any financial planner and other person who provides investment

1 advisory services to others for compensation and as part of a business
2 or who holds himself out as providing investment advisory services to
3 others for compensation.

4 (2) "Investment adviser " does not include:

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

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

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

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

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

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

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

35 (viii) an investment adviser representative; or

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

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

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

44 (h) "Issuer" means any person who issues or proposes to issue any
45 security, except that (1) with respect to certificates of deposit,
46 voting-trust certificates, or collateral-trust certificates, or with respect
47 to certificates of interest or shares in an unincorporated investment

1 trust not having a board of directors (or persons performing similar
2 functions) or of the fixed, restricted management, or unit type, the
3 term "issuer" means the person or persons performing the acts and
4 assuming the duties of depositor or manager pursuant to the provisions
5 of the trust or other agreement or instrument under which the security
6 is issued; and (2) with respect to certificates of interest in oil, gas, or
7 mining titles or leases, there is not considered to be any "issuer";

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

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

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

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

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

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

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

44 (k) "Savings institutions" shall mean any savings and loan
45 association or building and loan association operating pursuant to the
46 "Savings and Loan Act (1963)," P.L.1963, c.144 (C.17:12B-2 et seq.),
47 and any federal savings and loan association and any association or

1 credit union organized under the laws of the United States or of any
2 state whose accounts are insured by a federal corporation or agency;

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

10 (m) "Security" means any note; stock; treasury stock; bond;
11 debenture; evidence of indebtedness; certificate of interest or
12 participation in any profit-sharing agreement, including, but not limited
13 to, certificates of interest or participation in real or personal property;
14 collateral-trust certificate; preorganization certificate or subscription;
15 transferable share; investment contract; voting-trust certificate;
16 certificate of deposit for a security; certificate of interest in an oil, gas
17 or mining title or lease; a viatical investment; or, in general, any
18 interest or instrument commonly known as a "security," or any
19 certificate of interest or participation in, temporary or interim
20 certificate for, guarantee of, or warrant or right to subscribe to or
21 purchase, any of the foregoing. "Security" does not include any
22 insurance or endowment policy or annuity contract under which an
23 insurance company promises to pay a fixed or variable number of
24 dollars either in a lump sum or periodically for life or some other
25 specified period;

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

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

30 (p) "Accredited investor" means any person who is an "accredited
31 investor" as defined by subsection (15) of section 2 of the "Securities
32 Act of 1933," 15 U.S.C. s.77b¹(a)¹(15), and 17 C.F.R. s.230.215 and
33 s.230.501 or any successor rule promulgated pursuant to that act.

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

38 (q) "Direct participation security" means a security which provides
39 for flow-through tax consequences (tax shelter), regardless of the
40 structure of the legal entity or vehicle for distribution, including, but
41 not limited to, a security representing an interest in gas, oil, real estate,
42 agricultural property, cattle, a condominium, a Subchapter S
43 corporation, a limited liability company and all other securities of a
44 similar nature, regardless of the industry represented by the security,
45 or any combination thereof. Excluded from this definition are real
46 estate investment trusts, tax qualified pension and profit-sharing plans
47 pursuant to sections 401 and 403(a) of the Internal Revenue Code of

1 1986, 26 U.S.C. 401 and 403(a), and individual retirement plans under
2 section 408 of the Internal Revenue Code of 1986, 26 U.S.C. 408, tax
3 sheltered annuities pursuant to the provisions of section 403(b) of the
4 Internal Revenue Code of 1986, 26 U.S.C. 403(b), and any company
5 including separate accounts registered pursuant to the "Investment
6 Company Act of 1940;"

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

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

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

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

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

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

32 (2) manages accounts or portfolios of clients;

33 (3) determines recommendations or advice regarding securities;

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

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

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

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

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

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

6 (1) any transaction between a viator and a viatical settlement
7 provider as defined by the "Viatical Settlements Act", P.L. , c.
8 (C.) (now before the Legislature as this bill);

9 (2) any transfer of ownership or beneficial interest in a life
10 insurance policy from a viatical settlement provider to another viatical
11 settlement provider as defined in ¹the ¹"Viatical Settlements Act", P.L.
12 c. (C.) (now before the Legislature as this bill) or to any legal
13 entity formed solely for the purpose of holding ownership or beneficial
14 interest in a life insurance policy or policies;

15 (3) the *bona fide* assignment of a life insurance policy to a bank,
16 savings bank, savings and loan association, credit union, or other
17 licensed lending institution as collateral for a loan; ¹[or] ¹

18 (4) the exercise of accelerated benefits pursuant to the terms of a
19 life insurance policy issued in accordance with the provisions of Title
20 17B of the New Jersey Statutes ¹;or

21 (5) a loan by a life insurance company pursuant to the terms of the
22 life insurance contract¹ .
23 (cf: P.L.1997, c.276, s.2)

24

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

26

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