



**Sub. H.B. 404**

127th General Assembly  
(As Passed by the House)

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**BILL SUMMARY**

- Requires viatical settlement providers to meet financial responsibility requirements for licensure and allows the Superintendent of Insurance to adopt additional requirements for all applicants for licensure.
- Requires viatical settlement providers to provide information concerning their use of life expectancies for licensure.
- Requires a business that is licensed as a viatical settlement broker to maintain at least one individual who individually is licensed as a viatical settlement broker.
- Requires individuals who are licensed as viatical settlement brokers to complete continuing education requirements.
- Requires life expectancy providers to obtain a license from the Superintendent.
- Exempts certain attorneys, certified public accountants, financial planners, and insurance agents from viatical settlement provider or broker licensure requirements.
- Allows a viatical settlement provider or viatical settlement broker to assign, transfer, or pledge a viaticated policy to a viatical settlement purchaser or a qualified institutional buyer.

- Allows the Superintendent to refuse to issue, suspend, revoke, or refuse to renew a license because the licensee was the subject of administrative action by the Department of Commerce.
- Removes a requirement that the Superintendent conduct a hearing under the Administrative Procedure Act in order to refuse to renew a license.
- Revises the definition of "viatical settlement contract" and identifies nine situations or arrangements that are not viatical settlement contracts.
- Extends the rescission period available to a viator for viatical settlement contracts.
- Requires viatical settlement providers or viatical settlement brokers to disclose additional information to a viator.
- Requires the Superintendent to disapprove a contract or disclosure form if it does not meet the specified requirements for disclosures.
- Except under specified situations, prohibits a viator from entering into a viatical settlement contract within five years, rather than two years, of the date of issuance of the insurance policy.
- Specifies that a viator is prohibited from entering into a viatical settlement contract prior to the application for or issuance of the policy and from promoting a policy for the purpose of selling the policy.
- Redefines the possible situations (exceptions) under which a viator could enter into a viatical settlement contract within the required waiting period after the issuance of the insurance policy.
- Allows the Superintendent to develop or approve a form requesting verification of coverage of a viator by an insurer and requires insurers to accept an original or facsimile or electronic copy of that form.
- Allows a viatical settlement broker, in addition to a viatical settlement provider, to request verification of coverage from an insurer and allows an insurer to indicate in its response to such a request that it intends to investigate possible fraud.
- Redefines the escrow agent's role in the process of viaticating a policy.

- Prohibits, in advertisements, the use of certain words indicating that a life insurance policy is "free" unless true.
- Requires all licensees to file copies of any advertisements of their contracts, products, and services with the Superintendent.
- Adds additional fraudulent viatical settlement acts including actions regarding stranger-originated life insurance (STOLI) and defines STOLI.
- Specifies that a violation of the Viatical Settlement Insurance Law also must be a fraudulent viatical settlement act in order for the Superintendent to seek an injunction or apply for a temporary or permanent order to restrain a person from violating viatical settlement law or to subject that person to a civil fine.
- Specifies that a person may provide information to the Superintendent concerning fraudulent viatical settlement acts if that person has a reasonable suspicion, rather than a reasonable belief, that such an act is being, will be, or has been committed.
- Specifies that a prevailing party in a civil action is not entitled to attorney's fees if the prevailing party provided information of the party's own fraudulent viatical settlement acts.
- Requires antifraud initiatives to include a description of the procedures used to review the accuracy of life expectancies.
- Relieves an insurer that issued a policy being viaticated from liability for any act or omission of a viatical settlement broker or viatical settlement provider unless the insurer receives compensation for the placement of a viatical settlement contract.
- Requires the Superintendent to consider certain factors in determining the nature, scope, and frequency of examinations of licensees.
- Removes the authority of the Superintendent to conduct a market examination of an insurer.
- Requires the Superintendent to cooperate with an official from another state for the examination of a foreign or alien licensee as far as is practical.

- Revises the requirements for annual reports and requires all licensees to submit them to the Superintendent.
- Requires the Superintendent to keep confidential and not a matter of public record all individual transaction data regarding the business of viatical settlements and data that could compromise the privacy of personal, financial, and health information of the viator or insured.
- Allows persons with knowledge of an insured's identity to disclose that identity if the disclosure is required to purchase financial guarantee insurance.
- Makes certain other conforming changes.

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## CONTENT AND OPERATION

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

Current law (R.C. Chapter 3916.) prohibits individuals and businesses from operating as viatical settlement providers or viatical settlement brokers without obtaining a license from the Superintendent of Insurance. The Superintendent must issue a license to an applicant for licensure if the applicant meets specified requirements including demonstrating competency and trustworthiness and having a good business reputation. Current law also allows the Superintendent to require a bond or other mechanism for insuring the financial accountability of viatical settlement providers and viatical settlement brokers (R.C. 3916.20).

In the place of that authority, the bill allows the Superintendent to require an applicant for licensure to provide proof of financial responsibility in a format prescribed by the Superintendent through either of the following means:

(1) The applicant may utilize a surety bond executed and issued by an insurer authorized to issue surety bonds in this state. The bond must be in favor of this state and must authorize recovery by the Superintendent on behalf of any person in this state who sustains damages as a result of an erroneous act, failure to act, conviction of fraud or conviction of unfair practices committed by a viatical settlement provider or viatical settlement broker.

(2) The applicant may utilize a deposit of cash, certificates of deposit, or securities in any combination. (R.C. 3916.03.)

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

**Licensure requirements for viatical settlement providers only**

In addition to authorizing the Superintendent to require proof of financial responsibility, the bill requires applicants for licensure as viatical settlement providers to meet specific financial responsibility standards that are currently required for licensure by the Superintendent pursuant to the Superintendent's previously mentioned authority to require financial accountability. Under the bill, an applicant for licensure as a viatical settlement provider must submit evidence of financial responsibility in a format prescribed by the Superintendent by possessing a minimum equity of not less than \$250,000 in cash or cash equivalents reflected in the applicant's audited financial statements. In lieu of that minimum equity requirement, a viatical settlement provider with positive equity must provide either a surety bond executed and issued by an insurer licensed in this state or an irrevocable line of credit in the amount of \$250,000. (R.C. 3916.03.)

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

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

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

**Continuing education**

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

**Licensure requirements for life expectancy providers**

In addition to the current licensure requirement for viatical settlement providers and viatical settlement brokers, the bill requires life expectancy providers to obtain a license from the Superintendent in order to operate as life

expectancy providers (R.C. 3916.02). However, the bill delays the effective date of that requirement to 90 days after the effective date of the rest of the bill (Section 3).

Life expectancy providers must satisfy all requirements that the Ohio's Viatical Settlement Law generally places on applicants for licensure or licensees including application and licensure requirements (R.C. 3916.03), records retention and examination requirements (R.C. 3916.11 and 3916.14), filing of annual statements (R.C. 3916.12), advertising requirements (R.C. 3916.17), and grounds for refusal to issue, suspension, revocation, refusal to renew a license (R.C. 3916.15). Licensed life expectancy providers are also exempted from the definition of "viator" and "viatical settlement purchaser" (R.C. 3916.01).

Under the bill, "life expectancy" means "an opinion or evaluation as to how long a particular person is going to live," and "life expectancy provider" means:

a person who determines or claims to have the necessary education, training, and expertise to determine life expectancies or mortality ratings used to determine life expectancies on behalf of or in connection with any of the following: (1) a viatical settlement provider, viatical settlement broker, or person engaged in the business of viatical settlements; (2) a viatical settlement investment as defined by section 1707.01 of the Revised Code; (3) a viatical settlement contract or viatical settlement investment. (R.C. 3916.01.)

### **Exceptions to licensure requirements**

The bill exempts both of the following from the Viatical Settlement Law licensure requirements:

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

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

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

Under current law, the Superintendent of Insurance may refuse to issue or may suspend, revoke, or refuse to renew the license of a person licensed under the Viatical Settlement Law if the Superintendent finds that the licensee commits specified offenses including any of the following:

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

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

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

(4) The licensee no longer meets the requirements for initial licensure.

(5) The licensee or any officer, partner, member, key management personnel, or designee of the licensee has violated any provision of the Viatical Settlement Law or any rule adopted under the Law.

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

The bill adds both of the following to that list:

(1) The assigning, transferring, or pledging of a viaticated policy to a person who is not a viatical settlement purchaser or a qualified institutional buyer;

(2) Having been the subject of an administrative action brought by the Department of Commerce, Division of Securities.

Under current law, the Superintendent must conduct a hearing under the Administrative Procedure Act (R.C. Chapter 119.) in order to suspend, revoke, deny, or refuse to renew the license issued to any person under the Viatical Settlement Law. The bill removes the requirement to conduct such a hearing for



the nonrenewal of a license (R.C. 3916.11 and 3916.15). The bill also specifically allows the Superintendent to refuse to renew a license without conducting a hearing based upon the fact that the licensee has failed to pay the required renewal fee (R.C. 3916.03).

### Viatical settlement contracts

#### Definition

Under current law, a viatical settlement contract means any of the following three things:

- (1) A written agreement establishing the terms under which compensation or any thing of value, that is less than the expected death benefit of the insurance policy or certificate will be paid in return for the viator's (policy holder/owner) assignment, transfer, sale, devise, or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance;
- (2) A contract for a loan or any other financing transaction secured primarily by an individual or group life insurance policy or certificate, other than a loan by a life insurance company pursuant to the terms of the life insurance contract or a loan secured by the cash value of a policy or certificate;
- (3) An agreement to transfer ownership or change the beneficiary designation of the policy or certificate at a later date, regardless of the date that compensation is paid to the viator. (R.C. 3916.01.)

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

- (1) A premium finance loan made for a life insurance policy by a lender to a viator on, before, or after the date of issuance of the policy in either of the following

situations: (a) The viator or the insured receives a guarantee of the viatical settlement value of the policy. (b) The viator or the insured agrees to sell the policy or any portion of the policy's death benefit on any date before or after the issuance of the policy;

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

(3) A written agreement for a loan or other lending transaction, secured primarily by an individual life insurance policy or an individual certificate of a group life insurance policy. (R.C. 3916.01.)

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

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

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

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

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

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

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

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

(7) Any of the following business succession planning arrangements if those arrangements are bona fide arrangements: an arrangement between one or more shareholders in a corporation or between a corporation and one or more of its shareholders or one or more persons or trusts established by its shareholders; an arrangement between one or more partners in a partnership or between a partnership and one or more of its partners or one or more trusts established by its partners; or an arrangement between one or more members in a limited liability company or between a limited liability company and one or more of its members or one or more trusts established by its members;

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

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

### **Contract provisions**

Current law requires that viatical settlement contracts provide the viator the unconditional right to rescind the contract for at least 15 calendar days after the viator receives the viatical settlement proceeds. The bill extends the required rescission period to 60 calendar days after all parties sign the viatical settlement contract or 30 days after the viator receives the viatical settlement proceeds, whichever is sooner. The bill also specifies that the viator has an "absolute" right

to rescind the contract within that time period rather than an "unconditional" right to rescind the contract and specifies that the viator must rescind the contract by providing notice of rescission and repaying all proceeds paid to the viator pursuant to the escrow agreement. The bill specifies the same requirements for rescission if the insured dies within the rescission period. (R.C. 3916.06 and 3916.08.)

Additionally, if the viator rescinds the viatical settlement contract, the bill requires any person that received compensation under the terms of the escrow agreement, including the viatical settlement provider, viatical settlement broker, or any insurance agent to refund the full amount received to the viatical settlement provider, within five business days following receipt of written notice from the viatical settlement provider that includes a copy of the viator's notice of rescission or the notice of the death of the insured. (R.C. 3916.08.)

### **Disclosure requirements**

Prior to entering into a viatical settlement contract, current law requires a viatical settlement provider or viatical settlement broker to provide certain disclosures to the viator including the fact that there are alternatives to viatical settlement contracts; that some or all of the proceeds of the viatical settlement may be subject to federal income taxation and state franchise and income taxation; that the proceeds of the viatical settlement could be subject to the claims of creditors; that receipt of the proceeds of the viatical settlement may adversely affect the viator's eligibility for medical assistance under the Medicaid program; that the viator has a right to rescind the viatical settlement contract within the rescission period as previously specified; and that assistance should be sought from a financial advisor. (R.C. 3916.06.)

The bill adds to that disclosure a further required disclosure regarding contact with the insured after the execution of the viatical settlement. Under current law the viatical settlement provider or viatical settlement broker may contact the insured for the purpose of determining the insured's health status not more than once every three months if the insured has a life expectancy of more than one year or to once every month if the insured has a life expectancy of one year or less. The bill clarifies that, in lieu of the actual broker or provider, an authorized representative of the viatical settlement provider or viatical settlement broker may contact the insured under those terms. (R.C. 3916.10.) Under the bill, a viatical settlement provider or viatical settlement broker must disclose that the viatical settlement provider or viatical settlement provider's representative may contact the insured as described above and for the additional purpose of confirming the insured's residential or business address and telephone number or for other purposes permitted by law. (R.C. 3916.06.)

Along with the previously mentioned disclosures, current law requires the viatical settlement provider or viatical settlement broker to give the viator a brochure that describes the process of viatical settlements. The brochure must be in the form developed by the National Association of Insurance Commissioners (hereafter, NAIC) unless another one is developed by the Superintendent. The bill allows the Superintendent to develop an alternate form or to approve one. (R.C. 3916.06.)

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

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

The bill also removes the requirement that the viatical settlement provider disclose the amount and method of calculating the viatical settlement broker's compensation and places that requirement on the viatical settlement broker. (R.C. 3916.06.)

Under the bill, the viatical settlement broker must additionally disclose the following information: (1) the viatical settlement broker's contact information, (2) a full, complete, and accurate description of all offers, counter-offers, acceptances, and rejections relating to the proposed viatical settlement contract, (3) any affiliations or contractual agreements between the viatical settlement broker and any person making an offer in connection with the proposed viatical settlement

contract, and (4) if any portion of the viatical settlement broker's compensation is taken from the viatical settlement offer, the total amount of the viatical settlement offer and the viatical settlement broker's compensation as a percentage of that total including as compensation anything of value paid or given to a viatical settlement broker for the placement of a policy. (R.C. 3916.06.)

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

Current law prohibits individuals or businesses that use viatical settlement contracts and disclosure forms to use those contracts and forms unless they are filed with and approved by the Superintendent. The Superintendent must disapprove a contract or disclosure form if it or any part of it is unreasonable, contrary to the interests of the public or otherwise misleading or unfair to the viator. The bill also requires the Superintendent to disapprove a contract or disclosure form if it does not meet the previously discussed requirements for disclosure prior to entering into a contract. (R.C. 3916.05.)

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

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

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

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

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

Additionally, the bill extends the two-year waiting period to a five-year waiting period and specifies that a viator is prohibited both from entering into a viatical settlement contract prior to the application for or issuance of the policy and from issuing, soliciting, marketing, or otherwise promoting the purchase of a life insurance policy for the purpose of or with an emphasis on selling the policy.

(R.C. 3916.16.) However, the bill allows a viator to enter into a viatical settlement contract two years after the issuance of the policy if during those two years the viator has never had an agreement or understanding with any other person to guarantee any such liability, to purchase, or to stand ready to purchase the policy, including through an assumption or forgiveness of the loan; neither the insured nor the policy has been evaluated for settlement in connection with the issuance of the policy; and the viator has funded policy premiums using one or more of the following methods:

(1) Unencumbered assets provided by the insured which may include an interest in the life insurance policy being viaticated up to the amount of the policy's net cash surrender value;

(2) "Full recourse liability financing" incurred by the insured;

(3) An agreement where all parties are closely related to the insured by blood or law or have a lawfully substantial economic interest in the continued life, health, and bodily safety of the person insured, or are trusts established primarily for the benefit of such parties. (R.C. 3916.16.)

Under the bill, a viatical settlement provider or viatical settlement broker must disclose to the insurer that issues the policy, any plan, transaction, or series of transactions to originate, review, continue, or finance a life insurance policy with the insurer for the purpose of engaging in the business of viatical settlements prior to or during the first five years after the insurer issues the policy. (R.C. 3916.06 and 3916.16.)

### **Verification of coverage**

Under current law, the viatical settlement provider must give written notice to the insurer that issues the insurance policy within 20 days after a viator executes the documents necessary to transfer any rights under that insurance policy or within 20 days of entering any expressed or implied agreement, option promise, or other form of understanding to viaticate that policy. The notice must be accompanied by a copy of the required written statement from an attending physician that the viator is of sound mind and under no constraint or undue influence to enter into a viatical settlement contract, the insured's written consent to the release of the insured's medical records, and a request for verification of coverage. The viatical settlement provider's request for verification of coverage must be on a form prescribed by the NAIC unless another one is developed by the Superintendent. The bill allows the Superintendent to develop an alternate form or to approve one. The bill also requires the insurer to accept an original or facsimile or electronic copy of such request and any accompanying authorization signed by the viator. (R.C. 3916.07.)

Current law requires the insurer to respond to the request for verification of coverage from a viatical settlement provider within 30 days of receiving the request and indicate whether the insurer intends to pursue an investigation regarding the validity of the life insurance policy. The bills adds that the request also may be from the viatical settlement broker and that the insurer also may indicate in the insurer's response that the insurer intends to investigate possible fraud. (R.C. 3916.07 and 3916.16.)

### **Transfer of ownership**

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

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

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



### **Restrictions on advertising**

Current law requires viatical settlement licensees to maintain a system of control over the content, form, and method of dissemination of all advertisements of their contracts, products, and services. Current law also requires that the form and content of the advertisements be sufficiently complete and clear so as to avoid deception and places restrictions on the content of the advertisements including prohibiting the use of the words "free," "no cost," "without cost," "no additional cost," "at no extra cost," or similar words with respect to any benefit or service unless true. The bill adds to that requirement a prohibition from using those words in relation to a life insurance policy unless true. (R.C. 3916.17.)

Additionally, the bill requires every person licensed under the Viatical Settlement Law to file all advertisements of their contracts, products, and services with the Superintendent. The bill prohibits licensees from entering into a viatical settlement contract without previously filing the materials promoting, advertising, and marketing that contract with the Superintendent. Under the bill, all such materials filed with the Superintendent must be filed in a format prescribed by the Superintendent. Any filings that the Superintendent does not disapprove within 60 days of the Superintendent's receipt of the materials are approved unless the Superintendent requests additional time in writing. The bill allows the Superintendent to assess fees for the review of advertising materials. (R.C. 3916.17.)

### **Fraudulent viatical settlement acts**

The bill removes from a list of acts that constitute fraudulent viatical settlement acts the act of presenting, causing to be presented, or preparing with knowledge or reason to believe that it will be presented, to or by a viatical settlement provider, viatical settlement broker, insurer, insurance agent, financing entity, viatical settlement purchaser, or any other person, in connection with a viatical settlement transaction or insurance transaction, an insurance policy or certificate that the actor knows was fraudulently obtained by the insured, the owner, or any agent of the insured or owner. In its place, the bill includes the act of recklessly entering into, negotiating, brokering, or otherwise dealing in a viatical settlement contract involving a life insurance policy that was obtained by presenting false information of any fact material to the policy, or by concealing information concerning any fact material to the policy for the purpose of misleading and with the intent to defraud the insurer of the policy, the viatical settlement provider, or the viator.

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

- (1) Presenting misleading information concerning any application for or the existence of or any payments related to a loan secured directly or indirectly by any interest in a life insurance policy;
- (2) Failing to disclose to the insurer, where the insurer has requested such disclosure, that the prospective insured has undergone a life expectancy evaluation by any person or entity other than the insurer or its authorized representatives in connection with the application, underwriting, and issuance of the policy;
- (3) Employing any plan, financial structure, device, scheme, or artifice to defraud in relation to a viaticated policy;
- (4) Misrepresenting the state of residence or facilitating the change of the state in which a person owns a policy or the state of residency of a viator to a state or jurisdiction that does not have laws similar to Ohio for the express purposes of evading or avoiding the provisions of the Viatical Settlement Law;
- (5) In the solicitation, application, or issuance of a life insurance policy, employing any device, scheme, or artifice in violation of sections 3911.09 or 3911.091 of the Revised Code;
- (6) Engaging in any conduct related to a viatical settlement contract if the person knows or reasonably should have known that the intent of the transaction was to avoid the disclosure and notice requirements of Ohio's viatical settlement law;
- (7) Entering into a premium finance agreement with any person pursuant to which the person will receive, directly or indirectly, any proceeds, fees, or other considerations from the insurance policy, the owner of the insurance policy, or from any other person with respect to the premium finance agreement or any viatical settlement contract, or from any transaction related to the insurance policy, that are in addition to the amount required to pay the principal, interest, and service charges related to the policy premiums

pursuant to the premium finance agreement or subsequent sale of the agreement. Any payments, charges, fees, or other amounts in addition to the amounts required to pay the principal, interest, and service charges related to policy premiums paid under the premium finance agreement shall be remitted to the original owner of the policy or, if the owner is not living at the time of the determination of the overpayment, to the estate of the owner.

(8) With respect to any viatical settlement contract or insurance policy, for a viatical settlement broker or an agent registered under Ohio's viatical settlement law as operating as a viatical settlement broker to knowingly solicit an offer from, effectuate a viatical settlement with, or make a sale to any viatical settlement provider, viatical settlement purchaser, financing entity, or related provider trust that is controlling, controlled by, or under common control with such viatical settlement broker or registered agent;

(9) With respect to any viatical settlement contract or insurance policy, for a viatical settlement provider to knowingly enter into a viatical settlement contract with a viator if, in connection with such viatical settlement contract, anything of value will be paid to a viatical settlement broker or an agent registered under this chapter as operating as a viatical settlement broker that is controlling, controlled by, or under common control with such viatical settlement provider or the viatical settlement purchaser, financing entity, or related provider trust that is involved in such viatical settlement contract;

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

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

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

A plan or agreement that provides for both of the following at the time of the origination of a life insurance policy:

(1) The purchase of a life insurance policy by an applicant primarily for the benefit of a third party investor that lacks insurable interest in the insured person;

(2) The subsequent accrual, directly or indirectly, to that third party investor of the legal or beneficial ownership of the policy or the benefits of the policy. (R.C. 3916.01.)

Under the bill, "stranger-originated life insurance" does not include viatical settlement transactions that are specifically permitted by the Viatical Settlement Law (R.C. 3916.01).

In addition to any other penalties and enforcement provisions that are applicable, current law allows the Superintendent to seek an injunction in a court of competent jurisdiction and to apply for any temporary or permanent order to restrain a person from committing a violation of the Viatical Settlement Law. The bill clarifies that the violation must constitute a fraudulent viatical settlement act in order for the Superintendent to take such action. Current law also specifies that a person who violates the Viatical Settlement Law is subject to a civil penalty of up to \$10,000 by order of the Superintendent. Similarly, as a condition of the penalty being imposed, the bill requires that the violation must constitute a fraudulent viatical settlement act. (R.C. 3916.19.)

Current law requires every person engaged in the business of viatical settlements who has knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be, or has been committed to provide that information to the Superintendent. Current law also allows any other person to do the same. Under the bill, any person can provide information to the Superintendent if the person has a "reasonable suspicion" of a fraudulent viatical settlement act rather than a "reasonable belief." (R.C. 3916.18.)

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

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

### **Antifraud initiatives**

Current law requires viatical settlement providers and viatical settlement brokers to adopt and have in place antifraud initiatives reasonably calculated to detect, prosecute, and prevent fraudulent viatical settlement acts. Those initiatives must include fraud investigators and specified information including a description of the procedures for detecting and investigating possible fraud and procedures for resolving material inconsistencies between medical records and insurance records. The bill adds to that list, a description of the procedures used to perform initial and continuing review of the accuracy of life expectancies used in connection with a viatical settlement contract. (R.C. 3916.18.)

### **Liability of insurer**

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

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

Current law allows the Superintendent to conduct examinations of licensees as often as the Superintendent considers appropriate. The bill requires the Superintendent to consider the following factors when determining the nature, scope, and frequency of examinations: (1) consumer complaints, (2) the results of financial statement analyses and ratios, (3) any changes in ownership, officers, or directors, (4) actuarial opinions, (5) any report of independent certified public accountants, and (6) any other criteria the Superintendent determines to be appropriate. (R.C. 3916.14.)

Current law allows the Superintendent to appoint examiners to perform the examinations of licensees and insurers. Current law also requires the licensee or

insurer to bear the cost of any examination of which they are the subject. If a licensee refuses to submit to an examination or does not comply with any responsible request for information, the Superintendent may suspend, revoke, deny, or refuse to renew the license of the licensee or the certificate of authority of an insurer. The Superintendent also may request that the Attorney General initiate a civil action in the court of common pleas of Franklin County to obtain and enforce a judgment for expenses incurred in the performance of a market conduct examination. (R.C. 3916.11.)

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

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

### **Annual statement**

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

(1) A list of each life insurance policy, including policy number, date of issue, viator, insured, insurance company issuing policy, date viatical settlement contract signed by viator; viatical settlement broker, agent of record on the policy, any life insurance agents receiving compensation, regardless of the form, and any premium finance companies;

(2) Addresses and contact information for those persons;

(3) A list of all life expectancy providers who have directly or indirectly provided life expectancies to the viatical settlement provider for use in connection with a viatical settlement contract;

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

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

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

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

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

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

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

### **Confidentiality**

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

Current law prohibits a viatical settlement provider, viatical settlement broker, insurance company, insurance agent, insurance broker, information bureau, rating agency or company, or any other person with actual knowledge of an insured's identity, from disclosing that identity, including the insured's name and individual identification data, or the insured's financial or medical information except in specified circumstances. Those circumstances include when the disclosure is necessary to effect a viatical settlement between the viator and a viatical settlement provider, and the viator and insured have provided prior written consent to the disclosure; when the disclosure is provided in response to an investigation or examination by the Superintendent or by any other governmental officer or agency; and when the disclosure is required to purchase stop-loss coverage. The bill adds to those exceptions when the disclosure is required to purchase financial guarantee insurance. (R.C. 3916.13.)

### **Jurisdiction**

Current law specifies that if there is more than one viator on a single policy and the viators are residents of different states, the viatical settlement will be governed by the law of the state in which the viator having the largest percentage ownership of the policy resides or, if the viators hold equal ownership, the state of residence of one viator agreed upon in writing by all viators (R.C. 3916.02).

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

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

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



### **Incontestability period**

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

### **Other changes**

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

### **Other definitions**

#### **Revised definitions**

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

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

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

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

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

Adds to the definition of "special purpose entity." Existing law defines "special purpose entity" as corporations, partnerships, trusts, limited liability companies, or other similar entities formed solely to provide access, directly or

indirectly, to institutional capital markets. The bill adds that such may be in connection with a transaction in which the securities in the special purpose entity are acquired by qualified institutional buyers. (R.C. 3916.01.)

Adds to the definition of "viatical settlement broker." The current law definition of "viatical settlement broker" excludes attorneys, certified public accountants, and financial planners accredited by a nationally recognized accreditation agency, who are retained to represent the viator and whose compensation is not paid directly or indirectly by the viatical settlement provider or purchaser. The bill adds that, in order to be exempted, the viatical settlement activities of those professionals must be incidental to the practice of their individual profession.

Adds to current law's exemptions from the definition of "viatical settlement provider." Included in current law's exemptions from the definition of "viatical settlement provider" are financial institutions and the issuer of a life insurance policy or certificate providing accelerated benefits pursuant to the contract. The bill specifies that the financial institution must be a regulated financial institution (see the bill's new definition of "regulated financial institution") and it must take an assignment of a life insurance policy solely as collateral for a loan. The bill also removes the specification that the exempted policy or certificate must provide accelerated benefits. The bill adds to the exceptions from the definition of "viatical settlement provider" a premium finance company exempted from the licensure requirements of Ohio's law governing premium finance companies that takes an assignment of a life insurance policy or certificate solely as collateral for a premium finance loan and any other person the Superintendent determines is not consistent with the definition of viatical settlement provider. (R.C. 3916.01.)

Adds to the definition of "viator" a specific requirement the policy being viaticated has not been previously viaticated. The bill also removes accredited investors from the exceptions to the definition of viator.

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

### **New definitions**

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

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

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

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

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## HISTORY

ACTION	DATE
Introduced	11-29-07
Reported, H. Insurance	01-29-08
Passed House (89-0)	01-30-08

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