

CHAPTER 96

SENATE Substitute for HOUSE BILL No. 2110

AN ACT concerning viatical settlements; pertaining to stranger-originated life insurance; amending K.S.A. 2007 Supp. 40-5001, 40-5002, 40-5006, 40-5008 and 40-5010 and repealing the existing sections; also repealing K.S.A. 2007 Supp. 40-5007, 40-5009 and 40-5012.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) (1) The commissioner may conduct an examination under this act of a licensee as often as the commissioner in such commissioner's sole discretion deems appropriate.

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

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

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

(A) Proposed, offered or executed contracts, underwriting documents, policy forms, and applications from the date of the proposal, offer or execution of the contract, whichever is later;

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

(C) all other records and documents related to the requirements of this act.

(2) This section shall not relieve any person licensed under this act of the obligation to produce these documents and provide copies thereof to the commissioner after the retention period has expired if the person has retained such documents.

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

(c) (1) Upon determining that an examination should be conducted, the commissioner shall issue an examination warrant appointing one or more examiners to perform the examination and instructing them as to the scope of the examination. The commissioner may also employ such other guidelines or procedures as the commissioner may deem appropriate.

(2) Every licensee or person from whom information is sought, its officers, directors and agents shall provide to the examiners timely, convenient and free access at all reasonable hours at its offices to all books, records, accounts, papers, documents, assets and computer or other recordings relating to the property, assets, business and affairs of the licensee being examined. The officers, directors, employees and agents of the licensee or person shall facilitate the examination and aid in the examination so far as it is in their power to do so. The refusal of a licensee, by its officers, directors, employees or agents, to submit to examination or to comply with any reasonable written request of the commissioner shall be grounds for suspension or refusal of, or nonrenewal of any license or authority held by the licensee to engage in the viatical settlement business or other business subject to the commissioner's jurisdiction. Any proceedings for suspension, revocation or refusal of any license or authority shall be conducted pursuant to the Kansas administrative procedure act.

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

of court.

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

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

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

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

(2) Not later than 60 days following completion of the examination, the examiner in charge shall file with the commissioner a verified written report of examination under oath. Upon receipt of the verified report, the commissioner shall transmit the report to the licensee examined, together with a notice that shall afford the licensee examined a reasonable opportunity of not more than 30 days to make a written submission or rebuttal with respect to any matters contained in the examination report.

(3) In the event the commissioner determines that regulatory action is appropriate as a result of an examination, the commissioner may initiate any proceedings or actions provided by law.

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

(2) Except as otherwise provided in this act, all examination reports, working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination made under this act, or in the course of analysis or investigation by the commissioner of the financial condition or market conduct of a licensee shall be confidential by law and privileged, shall not be subject to the provisions of the Kansas open records act, K.S.A. 45-215 et seq., and amendments thereto, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. The commissioner is authorized to use the documents, materials or other information in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties.

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

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

(B) disclosed to the NAIC and its affiliates and subsidiaries under paragraph (4) of subsection (e) by the commissioner.

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

(4) Neither the commissioner nor any person that received the documents, material or other information while acting under the authority of the commissioner, including the NAIC and its affiliates and subsidiaries, shall be permitted to testify in any private civil action concerning any

confidential documents, materials or information subject to paragraph (1) of subsection (e).

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

(A) Share documents, materials or other information, including the confidential and privileged documents, materials or information subject to paragraph (1) of subsection (e), with other state, federal and international regulatory agencies, with the NAIC and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, communication or other information;

(B) receive documents, materials, communications or information, including otherwise confidential and privileged documents, materials or information, from the NAIC and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material or information; and

(C) enter into agreements governing sharing and use of information consistent with this subsection.

(6) No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in paragraph (4) of subsection (e).

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

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

(9) The provisions of this subsection shall expire July 1, 2013, unless the legislature acts to reenact such provisions. The provisions of this section shall be reviewed by the legislature prior to July 1, 2013.

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

(A) A viator;

(B) an insured in a viaticated insurance policy; or

(C) a beneficiary in an insurance policy that is proposed to be viaticated.

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

(g) Unless provided otherwise, all fees and procedures for examinations under this act shall be in accordance with K.S.A. 40-223, and amendments thereto.

(h) (1) No cause of action shall arise nor shall any liability be imposed against the commissioner, the commissioner's authorized representatives or any examiner appointed by the commissioner for any statements made or conduct performed in good faith while carrying out the provisions of this act.

(2) No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the commissioner or the commissioner's authorized representative or examiner pursuant to an examination made under this act, if the act of communication or delivery was performed in good faith and without

fraudulent intent or the intent to deceive. This paragraph does not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified in paragraph (1).

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

(i) The commissioner may investigate suspected fraudulent viatical settlement acts and persons engaged in the business of viatical settlements.

New Sec. 2. (a) (1) A viatical settlement provider entering into a viatical settlement contract shall first obtain:

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

(B) a document in which the insured consents to the release of such insured's medical records to a viatical settlement provider, viatical settlement broker and the insurance company that issued the life insurance policy covering the life of the insured.

(2) Within 20 days after a viator executes documents necessary to transfer any rights under an insurance policy or within 20 days of entering any agreement, option, promise or any other form of understanding, expressed or implied, to viaticate the policy, the viatical settlement provider shall give written notice to the insurer that issued that insurance policy that the policy has or will become a viaticated policy. The notice shall be accompanied by the documents required by paragraph (3).

(3) The viatical settlement provider shall deliver a copy of the medical release required under clause (B) of paragraph (1), a copy of the viator's application for the viatical settlement contract, the notice required under paragraph (2) and a request for verification of coverage to the insurer that issued the life policy that is the subject of the viatical transaction. The form for verification shall be developed by the commissioner.

(4) The insurer shall respond to a request for verification of coverage submitted on an approved form by a viatical settlement provider within 30 calendar days of the date the request is received and shall indicate whether, based on the medical evidence and documents provided, the insurer intends to pursue an investigation at this time regarding the validity of the insurance contract.

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

(6) If a viatical settlement broker performs any of these activities required of the viatical settlement provider, the viatical settlement provider is deemed to have fulfilled the requirements of this section.

(b) (1) All medical information solicited or obtained by any licensee shall be subject to the applicable provisions of state law relating to confidentiality of medical information.

(2) The provisions of this subsection shall expire July 1, 2013, unless the legislature acts to reenact such provisions. The provisions of this section shall be reviewed by the legislature prior to July 1, 2013.

(c) All viatical settlement contracts entered into in this state shall provide the viator with an unconditional right to rescind the contract for at least 15 calendar days from the receipt of the viatical settlement proceeds. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment to the viatical settlement provider or purchaser of all viatical settlement proceeds, and any premiums, loans and loan interest that have been paid by the viatical settlement provider or purchaser.

(d) The viatical settlement provider shall instruct the viator to send the executed documents required to effect the change in ownership, assignment or change in beneficiary directly to the independent escrow agent. Within three business days after the date the escrow agent receives the document, or from the date the viatical settlement provider receives the documents, if the viator erroneously provides the documents directly to the provider, the provider shall pay or transfer the proceeds of the viatical settlement into an escrow or trust account maintained in a state or federally-chartered financial institution whose deposits are insured by the federal deposit insurance corporation. Upon payment of the settlement proceeds into the escrow account, the escrow agent shall deliver the original change in ownership, assignment or change in beneficiary forms to the viatical settlement provider or related provider trust. Upon the escrow agent's receipt of the acknowledgment of the properly completed transfer of ownership, assignment or designation of beneficiary from the insurance company, the escrow agent shall pay the settlement proceeds to the viator.

(e) Failure to tender consideration to the viator for the viatical settlement contract within the time disclosed pursuant to clause (6) of subsection (a) of K.S.A. 2007 Supp. 40-5008, and amendments thereto, renders the viatical settlement contract voidable by the viator for lack of consideration until the time consideration is tendered to and accepted by the viator.

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

New Sec. 3. (a) No person shall:

(1) Commit a fraudulent viatical settlement act.

(2) Knowingly or intentionally interfere with the enforcement of any provision of this act or any investigation of suspected or actual violations of this act.

(3) Knowingly or intentionally permit any person, employed by a person in the business of viatical settlements, convicted of a felony involving dishonesty or breach of trust to participate in the business of viatical settlements. No person in the business of viatical settlements shall knowingly or intentionally permit any person convicted of a felony involving dishonesty or breach of trust to participate in the business of viatical settlements.

(4) Issue, solicit, market or otherwise promote the purchase of an insurance policy for the sole purpose of or with the primary emphasis on settling the policy.

(5) Employ any device, scheme or artifice in violation of K.S.A. 40-450, and amendments thereto, in the solicitation, application or issuance of a life insurance policy.

(6) Receive, when providing premium financing, any proceeds, fees or other consideration from the policy or owner of the policy that are in addition to the amounts required to pay the principal, interest and costs or expenses incurred by the lender or borrower related to policy premiums paid under the premium financing agreement, except for the event of a default unless either the default on such loan or the transfer of the policy in connection with such default occurs pursuant to an agreement or understanding with any other person for the purpose of evading regulation under this act.

(b) (1) Viatical settlements, contracts and applications for viatical settlements, regardless of the form of transmission, shall contain the following statement or a substantially similar statement:

"Any person who knowingly presents false information in an application for insurance or viatical settlement contract is guilty of a crime and may

be subject to fines and confinement in prison.”

(2) The lack of a statement as required in paragraph (1) shall not constitute a defense in any prosecution for a fraudulent viatical settlement act.

(c) (1) Any person engaged in the business of viatical settlements having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be or has been committed shall provide to the commissioner the information required by, and in a manner prescribed by, the commissioner.

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

(d) (1) No civil liability shall be imposed on and no cause of action shall arise from a person’s furnishing information concerning suspected, anticipated or completed fraudulent viatical settlement acts or suspected or completed fraudulent insurance acts, if the information is provided to or received from:

(A) The commissioner or the commissioner’s employees, agents or representatives;

(B) federal, state or local law enforcement or regulatory officials or their employees, agents or representatives;

(C) any person involved in the prevention and detection of fraudulent viatical settlement acts or that person’s agents, employees or representatives;

(D) the NAIC, national association of securities dealers, the North American securities administrators association, or their employees, agents or representatives, or other regulatory body overseeing life insurance, viatical settlements, securities or investment fraud; or

(E) the life insurer that issued the life insurance policy covering the life of the insured.

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

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

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

(e) (1) The documents and evidence provided pursuant to subsection (d) of this section or obtained by the commissioner in an investigation of suspected or actual fraudulent viatical settlement acts shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a civil or criminal action.

(2) Paragraph (1) of this subsection shall not prohibit release by the commissioner of documents and evidence obtained in an investigation of suspected or actual fraudulent viatical settlement acts:

(A) In administrative or judicial proceedings to enforce laws administered by the commissioner;

(B) to federal, state or local law enforcement or regulatory agencies, to an organization established for the purpose of detecting and preventing fraudulent viatical settlement acts or to the NAIC;

(C) at the discretion of the commissioner or pursuant to a court order, to a person in the business of viatical settlements that is aggrieved by a fraudulent viatical settlement act; or

(D) at the discretion of the commissioner or pursuant to a court order, to a person that is aggrieved by a fraudulent viatical settlement act.

(3) Release of documents and evidence under subparagraphs (A) and (B) of paragraph (2) of this subsection does not abrogate or modify the privilege granted in paragraph (1).

(4) The provisions of this subsection shall expire July 1, 2013, unless the legislature acts to reenact such provisions. The provisions of this sec-

tion shall be reviewed by the legislature prior to July 1, 2013.

(f) This act shall not:

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

(2) prevent or prohibit a person from disclosing voluntarily information concerning viatical settlement fraud to a law enforcement or regulatory agency other than the insurance department; or

(3) limit the powers granted elsewhere by the laws of this state to the commissioner or an insurance fraud unit to investigate and examine possible violations of law and to take appropriate action against wrongdoers.

(g) Viatical settlement providers and viatical settlement brokers shall have in place antifraud initiatives reasonably calculated to detect, prosecute and prevent fraudulent viatical settlement acts. At the discretion of the commissioner, the commissioner may order, or a licensee may request and the commissioner may grant, such modifications of the following required initiatives as necessary to ensure an effective antifraud program. The modifications may be more or less restrictive than the required initiatives so long as the modifications reasonably may be expected to accomplish the purpose of this section. Antifraud initiatives shall include:

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

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

(A) A description of the procedures for detecting and investigating possible fraudulent viatical settlement acts and procedures for resolving material inconsistencies between medical records and insurance applications;

(B) a description of the procedures for reporting possible fraudulent viatical settlement acts to the commissioner;

(C) a description of the plan for antifraud education and training of underwriters and other personnel; and

(D) a description or chart outlining the organizational arrangement of the antifraud personnel who are responsible for the investigation and reporting of possible fraudulent viatical settlement acts and investigating unresolved material inconsistencies between medical records and insurance applications; and

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

Sec. 4. K.S.A. 2007 Supp. 40-5001 is hereby amended to read as follows: 40-5001. K.S.A. 2007 Supp. 40-5001 through 40-5016 inclusive, and sections 1, 2 and 3, and amendments thereto, may be cited as the viatical settlements act of 2002.

Sec. 5. K.S.A. 2007 Supp. 40-5002 is hereby amended to read as follows: 40-5002. As used in this act, the following words and phrases shall have the meanings ascribed to them in this section:

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

(b) "Business of viatical settlements" means an activity involved in, but not limited to, offering, soliciting, negotiating, procuring, effectuation, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging or hypothecating any viatical settlement contract.

(c) "Chronically ill" means:

(1) Being unable to perform at least two activities of daily living including eating, toileting, transferring, bathing, dressing, continence or such other activity as determined by rules and regulations adopted by the commissioner; or

(2) requiring substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment.

(d) "Commissioner" means the commissioner of insurance.

(e) "Financing entity" means any underwriter, placement agent, lender, purchaser of securities, purchaser of a policy or certificate from

a viatical settlement provider, credit enhancer or any entity that has a direct ownership in a policy or certificate which is the subject of a viatical settlement contract, but:

(1) Whose principal activity related to the transaction is providing funds to effect the viatical settlement or purchase of one or more viatical policies; and

(2) who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of viatical settlement contracts.

Financing entity shall not include any nonaccredited investor or viatical settlement purchaser.

(f) "Fraudulent viatical settlement act" means and includes:

(1) Any act or omission committed by any person who, knowingly or with intent to defraud, for the purpose of depriving another of property or for pecuniary gain, commits, or permits such person's employees or agents to engage in acts including:

(A) Presenting, causing to be presented or preparing with knowledge or belief that it will be presented to or by a viatical settlement provider, viatical settlement broker, viatical settlement purchaser, financing entity, insurer, insurance producer or any other person, false material information, or concealing material information, as part of, in support of or concerning a fact material to one or more of the following:

(i) An application for the issuance of a viatical settlement contract or insurance policy;

(ii) the underwriting of a viatical settlement contract or insurance policy;

(iii) a claim for payment or benefit pursuant to a viatical settlement contract or insurance policy;

(iv) premiums paid on an insurance policy;

(v) payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract or insurance policy;

(vi) the reinstatement or conversion of an insurance policy;

(vii) in the solicitation, offer, effectuation or sale of a viatical settlement contract or insurance policy;

(viii) the issuance of written evidence of viatical settlement contract or insurance; or

(ix) a financing transaction.

(B) Employing any device, scheme or artifice to defraud related to viatical policies;

(2) any act done or committed in the furtherance of a fraud or to prevent the detection of a fraud any person commits or permits its employees or its agents to:

(A) Remove, conceal, alter, destroy or sequester from the commissioner the assets or records of a licensee or other person engaged in the business of viatical settlements;

(B) misrepresent or conceal the financial condition of a licensee, financing entity, insurer or other person;

(C) transact the business of viatical settlements in violation of laws requiring a license, certificate of authority or other legal authority for the transaction of the business of viatical settlements; or

(D) file with the commissioner or the chief insurance regulatory official of another jurisdiction a document containing false information or otherwise conceals information about a material fact from the commissioner;

(3) *commit* embezzlement, theft, misappropriation or conversion of moneys, funds, premiums, credits or other property of a viatical settlement provider, insurer, insured, viator, insurance policy owner or any other person engaged in the business of viatical settlements or insurance; or

(4) ~~recklessly entering into, brokering, otherwise dealing~~ *enter into, broker or otherwise deal* in a viatical settlement contract, the subject of which is a life insurance policy that was obtained by presenting false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where the viator or the viator's agent intended to defraud the policy's issuer. "Recklessly" means engaging in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a

gross deviation from acceptable standards of conduct;

(5) *stranger-originated life insurance; or*

~~(6) attempting to commit, assisting, aiding or abetting in the commission of, or conspiracy to commit the acts or omissions specified in this subsection.~~ *attempt to commit, assist, aid or abet in the commission of, or conspiracy to commit any act or omission specified in this subsection;*
or

(7) *fail to disclose to the insurer when requested by the insurer that the prospective insured has undergone a life expectancy evaluation by any person or entity other than the insurer or any authorized representative of such insurer in connection with the issuance of the policy.*

(g) “NAIC” means the national association of insurance commissioners.

(h) “Person” means a natural person or a legal entity, including, but not limited to, an individual, partnership, limited liability company, association, trust or corporation.

(i) “Policy” means an individual or group policy, group certificate, contract or arrangement of life insurance affecting the rights of a resident of this state or bearing a reasonable relation to this state, regardless of whether delivered or issued for delivery in this state.

(j) “Related provider trust” means a titling trust or other trust established by a licensed viatical settlement provider or a financing entity for the sole purpose of holding the ownership or beneficial interest in purchased policies in connection with a financing transaction. The trust shall have a written agreement with the licensed viatical settlement provider under which the licensed viatical settlement provider is responsible for ensuring compliance with all statutory and regulatory requirements and under which the trust agrees to make all records and files related to viatical settlement transactions available to the commissioner as if those records and files were maintained directly by the licensed viatical settlement provider.

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

(l) “*Stranger-originated life insurance*” means *an act, practice or arrangement to initiate a life insurance policy for the benefit of a third party investor who, at the time of policy origination, has no insurable interest in the insured under K.S.A. 40-450 and amendments thereto. Stranger-originated life insurance practices include, but are not limited to, cases in which life insurance is purchased with resources or guarantees from or through a person or entity who, at the time of policy inception, could not lawfully initiate the policy, and where, at the time of policy inception, there is an arrangement or agreement to directly or indirectly transfer the ownership of the policy or the policy benefits, or both, to a third party. Any trust that is created to give the appearance of insurable interest, and is used to initiate one or more policies for investors, violates K.S.A. 40-450, and amendments thereto, and the prohibition against wagering on human life. Stranger-originated life insurance arrangements do not include those practices set forth in paragraph (3) of subsection (o).*

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

~~(n)~~ (n) “Viatical settlement broker” means a person that on behalf of a viator and for a fee, commission or other valuable consideration offers or attempts to negotiate viatical settlement contracts between a viator and one or more viatical settlement providers. Notwithstanding the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the viator and owes a fiduciary duty to the viator to act according to the viator’s instructions and in the best interest of the viator. The term does not include an attorney, certified public accountant or a financial planner accredited by a nationally recognized accreditation agency, who is retained to represent the viator and whose compensation is not paid directly or indirectly by the viatical settlement provider or purchaser.

~~(o)~~ (o) (1) “Viatical settlement contract” means a written agreement establishing the terms under which compensation or anything of value will be paid, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator’s assignment, transfer, sale, devise or bequest of the death benefit or own-

ership of any portion of the insurance policy or certificate of insurance. A viatical settlement contract also includes a contract for a loan or other financing transaction with a viator secured primarily by an individual or group life insurance policy, 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. A viatical settlement contract includes an agreement with a viator to transfer ownership or change the beneficiary designation at a later date regardless of the date that compensation is paid to the viator. *between a viator and a viatical settlement provider establishing the terms under which compensation or anything of value is or will be paid, which compensation or value is less than the expected death benefits of the policy, in return for the viator's present or future assignment, transfer, sale, devise or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance, except that the minimum value for a viatical settlement contract shall be greater than the cash surrender value or accelerated death benefit available at the time of an application for a viatical settlement contract.*

(2) *Viatical settlement contract also includes:*

(A) *The transfer for compensation or value of ownership or beneficial interest in a trust or other entity that owns such policy if the trust or other entity was formed or availed of for the principal purpose of acquiring one or more life insurance contracts, which life insurance contract insures the life of a person residing in this state.*

(B) *A written agreement for a loan or other lending transaction, secured primarily by an individual or group life insurance policy, or a premium finance loan made for a policy on or before the date of issuance of the policy, where:*

(i) *The viator receives on the date of the premium finance loan a guarantee of a future viatical settlement value of the policy; or*

(ii) *the viator agrees on the date of the premium finance loan to sell the policy or any portion of its death benefit on any date following the issuance of the policy.*

(3) *Viatical settlement contract does not include:*

(A) *A policy loan by a life insurance company pursuant to the terms of the life insurance policy or accelerated death provisions contained in the life insurance policy, whether issued with the original policy or as a rider.*

(B) *Loan proceeds that are used solely to pay:*

(i) *Premiums for the policy; and*

(ii) *any costs or expenses incurred by the lender or the borrower in connection with the financing.*

(C) *A premium finance loan or any loan made by a bank or other licensed financial institution, provided that neither default on such loan nor the transfer of the policy in connection with such default is pursuant to an agreement or understanding with any other person for the purpose of evading regulation under this act.*

(D) *A collateral assignment of a life insurance policy by a viator.*

(E) *A loan made by a lender that does not violate the Kansas insurance premium finance company act, K.S.A. 40-2601 et seq., and acts amendatory thereof or supplemental thereto, unless the premium finance loan is described in subparagraph (B) of paragraph (2).*

(F) *An agreement where all the parties:*

(i) *Are closely related to the insured by blood or law; or*

(ii) *have a lawful 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;*

(G) *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;*

(H) *a bona fide business succession planning arrangement between one or more:*

(i) *Shareholders in a corporation or between a corporation and one or more of its shareholders or one or more trusts established by its shareholders;*

(ii) *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*

(iii) *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;

(I) an agreement entered into by a service recipient, or 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; or

(J) any other contract, transaction or arrangement exempted from the definition of viatical settlement contract by the commissioner based on a determination that the contract, transaction or arrangement is not of the type intended to be regulated by this act.

~~(p)~~ (p) "Viatical settlement provider" means a person, other than a viator, who enters into or effectuates a viatical settlement contract. Viatical settlement provider does not include:

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

(2) the issuer of a life insurance policy providing accelerated benefits under K.S.A. 40-401, and amendments thereto, and pursuant to the contract;

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

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

(5) a financing entity;

(6) a special purpose entity;

(7) a related provider trust;

(8) a viatical settlement purchaser; or

(9) an accredited investor or qualified institutional buyer as such term is defined respectively in regulation D, rule 501 or rule 144A of the federal securities act of 1933, as in effect upon the effective date of this act, and who purchases a viaticated policy from a viatical settlement provider.

~~(q)~~ (q) "Viator" means the owner of a life insurance policy or a certificate holder under a group policy who enters or seeks to enter into a viatical settlement contract. For the purposes of this act, a viator shall not be limited to an owner of a life insurance policy or a certificate holder under a group policy insuring the life of an individual with a terminal or chronic illness or condition except where specifically addressed. Viator shall not include:

(1) A licensee under this act;

(2) ~~an accredited investor or a~~ qualified institutional buyer as such term is defined ~~respectively in regulation D, rule 501 or in~~ rule 144A of the federal securities act of 1933, as in effect upon the effective date of this act;

(3) a financing entity;

(4) a special purpose entity; or

(5) a related provider trust.

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

~~(s)~~ (s) "Viatical settlement purchaser" means a person who gives a sum of money as consideration for a life insurance policy or an interest in the death benefits of a life insurance policy, or a person who owns or acquires or is entitled to a beneficial interest in a trust that owns a viatical settlement contract or is the beneficiary of a life insurance policy that has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit. Viatical settlement purchaser shall not include:

(1) A licensee under this act;

(2) an accredited investor or qualified institutional buyer as such term is defined respectively in regulation D, rule 501 or rule 144A of the federal securities act of 1933, as in effect upon the effective date of this act;

(3) a financing entity;

(4) a special purpose entity; or

(5) a related provider trust.

Sec. 6. K.S.A. 2007 Supp. 40-5006 is hereby amended to read as follows: 40-5006. (a) (1) Each licensee shall file with the commissioner on or before March 1 of each year an annual statement containing such information as the commissioner may prescribe by rule and regulation.

(2) *In addition to any other requirements, for any policy settled within five years of such policy's date of issuance, the annual statement shall specify the total number, aggregate face amount and life settlement proceeds of policies settled during the immediately preceding calendar year, together with a break down of the information by policy issue year. Such information shall be limited to only those transactions where the insured is a resident of this state and shall not include individual transaction data regarding the business of viatical settlements or information that there is a reasonable basis to believe could be used to identify the policy owner or the insured.*

(b) Except as otherwise allowed or required by law, a viatical settlement provider, viatical settlement broker, insurance company, insurance producer, information bureau, rating agency or company, or any other person with actual knowledge of an insured's identity, shall not disclose that identity as an insured, or the insured's financial or medical information to any other person unless the disclosure is:

(1) Necessary to effect a viatical settlement between the viator and a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;

(2) provided in response to an investigation or examination by the commissioner or any other governmental officer or agency or pursuant to the requirements of paragraph (c) of ~~K.S.A. 2007 Supp. 40-5012~~, *section 3* and amendments thereto;

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

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

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

(6) required to purchase stop loss coverage.

Sec. 7. ~~K.S.A. 2007 Supp. 40-5008~~ is hereby amended to read as follows: ~~40-5008~~. (a) With each application for a viatical settlement, a viatical settlement provider or viatical settlement broker shall provide the viator with at least the following disclosures no later than the time the application for the viatical settlement contract is signed by all parties. The disclosures shall be provided in a separate document that is signed by the viator and the viatical settlement provider or viatical settlement broker, and shall provide the following information:

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

(2) *That a viatical settlement broker represents exclusively the viator and not the insurer or the viatical settlement provider. Furthermore the viatical settlement broker owes a fiduciary duty to the viator including the duty to act according to the viator's instructions and in the best interest of the viator.*

~~(2)~~ (3) Some or all of the proceeds of the viatical settlement may be taxable under federal income tax and state franchise and income taxes, and assistance should be sought from a professional tax advisor.

~~(3)~~ (4) Proceeds of the viatical settlement could be subject to the claims of creditors.

~~(4)~~ (5) Receipt of the proceeds of a viatical settlement may adversely affect the viator's eligibility for medicaid or other government benefits or entitlements, and advice should be obtained from the appropriate government agencies.

~~(5)~~ (6) The viator has the right to rescind a viatical settlement contract for 15 calendar days after the receipt of the viatical settlement proceeds by the viator, as provided in subsection (c) of ~~K.S.A. 2007 Supp. 40-5009~~, *section 2* and amendments thereto. If the insured dies during the rescission period, the settlement contract shall be deemed to have been rescinded, subject to repayment of all viatical settlement proceeds and any premiums, loans and loan interest to the viatical settlement provider or purchaser.

~~(6)~~ (7) Funds will be sent to the viator within three business days after the viatical settlement provider has received the insurer or group administrator's acknowledgment that ownership of the policy or interest

in the certificate has been transferred and the beneficiary has been designated.

~~(7)~~ (8) Entering into a viatical settlement contract may cause other rights or benefits, including conversion rights and waiver of premium benefits that may exist under the policy or certificate, to be forfeited by the viator. Assistance should be sought from a financial adviser.

~~(8)~~ (9) Disclosure to a viator shall include distribution of a brochure describing the process of viatical settlements. The form for the brochure shall be developed by the commissioner.

~~(9)~~ (10) The disclosure document shall contain the following language: "All medical, financial or personal information solicited or obtained by a viatical settlement provider or viatical settlement broker about an insured, including the insured's identity or the identity of family members, a spouse or a significant other may be disclosed as necessary to effect the viatical settlement between the viator and the viatical settlement provider. If you are asked to provide this information, you will be asked to consent to the disclosure. The information may be provided to someone who buys the policy or provides funds for the purchase. You may be asked to renew your permission to share information every two years."

~~(10)~~ (11) The insured may be contacted by either the viatical settlement provider or viatical settlement broker or such viatical settlement provider's or viatical settlement broker's authorized representative for the purpose of determining the insured's health status. This contact is limited to once every three months if the insured has a life expectancy of more than one year, and no more than once per month if the insured has a life expectancy of one year or less.

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

(1) The affiliation, if any, between the viatical settlement provider and the issuer of the insurance policy to be viaticated.

(2) The name, address and telephone number of the viatical settlement provider.

(3) A viatical settlement broker shall disclose to a prospective viator the amount and method of calculating the broker's compensation. The term "compensation" includes anything of value paid or given to a viatical settlement broker for the placement of a policy.

(4) If an insurance policy to be viaticated has been issued as a joint policy or involves family riders or any coverage of a life other than the insured under the policy to be viaticated, the viator shall be informed of the possible loss of coverage on the other lives under the policy and shall be advised to consult with such viator's insurance producer or the insurer issuing the policy for advice on the proposed viatical settlement.

(5) State the dollar amount of the current death benefit payable to the viatical settlement provider under the policy or certificate. If known, the viatical settlement provider shall also disclose the availability of any additional guaranteed insurance benefits, the dollar amount of any accidental death and dismemberment benefits under the policy or certificate and the viatical settlement provider's interest in those benefits.

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

(c) *Without limiting the ability of an insurer from assessing the insurability of a policy applicant and determining whether or not to issue the policy, and in addition to other questions an insurance carrier may lawfully pose to a life insurance applicant, insurance carriers may inquire in the application for insurance whether the proposed owner intends to pay premiums with the assistance of financing from a lender that will use the policy as collateral to support the financing.*

(1) *If, as described in paragraph (3) of subsection (c) of K.S.A. 40-5002, and amendments thereto, the loan provides funds which can be used for a purpose other than paying for the premiums, costs, and expenses associated with obtaining and maintaining the life insurance policy and loan, the application shall be rejected as a violation of this act.*

(2) *If the financing does not violate this section in this manner, the*

insurance carrier:

(A) May make disclosures, including, but not limited to, such as the following, to the applicant and the insured, either on the application or an amendment to the application to be completed no later than the delivery of the policy:

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

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

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

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

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

(B) may require certifications, such as the following, from the applicant or the insured or both:

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

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

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

Sec. 8. K.S.A. 2007 Supp. 40-5010 is hereby amended to read as follows: 40-5010. ~~It shall be a violation of this act for any person to enter into a viatical settlement contract within a two-year period commencing with the date of issuance of the insurance policy or certificate unless the viator certifies to the viatical settlement provider that one or more of the following conditions have been met within the two-year period: No person at any time prior to, or at the time of, the application for or issuance of a policy, or during a two-year period commencing with the date of issuance of the policy, shall enter into a viatical settlement regardless of the date the compensation is to be provided and regardless of the date the assignment, transfer, sale, devise, bequest or surrender of the policy is to occur. This prohibition shall not apply if the viator certifies to the viatical settlement provider that:~~

(a) The policy was issued upon the viator’s exercise of conversion rights arising out of a group or individual policy, provided the total of the time covered under the conversion policy plus the time covered under the prior policy is at least 24 months. The time covered under a group policy shall be calculated without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship;

~~(b) the viator is a charitable organization exempt from taxation under 26 U.S.C. §501 (c)(3);~~

~~—(c) the viator is not a natural person;~~

~~—(d) (1) The viator submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within the two-year period:~~

~~(A) (1) The viator or insured is terminally or chronically ill;~~

~~(B) (2) the viator’s spouse dies;~~

~~(C) (3) the viator divorces such viator’s spouse;~~

~~(D) (4) the viator retires from full-time employment;~~

~~(E) (5) the viator becomes physically or mentally disabled and a physician determines that the disability prevents the viator from maintaining full-time employment;~~

~~(F) (6) the viator was the insured’s employer at the time the policy or certificate was issued and the employment relationship terminated; a final order, judgment or decree is entered by a court of competent jurisdiction, on the application of a creditor of the viator, adjudicating the viator bankrupt or insolvent, or approving a petition seeking reorganiza-~~

tion of the viator or appointing a receiver, trustee or liquidator to all or a substantial part of the viator's assets; or

~~(G) (7) the beneficiary of the policy is a family member of the viator and the beneficiary dies.~~

~~(H) the viator experiences a significant decrease in income that is unexpected and that impairs the viator's reasonable ability to pay the policy premium; or~~

~~(I) the viator or insured disposes of such viator's or insured's ownership interests in a closely held corporation.~~

~~(2) (c)~~ Copies of the independent evidence described in ~~paragraph (1) of this subsection (b)~~ and documents required by subsection (a) of K.S.A. 2007 Supp. 40-5009 section 2, and amendments thereto, shall be submitted to the insurer when the viatical settlement provider submits a request to the insurer for verification of coverage. The copies shall be accompanied by a letter of attestation from the viatical settlement provider that the copies are true and correct copies of the documents received by the viatical settlement provider. *No provision in this section shall prohibit an insurer from exercising its right to contest the validity of any policy.*

~~(e) (d)~~ If the viatical settlement provider submits to the insurer a copy of the owner or insured's certification described in subsection ~~(d) (b)~~ when provider submits a request to the insurer to effect the transfer of the policy or certificate to the viatical settlement provider, the copy shall be deemed to conclusively establish that the viatical settlement contract satisfies the requirements of this section and the insurer shall timely respond to the request.

Sec. 9. K.S.A. 2007 Supp. 40-5001, 40-5002, 40-5006, 40-5007, 40-5008, 40-5009, 40-5010 and 40-5012 are hereby repealed.

Sec. 10. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 21, 2008.
