Life Settlements Task Force

Staff Report to the
United States Securities and Exchange Commission

July 22, 2010

This is a report by the Staff of the U.S. Securities and Exchange Commission. The Commission has expressed no view regarding the analysis, findings, or conclusions contained herein.

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Executive Summary

Chairman Schapiro established the Life Settlements Task Force in August 2009 to examine emerging issues in the life settlements market and to advise the Commission whether market practices and regulatory oversight could be improved. A life settlement is a transaction in which an insurance policy owner sells a life insurance policy to a third party for an amount that exceeds the policy's cash surrender value, but is less than the expected death benefit of the policy. Reports indicate that the life settlements market had experienced robust growth up until 2007 when it was estimated that $12 billion in face amount, or stated benefit amount, of life insurance was sold in life settlement transactions. More recently, the amount sold has declined. Based on a recent estimate, $7.01 billion of face amount in life insurance was sold in life settlement transactions in 2009.[1]

The Task Force was set up as a cross-Divisional SEC Staff task force to bring a multi-disciplinary approach to the review. The Task Force reviewed articles and other resources related to life settlements, and met with 23 outside groups knowledgeable about the life settlements market, its regulation, its participants and its impact on policy owners and investors. In addition to meeting with industry participants, the Task Force also met with the Financial Industry Regulatory Authority ("FINRA"), the U.K.'s Financial Services Authority ("FSA"), the U.S. Government Accountability Office ("GAO"), and state insurance commissioners and securities regulators and their representatives.

This Report outlines the Task Force's findings about the life settlements market and recommends that the Commission consider certain actions to improve market practices and regulatory oversight in the life settlements market. The views expressed in this Report are those of the Task Force and do not necessarily reflect the views of the Commission or the individual Commissioners.

Characteristics of the Life Settlements Market

A life settlement is usually accomplished through the efforts of a number of market intermediaries, each of them dealing with a specific aspect of the settlement of a life insurance policy. Participants in a life settlement transaction generally include an insured individual or the owner of the policy, a producer who may be a financial advisor or an insurance agent, one or more settlement brokers who may also be insurance agents, one or more life expectancy underwriters, one or more providers who typically represent the party acquiring the policy, and one or more investors.

1 See U.S. Government Accountability Office, GAO-10-775, Life Insurance Settlements: Regulatory Inconsistencies May Pose a Number of Challenges (2010).

Most insured individuals participating in today's life settlement market are seniors with a life expectancy of more than two years.[2] Often, insured individuals or policy owners first discuss a life settlement with a producer, who may be the policy owner's financial advisor or the insurance agent who sold the insurance policy to the policy owner. A settlement broker will generally gather the information necessary to sell a life insurance policy to a provider, known as settling the policy, including medical information. Providers will review and bid on settlement applications prepared by settlement brokers. Life expectancy underwriters are responsible for preparing a life expectancy assessment that evaluates the risk of mortality of the insured. Providers may hold but typically resell life settlements or interests in life settlements to investors. The majority of investors in today's life settlement market are large institutional investors seeking to acquire large pools of policies. Retail investors also participate in the life settlements market, generally by purchasing fractional interests in settled policies.

Some companies, in addition to being providers, specialize in the secondary market of life settlements and their activities range from buying life insurance policies to selling those policies, either as whole policies or fractional interests in policies, or using those policies as collateral for other investment instruments.

Stranger-Originated Life Insurance

Stranger-originated life insurance ("STOLI") is a transaction in which an investor or its representative induces an individual, typically a senior, to purchase a life insurance policy that he likely would not otherwise have purchased. The individual applies for the policy with a prior understanding to cede control of the policy to the investor. The applicant and the investor agree that, at the end of a given period, ownership of the policy will be transferred to the investor, or some other third party, who would expect to receive the death benefit when the insured dies.

Critics of STOLI, including state insurance regulators, argue that STOLI is inconsistent with state "insurable interest" laws and the historical social policy of insurance, which is to protect families and businesses from potential economic hardship caused by untimely death of the insured. Other concerns cited about STOLI include that it may encourage insurance fraud; it may result in an insured incurring a tax liability resulting from forgiveness of premium loans or receipt of incentives from the investor for obtaining the life insurance policy; it may make the insured unable to obtain life insurance legitimately needed in the future; and it could make life insurance more expensive and less available for other consumers. From the standpoint of an investor in life settlements, STOLI policies may introduce additional risks, given that insurers may contest them on grounds such as fraud or violations of state insurable interest laws.

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2 The market refers to the settlement of a life insurance policy by an individual with a life expectancy of less than two years as a viatical settlement. If the life expectancy of the insured is greater than two years, then the market refers to that settlement as a life settlement.

Securitization of Life Settlements and the Role of Rating Agencies

To date, there have been no securitizations of life settlements registered with the SEC, although there have been some privately offered life settlement securitizations. Market participants believe a rating from a rating agency would be essential in order to be able to sell a securitization of life settlements. There have been only a very limited number of securitizations of life settlements that have ever received a rating. The Task Force was told by groups representing a wide array of market participants that it is unlikely that there will be an increase in securitizations of life settlements in the near future. Some rating agencies have also publicly highlighted multiple obstacles that would make it difficult to rate a life settlement securitization. Among those obstacles are: legal uncertainty surrounding the existence and transferability of insurable interests; the lack of experience and reputation of the prospective issuers of the securitization; the large number of policies needed for life settlements securitizations; questions regarding the reliability of medical reviews of the insured individuals; and the potential timing mismatch of cash flows. These are many of the same risks and challenges presented to anyone seeking to invest in life settlements generally.

Application of the Federal Securities Laws to Life Settlements

A variable life insurance contract is a security under the federal securities laws, so the sale of such a contract by its owner would involve a securities transaction subject to the federal securities laws and the SEC's jurisdiction. In the context of non-variable life insurance contracts, which constitute the vast majority of settled contracts, in two instances federal courts have considered whether fractional interests in viatical settlements are securities. The courts reached different conclusions and thus this issue remains unresolved.

In instances where life settlements constitute a security under the federal securities laws, market intermediaries engaging in transactions in those securities must be registered as broker-dealers and are subject to regulations designed to promote business conduct that facilitates fair, orderly and efficient markets and protects investors from abusive practices.

Trading platforms that facilitate transactions in life settlements that are securities under the federal securities laws must register as national securities exchanges pursuant to Sections 5 and 6 of the Securities Exchange Act of 1934 ("Exchange Act"), or register as a broker-dealer.

The SEC has brought a number of enforcement actions alleging fraud in connection with life settlement investments. Those enforcement actions have typically involved misrepresentations to investors about the profitability and safety of the underlying life insurance policies, including the life expectancies of the insured persons, and Ponzi schemes whereby investor funds have been used to pay promised investment returns or simply misappropriated. The schemes in these cases ranged from tens of millions of dollars to at least one billion dollars. FINRA has also brought enforcement

actions concerning life settlement investments. FINRA cases involved violations of FINRA rules by either engaging in an outside business or engaging in private securities transactions without complying with the relevant FINRA rules for such conduct.

Application of State Insurance and Securities Laws to Life Settlements

With respect to state insurance laws, both the National Association of Insurance Commissioners ("NAIC") and the National Conference of Insurance Legislators ("NCOIL") have adopted model state statutes addressing life settlements. Both model acts include provisions addressing licensing of life settlement brokers and providers, disclosure to policy owners in connection with entering into life settlement contracts, regulators' examination and enforcement powers, and deterrence of STOLI transactions. However, there are many variations of these two model acts due to the different ways states enact them. A total of 45 states have adopted some form of legislation relating to life settlements under state insurance laws. Unlike other market participants, life expectancy underwriters are not subject to significant regulation at the state level.

With respect to state securities laws, 48 states treat life settlements as securities under state laws, although some states exclude from the definition of security the original sale from the insured or the policy owner to the provider. A majority of states include life settlements in their statutory definition of security, either directly in that definition, or as part of the definition of investment contract. In a number of other states that do not include life settlements in their statutory definition of security or investment contract, state courts or state regulators have found life settlements to be a security under an investment contract analysis.

Recommendations

A. <u>The Commission Should Consider Recommending to Congress that It Amend the Definition of Security under the Federal Securities Laws to Include Life Settlements</u>

The Task Force recommends that the Commission consider recommending to Congress that it amend the definition of "security" under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 to include life settlements. The amendment would clarify the status of life settlements under the federal securities laws and provide for a more consistent treatment of life settlements under both federal and state securities laws.

Under the Securities Exchange Act of 1934, the amendment of the definition of "security" would bring market intermediaries in the life settlements market within the regulatory framework of the SEC and FINRA. The market intermediaries would be required to register with the SEC and a self-regulatory organization ("SRO"), such as FINRA, and would become subject to a comprehensive set of SEC and SRO requirements that are designed to protect investors from abusive practices and to promote business conduct that facilitates fair, orderly and efficient markets. Among these

requirements are a duty to deal fairly with customers, a duty to seek to obtain best execution of customer orders, suitability requirements, and a requirement that compensation for services be fair and reasonable. In addition, the amendment would give the SEC and FINRA clear authority to police the life settlements market for compliance with the federal securities laws and SRO requirements, which could lead to early detection of abuses and help deter fraud.

Under the Securities Act of 1933, the amendment of the definition of "security" would mean that all offers and sales of life settlements, whether single life settlements or fractional interests in life settlements, would need to be registered with the SEC, unless an exemption from such registration requirement is available. In addition, any misstatement in the offers and sales of life settlements, whether registered or offered pursuant to an exemption, would be covered by the antifraud provisions in the Securities Act.

Under the Investment Company Act of 1940, the amendment of the definition of "security" would mean that a pool of life settlements issuing interests in the pool would be an investment company under the Investment Company Act, unless it falls within an exemption. Investors in the pool would benefit from the comprehensive federal regulatory framework the Investment Company Act establishes for investment companies.

B. The Commission Should Instruct the Staff to Continue to Monitor that Legal Standards of Conduct Are Being Met by Brokers and Providers

The Commission should instruct the Staff to help ensure that settlement brokers and providers, as well as other participants in the settlement transaction, are adequately discharging their obligations under the federal securities laws and FINRA rules. Action by FINRA and the SEC could include examination and enforcement efforts, consideration of whether existing licensing schemes should be expanded, as well as investor education efforts.

C. The Commission Should Instruct the Staff to Monitor for the Development of a Life Settlement Securitization Market

The Commission should instruct the Staff to monitor for developments related to life settlements and the securitization market. To date, no securitizations of life settlements have been registered with the SEC and offered to the public. Since life settlement securitizations or pools of life settlements to date have been offered and sold in reliance on exemptions from registration with the SEC, information about those transactions is not generally available. However, the SEC and the market would benefit from having access to more information about the sales of these securities in the private markets. The SEC has proposed revisions to its rules to require issuers of structured finance products, which would include securitizations backed by life settlements, that sell securities without registration under the Securities Act in reliance on Regulation D or that rely on Rule 144A for resales of the securities to make a notice filing describing the

offering.[3] The Staff would be in a better position to monitor developments in the market for life settlement securitizations if this or a similar proposal were adopted.

D. The Commission Should Encourage Congress and State Legislators to Consider More Significant and Consistent Regulation of Life Expectancy Underwriters

The Commission should consider highlighting to Congress that the life settlement market could benefit from more significant and consistent regulation of life expectancy underwriters. The estimated life expectancy of the insured constitutes a critical component of the life settlement transaction, which affects the amount paid to the policy owner, the expected timing of the payment to the investor, and the value of any securitization.

E. The Commission Should Instruct the Staff to Consider Issuing an Investor Bulletin Regarding Investments in Life Settlements

The Commission should instruct the Staff to consider issuing an Investor Bulletin regarding investments in life settlements.

3 See Asset-Backed Securities, Securities Act Release No. 9117 (Apr. 7, 2010) [75 FR 23328] ("Asset-Backed Securities Release").

I. Introduction

Chairman Schapiro established the Life Settlements Task Force in August 2009, in light of concerns about the developing life settlements market and the prospect of securitization of life settlements. The goals of the Task Force were to examine emerging issues in the life settlements market and to advise the Commission whether market practices and regulatory oversight can be improved.

Given the array of issues presented by the life settlements market, including issues related to sales practices, market intermediaries, investor disclosures, trading platforms, and the prospect of securitization, the Task Force was formed as a cross-Divisional SEC Staff task force to bring a multi-disciplinary approach to the review (see Appendix A). Task Force participants include senior representatives from the following Divisions and Offices:

- Division of Corporation Finance;
- Division of Enforcement;
- Division of Investment Management;
- Division of Risk, Strategy, and Financial Innovation;
- Division of Trading and Markets;
- Office of the Chief Accountant;
- Office of Compliance Inspections and Examinations;
- Office of the General Counsel; and
- Office of Investor Education and Advocacy.

Following a review of articles and other resources related to life settlements, the Task Force began meeting with outside representatives knowledgeable about the life settlements market in September 2009. The Task Force met with 23 outside groups with first-hand knowledge of the life settlements market, its regulation, its participants and its impact on policy owners and investors (see Appendix B). In addition to industry participants, the Task Force met with the Financial Industry Regulatory Authority ("FINRA"), the U.K.'s Financial Services Authority ("FSA"), the U.S. Government Accountability Office ("GAO"), and state insurance commissioners and securities regulators and their representatives.

In preparing recommendations, the Task Force focused on ways to better inform and protect individuals participating in the life settlements market. The Task Force notes that "[s]ome investors may feel uncomfortable with an asset where profits relate to deaths."[4] However, policy owners also benefit from the sale of life insurance policies that are no longer needed because "[l]ife settlements pay policyholders more than they could get from their insurers by cashing in their policies" and "policyholders might decide that taking a portion of the death benefit now makes more sense than passing the

4 Richard Morris, Asset Allocator: Life Settlements, Citywire, May 28, 2009.

entire benefit on after their death."[5] The Task Force takes no position on the ethical issues surrounding this foundational concept of a life settlement transaction.

As a result, the goal of the Task Force was to consider whether changes in regulatory oversight are appropriate to help assure that those who choose to participate in the life settlements market have the benefit of appropriate disclosure, marketplace protections and fair dealing practices. This report provides an overview of the life settlements market and makes a series of recommendations to improve the transparency, oversight, and investor protections in that market.

5 Rob Curran, Wealth Advisor (A Special Report) – The Pros and Cons of Betting on Death: What You Need to Know before you Buy Someone Else's Life-Insurance Policy, Wall St. J., Apr. 12, 2010, at R7.

II. Life Settlements

A. What is a Life Settlement

A life settlement is a transaction in which an insurance policy owner sells a life insurance policy to a third party for an amount that exceeds the policy's cash surrender value, but is less than the expected death benefit of the policy. The life insurance policies used in these transactions typically involve amounts larger than $1 million.[6] The Life Settlements Model Act adopted by the National Conference of Insurance Legislators (the "NCOIL model act") provides that a life settlement transaction may be structured in many ways, including: (1) an assignment, transfer, sale, devise or bequest of the benefit in a life insurance policy for value; (2) a loan or other lending transaction, secured by one or more life insurance policies; (3) certain premium finance loans made for a life insurance policy on or before the date of issuance of the life insurance policy; and (4) the transfer for compensation or value of the "interest in a trust or other entity that owns a life insurance policy if the trust or other entity was formed or availed of for the principal purpose of acquiring one or more life insurance contracts . . .."[7]

Insured individuals or policy owners sell their policies in the secondary market rather than allowing them to lapse or surrendering them to the insurance company for cash value to maximize their asset. The right of conveyance stems from a 1911 Supreme Court decision, Grigsby v. Russell.[8] The Supreme Court noted that it was desirable to give life insurance the characteristics of property.[9]

Many point to the AIDS crisis in the 1980's as the triggering event that resulted in the creation of a secondary market for life insurance policies.[10] AIDS patients needed to pay for the high cost of medical care and had, as one of their assets, a life insurance policy. Investors were willing to pay those AIDS patients an advanced portion of their life insurance benefit in exchange for the rights to the expected death benefit of the life insurance policy.[11] In 1993, the National Association of Insurance Commissioners ("NAIC")[12] adopted the first Viatical Settlement Model Act (the "NAIC model act") to encourage the promulgation of rules that would regulate the sale or transfer of a benefit

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6 Reap the Benefit of Lives in Your Hands, Financial Advisor, June 29, 2006.

7 LIFE SETTLEMENTS MODEL ACT § 2(L) (National Conference of Insurance Legislators 2007) ("NCOIL model act").

8 222 U.S. 149 (1911).

9 Id. at 156.

10 Life Partners, Inc. v. Morrison, 484 F.3d 284, 287 (4th Cir. 2007). Michael Lovendusky, Illicit Life Insurance Settlements, New Appleman on Ins.: Current Critical Issues in Ins. Law, 1-2 (Oct. 2008), available at http://www.lexisnexis.com/documents/pdf/20081022093920_large.pdf ("Lovendusky").

11 Miriam R. Albert, The Future of Death Futures: Why Viatical Settlements Must Be Classified as Securities, 19 Pace L. Rev. 345, 349 (1999).

12 The National Association of Insurance Commissioners is a voluntary organization of the chief insurance regulatory officials of the 50 states, the District of Columbia, and the five U.S. territories.

under a life insurance policy.[13] The adoption of the Viatical Settlement Model Act by several states in the 1990s contributed to the development of a secondary market for life insurance policies, which became known as the viatical settlement market.[14] As medical advancements in the treatment of AIDS prolonged the life expectancy of AIDS patients, the viatical settlement market started looking for policy owners with other terminal illnesses and, subsequently, seniors who wanted to sell their life insurance policies.[15] The settlement of the life insurance policies of these seniors became known as life settlements, while the term viatical settlements continues to be used by the market to refer to the settlement of policies of individuals with a life expectancy of less than two years.[16] For the sake of simplicity, unless otherwise indicated, this Report will refer to both life settlements and viatical settlements as "life settlements."

B. Size of the Life Settlements Market

When life settlements began in the United States, the market experienced relatively robust growth in its early years. Conning Research and Consulting, an insurance industry observer, reports on the life settlements industry and produces an annual study. In 2007, Conning estimated that the market, then estimated at $12 billion in face amount of life insurance settled, would grow to $90-$140 billion in face amount settled by 2016. Conning estimates that $11.7 billion of face amount in life insurance was settled in 2008,[17] putting growth in the market from 2007 to 2008 at slightly below zero. Business Week estimated the market for unwanted life insurance policies at $15 billion in face amount during 2008.[18] More recently, the amount settled has declined. Based on a recent estimate, $7.01 billion of face amount in life insurance settled in 2009.[19]

According to Conning, "the economic crisis was the major impediment to growth in the United States life settlements market in 2008."[20] Press reports citing industry commentators are mixed about growth prospects after Goldman Sachs' exit from the market in early 2010[21] and Deutsche Bank's earlier downsizing of its life settlement operations.[22]

Several firms involved in the life settlements market, when speaking with the Task Force, cited the "wasting asset" nature of life settlements as an impediment to increased business. Life settlements require significant up-front capital to "pay premiums of 5 to 10% of face per year"[23] and it may take three years or more before any "maturities" occur

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13 Lovendusky, supra note 10, at 1.
14 Id. at 2.
15 Albert, supra note 11, at 357.
16 Charles Delafuente, When Life Insurance Is More Valuable as Cash, N.Y. Times, Mar. 3, 2010, at F2.
17 Conning Research and Consulting, Inc., Life Settlements: A Buyers' Market for Now, Oct. 8, 2009 ("Conning").
18 Matthew Goldstein, Why Death Bonds Look so Frail, Bus. Wk., Feb. 25, 2008.
19 GAO, supra note 1.
20 Conning, supra note 17.
21 Darla Mercado, Goldman Sachs abandoning life settlements market, InvestmentNews, Jan. 29, 2010.
22 Matthew Goldstein, Deutsche Kicks the Grim Reaper, Bus. Wk., Jan 30, 2010.
23 Telephone Interview with a participant in the life settlements market (Oct. 2009).

(i.e. before any death benefits are paid). In the current capital-constrained environment, there has not been sufficient capital for buyers of insurance policies in the secondary market to grow their businesses.

There appears, however, to be some interest from investors.[24] Institutional investors reportedly view life settlements as an alternative asset class[25] that is not correlated to traditional asset classes because returns principally are based on the death rates of the insured individuals rather than the performance of financial instruments or the overall economy. Diversification to uncorrelated assets is especially attractive to investors during periods of unfavorable economic conditions.

The Task Force was told that hedge funds, and offshore funds, in particular, have been buyers of pools of life settlements. The pools are typically packaged by an intermediary, which could be a large investment bank or a smaller, lesser known market participant. The pools may be created for a specific investor, or policies may have been purchased on a principal basis by a life settlements provider, who distributes its risk through "physical" portfolio sales or through derivatives – for instance, an investment product based on a longevity index.[26] Interests in the pool are offered as unregistered securities in private placements.

In spite of predictions that life settlements would become the new product of rapid growth on Wall Street,[27] to date, there have not been any securitizations of life settlement pools, the offer and sale of which have been registered with the SEC. However, there have been a limited number of privately offered life settlement securitizations.

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24 We have not attempted to measure demand, nor have we found an estimate of investor demand.

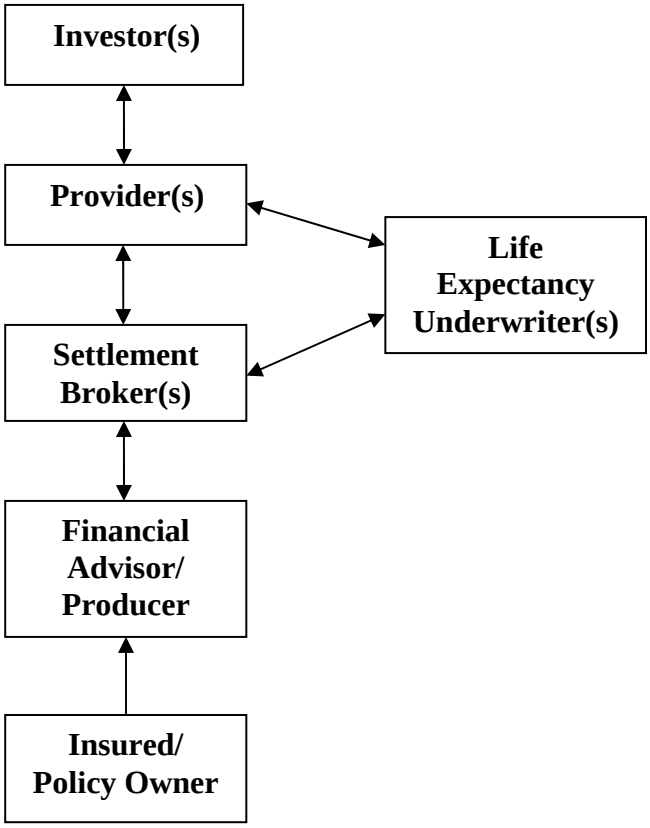
25 Sam Rosenfeld, Life Settlements: Signposts to a Principal Asset Class, (Wharton Fin. Institutions Centre, Working Paper No. 09-20, 2009).

26 This report does not cover the broader "longevity markets" of which life settlements are a part. Market participants interviewed by the Task Force estimate the longevity derivatives markets are roughly ten times the size of the life settlements markets. However, the estimate included both the United States and United Kingdom, with the U.K. longevity market currently several times as large as the U.S. market.

27 Matthew Goldstein, A Hedge Fund Gambles on Death, Bus. Wk., Feb. 4, 2009; Jenny Anderson, Wall Street Pursues Profit in Bundles of Life Insurance, N.Y. Times, Sept. 5, 2009, at A1.

III. Current Practices in the Life Settlements Market

Although life settlement transactions may be structured in different ways, they typically involve an insured individual or the owner of the policy, a producer who may be a financial advisor or an insurance agent, one or more settlement brokers who may also be insurance agents, one or more life expectancy underwriters, one or more providers who typically represent the party acquiring the policy, and one or more investors. When multiple settlement brokers, providers or investors are consulted, it is generally to obtain and compare multiple offers for the same life insurance policy.



According to information provided to the Task Force, the majority of investors in today's life settlements market are large institutional investors looking to acquire pools of policies. Some providers, who we refer to as secondary market companies, not only serve as purchasers on behalf of investors, but also develop investment instruments derived from life settlements. Some providers sell life settlements, or investment instruments derived from life settlements, in a manner they believe reduces the risk that the life settlements or the investment instruments will be treated as securities under state and federal laws.[28] The Task Force was also told about offerings of bonds or notes

28 See, e.g., Life Partners Holdings, Inc., Annual Report on Form 10-K for the Fiscal Year Ended Feb. 28, 2010 (filed May 12, 2010) ("Life Partners Annual Report"), available at

backed or secured by pools of life settlements, which are offered, apparently, in reliance on the private placement exemption in Section 4(2) of the Securities Act and the Regulation D safe harbor thereunder. A number of groups that met with the Task Force indicated that they do not think life settlements are an appropriate investment for retail investors due to their complexity.

Currently, the majority of states have no requirement that an insurance company disclose to an insured that there is a life settlement option prior to permitting the lapse or surrender of a life insurance policy. The Task Force is aware of six states[29] that require insurance companies to inform senior citizens or the chronically ill who are about to surrender life insurance policies for cash value, or let them lapse entirely, about the option of privately selling that asset to a third party in a life settlement transaction.

A. Market Intermediaries

1. Brokers and Providers

Often, a policy owner considering a life settlement transaction will work with a producer and/or a life settlement broker, who will negotiate the sale of the life insurance policy with the provider. A settlement broker may solicit policy owners directly, or may work with others, such as financial professionals, to obtain prospects. For example, the settlement broker in some instances may be the same insurance agent who sold the policy to the policy owner. In other cases, a broker may work with a variety of insurance agents or other financial professionals to solicit interest from policy owners. In any event, the settlement broker and any financial professional making the referral are usually paid a commission based on some percentage of the transaction amount.

Typically, a settlement broker will gather the information necessary for providers to consider the transaction. This includes the insured's application and authorization to release health and medical information. Once the application materials are complete, the settlement broker will offer or "bid" the contract to a number of providers to obtain a range of provider offers.

On the buy side, providers typically represent a financing entity with an interest in acquiring policies, or providers may purchase policies for their own portfolio. Providers review and bid on settlement applications. This will often involve either a review of the insured's life expectancy information provided as part of the application file, or in many cases the use of a life expectancy underwriter to generate an additional life expectancy

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http://www.sec.gov/Archives/edgar/data/49534/000114420410026557/v184217_10k.htm. Life Partners discloses in its Annual Report on Form 10-K that:

> Some states and the Securities and Exchange Commission have attempted to treat life settlements as securities under federal or state securities laws. We have structured our settlement transactions to reduce the risk that they would be treated as securities under state or Federal securities law, and the Federal Circuit Court for the District of Columbia has ruled that our settlement transactions are not securities under the Federal securities laws.

29 The six states are California, Kentucky, Maine, Oregon, Washington and Wisconsin.

estimate on the provider's behalf. Other factors will include the financial strength of the issuing insurance company, as well as any factors that could indicate the issuing insurer may choose to challenge the validity of the insurance contract's issuance, such as a possible challenge by the insurer based on a claim that the beneficiary had no insurable interest in the insured's life.

Providers also typically arrange for or directly provide the servicing necessary for purchased policies. Tracking agents provide information to investors regarding the whereabouts and mortality status of each insured person who has settled a life insurance policy. Tracking agents use a variety of methods to collect this type of information such as phone, email, mail, and the Social Security database. Most tracking agents also provide premium management, death claim processing (collecting the death benefit from the insurance company once the insured has died) and reporting services. Upon the death of the named insured, the life insurance company pays the death claim to the provider or to the financing entity that paid the insurance premiums during the life of the insured.

2. Life Expectancy Underwriters

Life expectancy underwriters evaluate the risk and exposures of insured individuals so that they or the policy owners may sell their insurance policies to life settlement providers. More specifically, a life expectancy underwriter conducts a risk analysis of mortality for the insured so that he can sell his insurance to a provider for more than the cash surrender value but less than the expected death benefit amount. The role of the life expectancy underwriter is to provide an accurate assessment of the risk of mortality of the insured based on his characteristics. This life expectancy assessment is then relied upon by investors who purchase the life policy for investment purposes.

Life expectancy underwriters work for settlement brokers who represent policy owners and providers who are evaluating whether to settle a life policy. The Task Force was informed that life expectancy underwriters use methodologies that differ from more formulaic methodologies used by underwriters of life insurance or life settlements involving policies with death benefits of under $1 million.[30] Different methodologies are used because life insurance underwriting is generally limited to a younger population with limited medical impairments whereas life expectancy underwriting is used with an older population who may have multiple and significant impairments.

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30 A life expectancy underwriter told the Task Force that the lower value policies are subject to the debit methodology (described in text above at note 32) by providers, and the higher value policies are referred to life settlement underwriters, who are specialists. See, e.g., Milestone Managers & Providers, Underwriting, http://www.milestonesettlements.com/process/underwriting.php. Accordingly, modified debit methodology and research-based clinical judgment appear to be conducted only by life settlement underwriters. For details on the more specialized methodologies, see Michael Fasano, Chapter 6 Underwriting, in Life Markets: Trading Mortality and Longevity Risk with Life Settlements and Linked Securities 25-31 (Vishaal Bhuyan ed., 2009), available at http://books.google.com/books?id=UkuzHLKPOW8C&pg=PA25&lpg=PA25&dq=debit+methodology&source=bl&ots=rdiU8mJ072&sig=GAxBEE2tyjnq1QHXIOB75i9xCh0&hl=en&ei=YgehS4nGI4aBlAfq6NCbDg&sa=X&oi=book_result&ct=result&resnum=9&ved=0CDMQ6AEwCA#v=onepage&q=debit%20methodology&f=false (pre-release form).

Life insurance underwriters use the debit methodology, which uses medical records and paramedical[31] examinations to identify medical risks and compares those risks to underwriting debit manuals issued by insurance companies.[32] The underwriter will also refer to the Medical Information Bureau, an insurance industry information cooperative, for undisclosed conditions that may factor in the individual's mortality. Life expectancy underwriters use a modified debit methodology or research-based clinical judgment. The modified debit methodology adjusts the debit methodology to the life settlement demographic. There are three common adjustments: (1) diseases that move slowly; (2) impairments that do not have time to become life threatening; and (3) diseases that present less relative risk because of increasing overall mortality. These adjustments compensate for mortality in an older population that accelerates at a significantly faster rate than in a younger population, and diseases that often move at different speeds in an older population than in a younger one. For example, prostate cancer moves more slowly in an older population than a younger one and results in reduced debits. Research-based clinical judgment is used when severe impairments, such as metastasized cancers, would cause unsatisfactory life expectancy estimates from debit or modified debit methodologies. The life expectancy underwriter will identify the proper mortality curves based on the senior's risk profile and then measure the disease's progression along the relevant mortality curve based on the onset of symptoms. An underwriter using this methodology must have significant medical and analytic experience.

To develop an evaluation, a life expectancy underwriter will generally have a physician review the individual's entire medical record history, and the physician will provide a recommendation. A second physician may conduct a peer review of the file and provide a recommendation. The underwriter may also conduct a review of the file. If a peer review is used and there is a variance between the recommendations, the underwriter may seek to reconcile the recommendations.

Once the analysis of the life expectancy underwriter is given to the provider, the provider may seek an analysis from other life expectancy underwriters. The provider will then make a value determination on the policy and may extend an offer to the policy owner for the settlement of the policy.[33]

A life settlement underwriter may provide an accuracy report to a purchaser of a life settlement investment upon request. Such a report could be an ongoing analysis of actual to expected performance to assess the accuracy of the life settlement underwriter's mortality estimates to a mortality distribution.

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31 Paramedical is a person trained to assist medical professionals to give emergency medical treatment.

32 The term "debit" refers to excess mortality above standard mortality for a condition.

33 See Milestone Managers & Providers, Pricing, http://www.milestonesettlements.com/process/pricing.php.

3. Trading Platforms

In an effort to help make the bidding process more efficient and to facilitate trading of policies after the initial settlement occurs, some intermediaries have considered or instituted a trading platform for life settlements.

For example, one entity created a life settlements group to bring together intermediaries and others involved in the life settlements business.[34] This group set up a trading platform for institutional customers, with the goal of providing uniformity and predictability, as well as price transparency, efficiency, and liquidity. The sponsors believed that, in turn, could reduce intermediary costs and commissions for individual insurance policy sales. It also could enhance insured individuals' privacy protection by centralizing and controlling access to medical information. However, the Task Force has been informed by several market participants that trading platforms are not widely used in the life settlements market.

4. Secondary Market Companies

Some companies specialize in the secondary market of life settlements. The activities of these companies range from buying life insurance policies to selling those policies, either as whole policies or fractional interests in policies, or using those policies as collateral for other investment instruments.

One large participant purchases life insurance policies mostly from trusts, corporate entities, and high net worth individuals.[35] Generally, the funding to purchase the life insurance policies comes from institutional investors. This participant also has a program called SWAPP (Settlement with a Paid-up Policy) that allows policy owners to transfer the value in an existing life insurance policy into a new paid-up policy with a smaller face amount. Unlike a traditional exchange, which is based on the life insurance policy's cash surrender value, in a SWAPP the value of the policy is determined based on the policy's secondary market value, similarly to how it would be done if the policy were to be sold.[36]

Another large participant acts as a purchasing agent of life insurance policies. This participant's customers are primarily retail investors[37] who generally buy fractional interests in one or more policies.[38] This participant earns revenues from fees it charges to

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34 Cantor Insurance Group operates LexNet, an electronic marketplace for trading life settlements. See Cantor Fitzgerald, Cantor Insurance Group, http://www.cantor.com/brokerage_services/life_markets.

35 Betting on Death in the Life Settlement Market – What's at Stake for Seniors: Hearing Before the Senate Special Committee on Aging, 111th Cong. (2009) (statement of Michael Freedman, Senior Vice President of Coventry First LLC).

36 Coventry, Coventry First: SWAPP (2010), http://www.coventry.com/coventry-first/swapp/coventry-swapp.asp.

37 Life Partners Annual Report, supra note 28, at 4. Life Partners reported that institutional purchasers accounted for only 1%, 8% and 7% of the company's total revenues in fiscal years 2010, 2009 and 2008, respectively.

38 Id. at 5.

identify, qualify and purchase policies on behalf of the company's investor customers. Recently, it also began purchasing policies for the company's own investment.[39]

The Task Force was also told about a movement to develop financial instruments that derive their returns from pools of life settlements. Some companies facilitate the formation of trusts that invest in life settlements and, in some cases, guarantee a minimum annual return for each life settlement included in the trust. Other companies have sold notes that are backed by a portfolio of life insurance policies. Each of these vehicles is offered on a private placement basis.

B. Stranger-Originated Life Insurance (STOLI)

"Stranger-originated life insurance" ("STOLI") is a type of transaction which we understand has emerged during the past decade. In a STOLI transaction, an investor or its representative induces an individual, typically a senior, to purchase a life insurance policy that he likely would not otherwise have purchased. The individual applies for the policy with a prior understanding to cede control of the policy to the investor. The applicant and the investor agree that, at the end of a given period, ownership of the policy will be transferred to the investor, or some other third party, who would expect to receive the death benefit when the insured dies.[40]

The investor may arrange financing of the premiums during the time the insured owns the policy by means of non-recourse premium financing; that is, the only collateral for the loan is the insurance policy itself.[41] When the policy is transferred the loan may be forgiven in return for the policy. Indeed, STOLI arrangements may be marketed as "free insurance," because during the period prior to transfer of the policy, the insured has life insurance protection, paid for with a loan that will not have to be repaid if the policy is ultimately transferred.[42] Premium financing is considered one indicator of a STOLI

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39 Id. at 22.

40 See generally, Recent Innovations in Securitization: Hearing Before the House Financial Services Committee, Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, 111th Cong. (2009) ("House Capital Markets Subcommittee Hearing") (statement of Susan E. Voss, Commissioner, Iowa Insurance Commission and Vice President, National Association of Insurance Commissioners) ("Voss statement"); Betting on Death in the Life Settlement Market – What's at Stake for Seniors: Hearing Before the Senate Special Committee on Aging, 111th Cong. (2009) ("Senate Special Committee Hearing") (statement of Stephan R. Leimberg, Esq., CEO, Leimberg Information Services, Inc., Creator/Editor: Tools and Techniques of Life Settlement Planning) ("Leimberg statement"); Senate Special Committee Hearing (statement of Mary Beth Senkewicz, Deputy Insurance Commissioner, Florida Office of Insurance Regulation) ("Senkewicz statement"); Senate Special Committee Hearing (statement of James J. Avery, Jr., FSA, President, Individual Life Insurance, Prudential Financial, and Chairman of the ACLI Life Insurance Committee) ("Avery statement").

41 The insured may have the option to retain the policy by repaying the loan with interest, but the cost of doing so may make that option economically infeasible. See Avery statement, supra note 40.

42 See ACLI, Statement of the ACLI Regarding Securitization of Life Settlements (Feb. 3, 2010) ("ACLI Statement"), available at http://www.acli.com/NR/rdonlyres/972B2B38-89F0-4683-B236-A01360544A9F/23344/STOLI_SecuritizationPolicyFinal_020310.pdf; Senkewicz statement, supra note 40.

transaction, although not all premium financing is STOLI-related.[43] In some cases, the insured may receive an upfront cash payment, or other incentives, for agreeing to purchase the policy.

The understanding between the investor and the insured may call for the transfer of ownership at the end of a two-year period.[44] Two years is the common life insurance policy contestability limitation under state law.[45] At the end of that two year period the insurer is prohibited from contesting the policy based on misrepresentations by the insured.[46]

Critics of STOLI have expressed the view that it is inconsistent with the historical social policy of insurance, which is to protect families and businesses from potential economic hardship caused by untimely death of the insured. In contrast, STOLI is viewed, not as a means of protecting families and businesses, but rather a means of making a profit for investors.[47]

In this regard, state regulators and others have expressed the view that STOLI is inconsistent with state "insurable interest" laws.[48] These laws provide that a person who purchases a life insurance policy must have an insurable interest in the continued life of the insured. In general, an insurable interest exists where the owner of the policy is closely related to the insured or otherwise has a financial interest in the continued life of the insured.[49] In addition, state law commonly recognizes that a person has an insurable interest in his own life.[50] However, one cannot take out a life insurance policy on a perfect stranger.[51] Critics of STOLI argue that it is inconsistent with state insurable interest laws, because of the prior understanding to cede control of the policy and the

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43 See Senkewicz statement, supra note 40; Cory Chmelka, Premium Financing: The Time Is Now, The CPA Journal, Sept. 2009.

44 Under recently enacted anti-STOLI legislation, some states now require a five-year waiting period for settlement of a life insurance policy and thus would preclude an agreement to settle after two years. See discussion infra Section IV.B.1.

45 17 Couch on Ins. § 240:1 (2009) ("Couch"); 2-5 Harnett & Lesnick, The Law of Life and Health Insurance §5.07 (Matthew Bender, Rev. Ed.) ("Harnett & Lesnick"); Senkewicz statement, supra note 40.

46 Couch, supra note 45; Harnett & Lesnick, supra note 45. There is authority that certain defenses other than misrepresentation – such as lack of insurable interest – may not be barred by state incontestability laws. See infra note 59.

47 Avery statement, supra note 40; California Department of Insurance, Seniors: Senior Advisory on STOLI or SPINLIFE Life Insurance Schemes, http://www.insurance.ca.gov/0150-seniors/0100alerts/strangerownedlifeins.cfm (2010) ("California Senior Advisory"); Ohio Department of Insurance, Seniors: Be Aware of Stranger Originated Life Insurance (STOLI) Transactions (September 11, 2008), http://www.insurance.ohio.gov/Newsroom/Pages/09112008SeniorsBeAware.aspx ("Ohio News Release").

48 Voss statement, supra note 40; Avery statement, supra note 40; Life Insurance Settlement Association, "What Is Stoli?", http://www.thevoiceoftheindustry.com/files/content/docs/Brochures/STOLI.pdf.

49 1-2 Harnett & Lesnick, supra note 45, at §2.02.

50 Id.

51 California Senior Advisory, supra note 47.

ultimate goal of the transaction, which is to transfer the policy to a party who does not have an insurable interest in the continued life of the insured.[52]

Other concerns cited about STOLI include that it may encourage insurance fraud. An insurance industry representative has cited cases where the insured's net worth was fraudulently stated to be much higher than it was, presumably to secure a higher death benefit.[53] One state regulator has testified that some STOLI investors encourage seniors to overstate their net worth on the life insurance application to obtain higher value life insurance and that they coach seniors how to answer specific questions on the application to avoid detection by insurance companies of their intent to resell the policy.[54]

In addition, an insured may incur tax liability resulting from forgiveness of premium loans or receipt of incentives from the investor for obtaining the life insurance policy.[55] Another concern is that the insured may be unable to obtain life insurance legitimately needed in the future because he may reach the limit of his insurability as a result of the STOLI transaction.[56]

STOLI critics have also voiced concern that the practice could make life insurance more expensive and less available for consumers. [57] Insurers base their premium rates on certain assumptions, including assumptions of policy lapse rates. That is, insurers assume that a certain number of insured persons will allow their policies to lapse if, for example, they determine that they no longer need the insurance, and the insurer will therefore not be obligated to pay a death benefit under these policies. There is concern that STOLI distorts these assumptions. STOLI policies are specifically initiated for the purpose of profiting from the death benefit, and are therefore less likely to lapse than conventional policies. In addition, STOLI transactions are generally entered into with seniors, who otherwise might not have purchased insurance, and this number of senior buyers may cause life insurance to become more expensive by changing the risk pool.[58]

As investments, STOLI policies may introduce particular risks for investors who purchase the policies, given the risk that insurers may contest them on grounds such as fraud (at least prior to the end of the contestability period) or violations of state insurable interest laws. There is some authority that the two-year contestability limitation does not bar an insurer from challenging a policy for lack of insurable interest.[59] We understand that this risk may be compounded, because whether a settled policy is the result of a

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52 E.g., California Senior Advisory, supra note 47; Ohio News Release, supra note 47.
53 Avery statement, supra note 40.
54 Senkewicz statement, supra note 40 .
55 Senkewicz statement, supra note 40; Avery statement, supra note 40; Ohio News Release, supra note 47.
56 Id.
57 Leimberg statement, supra note 40 (STOLI has already resulted in higher life insurance rates for seniors and stopped some companies from selling insurance to those over 75); Avery statement, supra note 40.
58 Ohio News Release, supra note 47; see also Senkewicz statement, supra note 40.
59 2-5 Harnett and Lesnick, supra note 45, at § 5.07[5][g]; 44 C.J.S. Insurance § 352 (2007).

STOLI transaction may be very difficult for investors to determine.[60] Attorneys involved in litigation of STOLI cases indicated to the Task Force that they were aware of approximately 300 STOLI cases in active litigation.[61] These cases are brought by insurance companies, investors, and parties such as family members, who might otherwise have been beneficiaries under the policies.

Insurance industry representatives told us that insurers make efforts to stop STOLI transactions in the underwriting process. Insurers may make inquires during the underwriting process to determine whether premium financing, which is a marker of a STOLI transaction, is involved. In addition, because investors may establish trusts to purchase life insurance policies in order to conceal STOLI transactions, insurers may make inquiries regarding policies being purchased on behalf of trusts. However, the insurance industry representatives also told us that, despite their efforts, STOLI transactions can be difficult to detect, in part because investors continue to devise new ways of concealing the nature of these types of transactions. There is a concern that STOLI policies, which typically have high face amounts, therefore provide for high premium payments for insurance companies and therefore high commissions to agents. Thus, in some cases, there may not be an incentive to question them until a death claim is made.

The American Council of Life Insurers (the "ACLI"), a trade association that represents life insurance companies, has stated that it believes that an increased interest in securitization of life settlements may encourage more STOLI transactions, and exacerbate any problems or concerns to which these transactions give rise. Securitization may require increased numbers of settled policies. There may not be sufficient numbers of conventional life insurance policies available for settlement, and this could result in the need to "manufacture" additional policies through STOLI transactions.[62]

Regulators, insurers, and life settlements market participants expressed concerns to the Task Force regarding STOLI transactions and in general appeared to support addressing STOLI by state insurance regulation.

C. Securitization of Life Settlements

Securitization is a financing technique in which financial assets, in many cases themselves relatively illiquid, are pooled and converted into instruments that may be offered and sold in the capital markets. In a typical securitization, a sponsor initiates a securitization transaction by selling to a specially created issuing entity, such as a trust, a group of financial assets that the sponsor either has originated itself or has purchased.

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60 See ACLI Statement, supra note 42.

61 E.g., American General Life Insurance Company v. Salamon et al., No. CV 09-5428 (E.D.N.Y. filed Dec. 11, 2009) (action by insurer for rescission and other relief, alleging fraud in applying for life insurance policy and lack of insurable interest); The John Hancock Life Insurance Company v. Fein et al., CV 09-5606 (E.D.N.Y. filed Dec. 22, 2009) (action by insurer for declaratory judgment that life policies are void based on fraud in application for the policies and lack of insurable interest).

62 ACLI Statement, supra note 42.

The trust or other issuing entity sells securities. The money from the sale of the securities is used to purchase the financial assets from the sponsor, which in the case of a securitization of life settlements would be a pool of life settlements. In a securitization of life settlements, arrangements must also be made to pay the upcoming premiums for the life insurance policies. The securities issued by the trust or other issuing entity pay a return based on the future proceeds from the death benefits of the life insurance policies.

To date, there have been no securitizations of life settlements registered with the SEC, although there have been some privately offered life settlement securitizations. Only a very limited number of those privately offered life settlement securitizations have ever received a rating from a rating agency.[63] The Task Force was informed that many market participants believe that a rating would be necessary to sell a securitization of life settlements. The first rated securitization of life settlements took place in 1995 and was originated by Dignity Partners Inc.[64] It involved a pool of life insurance policies with a face amount of $35 million and was rated by Standard & Poor's. Based on this pool, a Dignity Partners Inc. special purpose subsidiary issued senior notes to two institutional investors.[65] The notes were sold in reliance on exemptions from registration with the SEC.

The next rated life settlement structured deal took place in March 2004 and was originated by Legacy Benefits Corporation. While it was not a true securitization because it had an annuity tied to it that functioned as a hedge and insurance against default,[66] it involved a pool of life insurance policies with a face amount of $70.3 million and was rated by Moody's Investors Service.[67] Merrill Lynch served as the underwriter

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63 While there have been only a few rated securitizations of life settlements, other types of structured financing in the life insurance industry are more common. House Capital Markets Subcommittee Hearing, supra note 40 (statement of Kurt Gearhart, Head of Regulatory & Execution Risk, Life Finance Group, Credit Suisse). Mr. Gearhart's statement notes "closed block securitizations", which are large transactions that involve the securitization of millions of life insurance policies and have been done in connection with the demutualization of large insurance carriers, including Prudential, MetLife, and Axa, to facilitate the initial public offering or acquisition of the insurance carriers. Other life insurance structured finance transactions may be done for insurers and reinsurers to transfer their regulatory reserve requirements, which are in excess of their economic reserves, to investors. "Embedded value securitizations" allow insurance companies to transfer the risk in a block of policies to investors and to monetize the value of that block of business. "Extreme mortality securitizations" allow insurance companies to transfer to investors the risk, and resulting losses, of a catastrophic event that would cause a significant reduction in the length of time that people are living.

64 The securitization involved policies purchased from individuals with terminal illnesses, so it was technically a securitization of viatical settlements.

65 Ironwood Capital and Dignity Partners completes the first ever asset securitization of viatical settlements in the amount of $35 million, Bus. Wire, Mar. 2, 1995.

66 John D'Antona Jr., Securitization Poised to Bring Life to Death Bonds, Pensions & Investments, Sept. 15, 2008.

67 Moody's Rates Legacy Life Settlement Securitization A1 and Baa2, Moody's Investors Service (Mar. 16, 2004), http://www.legacybenefits.com/images/doc/Moodys_20Press_20Release-031604.pdf. The approximate weighted average age of the insured individuals was 77 years old.

and sold notes to institutional investors in a private placement in reliance on exemptions from registration with the SEC.[68]

In 2006, a partnership formed by Coventry First ("Coventry") and Ritchie Capital attempted to complete a securitization of a pool of life insurance policies with a face amount of $1.16 billion, rated by Moody's.[69] On October 26, 2006, the New York attorney general sued Coventry alleging that Coventry made secret payments to life settlement brokers in exchange for convincing insured individuals to sell their policies at lower prices, and to entice other buyers to withdraw rival bids.[70] After the filing of the suit by the New York attorney general, Moody's withdrew its rating and the securitization transaction was not completed.[71]

The only other rated securitization of life settlements we are aware of took place in early 2009 and was an entirely internal transaction by a subsidiary of American International Group, Inc. that was not sold to any outside investors. Reports indicate that the securitization, which was rated by A.M. Best, involved life insurance policies with a face amount of $8.4 billion.[72]

The Task Force was told by groups representing a wide array of market participants that it is unlikely that there will be an increase in securitizations of life settlements.[73] Any future securitization of life settlements would face a number of obstacles, including pooling together a sufficiently large number of life insurance policies, which in turn would require a large investment of capital to pay the continued premiums, obtaining a favorable rating from a rating agency to generate investor interest, addressing concerns about protecting the privacy of the individuals who sold the insurance policies, addressing concerns about insurable interest, addressing concerns about the possibility that there may be a wide range of life expectancy opinions,

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68 Legacy Benefits: Life Settlement Securitization, http://www.legacybenefits.com/life_settlement_viatical/life_insurance_settlements/life_settlement_securitization.htm.

69 Matthew Goldstein, Profiting from Mortality: Death Bonds May Be the Most Macabre Investment Scheme Ever Devised by Wall Street, Bus. Wk., July 30, 2007.

70 Charles Duhigg and Joseph B. Treaster, Spitzer Suit Accuses Company of Abuses in Insurance for Elderly and Ill, N.Y. Times, Oct. 27, 2006, at C3. In October 2009, Coventry agreed to pay $12 million to settle the suit. Joan E. Solsman, Life Insurer To Pay $12 Million In Settling Cuomo Lawsuit, Dow Jones Newswires, Oct. 2, 2009.

71 Goldstein, supra note 69.

72 Meg Green, AIG Files First Rated Life Settlement Securitization, BestWeek, Apr. 16, 2009.

73 The life settlement market in Germany appears to provide a case in point. From 2003 to 2005, German investors invested approximately $2.87 billion in life settlement securitizations in 2004 and 2005. See Boris Ziser & Craig Seitel, Securitization of Life Settlements: A Pivotal Phase in the Product Life Cycle, National Underwriter, Feb. 21, 2005; Christoph Pauly & Anne Seith, Betting on US Life Expectancy Proves Risky, Spiegel Online, Sept. 1, 2009. However, German investor interest in life settlement securitizations has waned in recent years due to changes in tax laws, which made returns from life settlement funds taxable in Germany for the first time, and changes to methodologies used by major life expectancy underwriters, which decreased the value of life settlements acquired before the changes to the methodology. See Pauly & Seith, supra; Ronald J. Panko, Despite Slow Market, Vida Capital Acquires Life Settlement Broker, BestWire, Jan. 27, 2010.

addressing questions about the ability to conduct due diligence, and addressing questions about the ability to service the policies after the securitization is completed.[74] The ACLI recently urged policymakers to ban the securitization of life settlements.[75] Several market participants, however, sharply disagreed with the ACLI's position.[76]

D. Role of Rating Agencies

For several years rating agencies[77] have received sporadic inquiries from prospective issuers of "life settlement securitizations" regarding the possibility of obtaining ratings for these products. Rating agencies have highlighted multiple issues as problematic with respect to issuing ratings on life settlement securitizations, and, as noted above, only a handful of ratings have been issued on this type of product, although none in public offerings. The issues raised by the rating agencies include legal uncertainty surrounding the existence and transferability of insurable interests, the lack of experience and reputation of the prospective issuers, the limited number of policies in each life settlement securitization, questions regarding the reliability of medical reviews of the insured individuals, and the potential timing mismatch of cash flows.[78]

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74 Some rating agencies have expressed concerns about rating securitizations of life settlements. See discussion infra Section III.D.

75 ACLI Statement, supra note 42.

76 Press Release, Institutional Life Markets Association, ACLI Mixes "Apples and Oranges" to Mislead Customers (Feb. 4, 2010), available at http://www.lifemarketsassociation.org/documents/PR-%20ACLI%20misleads.pdf; Press Release, Life Insurance Settlement Association, Life Insurance Settlement Association Responds to Misleading ACLI Position on Life Settlements (Feb. 5, 2010), available at http://www.marketwire.com/press-release/Life-Insurance-Settlement-Association-Responds-Misleading-ACLI-Position-on-Life-Settlements-1113175.htm.

77 The Credit Rating Agency Reform Act of 2006 (the "Rating Agency Act") defined the term "nationally recognized statistical rating organization" ("NRSRO") and provided the SEC with authority to implement registration, recordkeeping, financial reporting, and oversight rules with respect to registered credit rating agencies. See Pub. L. No. 109-291 (2006). On June 5, 2007, the SEC adopted Exchange Act Rules 17g-1 through 17g-6 (17 CFR 240.17g-1 to 240.17g-6) to implement the Rating Agency Act, as mandated. Oversight of Credit Rating Agencies Registered as Nationally Recognized Statistical Ratings Organizations, Exchange Act Release No. 55857 (June 5, 2007) [72 FR 33564]. Those rules have since been amended. See Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 59342 (Feb. 2, 2009) [74 FR 6456] (increasing the transparency of the NRSROs' rating methodologies, strengthen the NRSROs' disclosure of ratings performance, prohibit the NRSROs from engaging in certain practices that create conflicts of interest, and enhance the NRSROs' recordkeeping and reporting obligations to assist the SEC in performing its regulatory and oversight functions). In addition, the SEC has taken action to eliminate certain references to credit ratings issued by NRSROs in rules and forms under the Exchange Act and in rules under the Investment Company Act of 1940. References to Ratings of Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 60789 (Oct. 5, 2009) [74 FR 52358]. At present, the SEC oversees ten registered NRSROs.

78 Standard and Poor's and DBRS have both publicly expressed concerns regarding these issues. Winston Chang & Gary Martucci, Credit FAQ: Uncovering the Challenges in Rating Life Settlement Securitizations, Standard & Poor's (Global Credit Portal, RatingsDirect), Oct. 13, 2009; Methodology – Rating U.S. Life Settlement Securitizations, DBRS, Inc., Feb. 2008.

As noted above, state law generally requires that an insurable interest exist when life insurance is purchased. Determining whether an insurable interest existed when the policy was purchased requires a review of each policy, which can be costly and uncertain. Further, while the courts in some states have held that an investor also must have an insurable interest in the deceased to claim the death benefit of a life insurance policy, not all states have ruled on this issue and those that have are not in agreement. This legal uncertainty limits a rating agency's ability to forecast whether a life settlement securitization trust will be able to receive death benefits on all of its underlying life insurance policies.

Few firms have experience packaging and issuing life settlement securitizations, and those that have packaged non-securitized pools of life settlements and issued life settlement securities may not be large financial institutions with widely known reputations. Further, those firms may have borrowed funds to purchase the life insurance policies underlying a life settlement securitization, which ratings agencies believe increases the risks associated with the product.

In general, many policies must be included in a life settlement securitization to assure the statistical integrity and diversify risk. If an insufficient number of policies are included, incorrect assumptions can have a relatively larger impact on the projected performance of the security. Further, life settlement securitizations with smaller pools of policies may contain statistically significant characteristics that may be missed (such as living in a rural vs. urban environment or working in a blue collar vs. white collar occupation) and that could impact the security's profitability. Ratings agencies believe these factors hamper their ability to accurately rate the security.[79]

Little data exists regarding the historical accuracy of medical reviews of individuals who purchase life insurance. The limited number of policies underlying a life settlement securitization increases the importance that the medical reviews for those policies be correct. In some cases, the medical review is based only on a review of the insured's medical file and the life expectancy underwriters receive a flat fee, both of which may increase the possibility of errors. This potential for inaccuracy may also hinder a rating agency's ability to rate life settlement securitizations.

While the rating agencies have developed methods to address some of these issues, those methods are costly and can dramatically affect a firm's ability to package and issue life settlement securitizations in a cost effective manner. For instance, the rating agencies could get comfort regarding the legal uncertainties surrounding the insurable interest issue by requiring that the firm packaging the deal provide an opinion from its outside counsel to the effect that the state law applicable to each of the policies backing a particular life settlement securitization would allow payment to the trust. In addition, the rating agencies could require that the firm packaging the deal itself be highly rated, and provide assurances or guaranties that it will assume any policies that prove not to have met the criteria to be included in the pool. However, the Task Force was told that these methods could impose significant additional costs on the firm packaging the securitization. Many of the issues that make a securitized pool of life

79 Id.

settlements difficult to rate also could make a pool of life settlements a difficult investment for investors to evaluate.

E. Effect of Life Settlements on Life Insurers

The impact of life settlements on the primary insurance market has been debated since insured individuals began selling their policies. Academic research suggests that there are two principal points of view.[80] First, a secondary market for life insurance will enhance liquidity for policy owners, which may increase the number of individuals purchasing policies and help the primary market grow by making life insurance more attractive to buyers in the long term, while increasing consumer welfare.[81] Second, life settlements will increase the cost of insurance in the primary market.[82] Currently, insurers may experience economic gains associated with lapsed policies because insurers will have received premiums for these policies but will not be liable for payment of death claims associated with these policies.[83] These economic gains may be used to subsidize remaining policy owners. Since life settlements provide policy owners with an alternative to allowing their policies to lapse, they may cause lapse rates to decline and reduce the subsidies available to the remaining policy owners.

Life insurance premiums are based on models that include many assumptions affecting the policy. They include mortality (how many people of a given age group die at a particular age); persistency (what percentage of a pool of insured individuals continue to pay premiums on their policies *x* years into the policy's life), or lapse rates (what percentage of a pool of insured individuals stop paying premiums on their policies *x* years into the policy's life); and expected profits (the rate of return expected by the insurer). They may also include additional assumptions such as longevity improvements, which refer to how many additional months or years an insured person may live based on medical improvements and improving health. All policies with an investment component also rely on investment return assumptions.

Since assumptions relating to lapse rates impact pricing of life insurance premiums, lapse rates may impact an insurer's profitability.[84] Life insurers typically base assumed

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80 Hanming Fang & Edward Kung, How Does Life Settlement Affect the Primary Life Insurance Market? (NBER, Working Paper No. 15761, 2010), available at http://econ-www.mit.edu/files/5329

81 Neil A. Doherty & Hal J. Singer, The Benefits of a Secondary Market for Life Insurance Policies, 38 Real Prop. Prob. & Tr. J. 449 (2003), available at http://ssrn.com/abstract=387321

82 Fang, supra note 80 ("[L]ife insurance companies, as represented by the Deloitte Report (2005), claim that the life settlement market, by denying them the return on lapsing or surrendered policies, increases the costs of providing policies in the primary market. They allege that these costs will have to be passed on to consumers, which would ultimately make the consumers worse off.").

83 Mutual insurers may share the economic gain with insured individuals through dividends, and stock insurers may use the economic gains to subsidize the cost of insurance for the remaining insured individuals.

84 Dominique LeBel & Towers Perrin Tillinghast, Pricing Lapse-Supported Products/Lapse-Sensitive Products (Society of Actuaries – Annual Meeting, Oct. 16, 2006) (A lapse-supported product is "a product where there would be a material decrease in profitability if, in the pricing

lapse rates on experience. Future changes are difficult to predict and may or may not be included in the lapse rate assumptions used by pricing models. Therefore, differences between assumed and actual lapse rates due to declining lapse rates may impact the insurer's financial condition. Insurers experiencing lower-than-assumed lapse rates due to declining lapse rates or overly optimistic assumptions may be able to raise premiums to cover shortfalls, depending on the policy. If they cannot raise premiums (e.g., premiums are guaranteed), the insurer may fail to meet profit objectives on a group of policies, or, depending upon investment conditions, may have insufficient cash to pay claims if reserves are insufficient. However, numerous articles in the trade press refer to "prudent" pricing as pricing with conservative (lower) lapse rate assumptions.[85]

While life settlements may impact an insurer's profitability and financial condition by leading to declining lapse rates, the Task Force was told that the extent of this impact is likely to be small. Industry observers have predicted that life settlements will have an insignificant impact on the insurance industry in the aggregate, given the very small percentage of in-force policies that have been settled.[86] They advise that the impact on specific individual insurers could be more significant, depending on the insurer's mix of lapse-sensitive products in the overall portfolio. Conversely, according to another industry analysis, "a life settlements transaction generally has minimal or no impact on the anticipated profitability of a life insurance contract because the persistency of an unhealthy policyholder is precisely what is assumed at the time of original pricing."[87]

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calculation, the ultimate lapse rates were set to zero (assuming all other pricing parameters remain the same).").

85 See, e.g., Christian Kendrick, Transamerica Special Report: Return of Premium Products (Jul. 13, 2007), available at http://www.transamericareinsurance.com/Media/media_associateArticle.aspx?id=295.

86 Telephone Interview with Scott Hawkins, Conning Research & Consulting (Mar. 30, 2010). Conning Research has produced several reports about the life settlements market. See also Michael Shumrak, Life Settlements—A Window Of Opportunity For The Life Insurance Industry?, Reinsurance News, Feb. 2010 (only about 1% of life policies have been settled).

87 Deloitte Consulting LLP & The University of Connecticut, The Life Settlement Market: An Actuarial Perspective on Consumer Economic Value (2005), available at http://www.quatloos.com/uconn_deloitte_life_settlements.pdf.

IV. Regulation of the Life Settlements Market

A. Application of the Federal Securities Laws

1. The Securities Act of 1933

Every offer and sale of a security must be registered or exempt from registration under the Securities Act of 1933. Section 3(a)(8) of the Securities Act provides an exemption for any "insurance . . . policy" or "annuity contract" issued by a corporation that is subject to the supervision of the insurance commissioner, bank commissioner, or similar state regulatory authority.[88] Insurance policies that fall within this exemption – for example, term life insurance policies – are subject to regulation by state insurance commissions, but are not subject to regulation under the federal securities laws.

The exemption, however, is not available to all contracts that are considered insurance or annuities under state insurance law. Variable life insurance policies[89] and variable annuities, which pass through to the purchaser the investment performance of a pool of assets, are not exempt under Section 3(a)(8).

The United States Supreme Court has addressed the insurance exemption on two occasions with respect to variable annuities.[90] Under these cases, factors that are important to a determination of an annuity's status under Section 3(a)(8) include: (1) the allocation of investment risk between insurer and purchaser, and (2) the manner in which the annuity is marketed. With regard to investment risk, the Court has considered whether the risk is borne by the purchaser, which tends to indicate that the product is not an exempt "annuity contract", or by the insurer, which tends to indicate that the product falls within the Section 3(a)(8) exemption. In VALIC, the Court determined that variable annuities, under which payments varied with the performance of particular investments

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88 The SEC has previously stated its view that Congress intended any insurance contract falling within Section 3(a)(8) to be excluded from all provisions of the Securities Act notwithstanding the language of the Act indicating that Section 3(a)(8) is an exemption from the registration but not the antifraud provisions. Securities Act Release No. 6558 (Nov. 21, 1984) [49 FR 46750, 46753]. See also Tcherepnin v. Knight, 389 U.S. 332, 342 n.30 (1967) (Congress specifically stated that "insurance policies are not to be regarded as securities subject to the provisions of the [Securities] act," (quoting H.R. Rep. No. 73-85, at 15 (1933)).

89 In a variable life insurance policy, the cash value and/or death benefit vary based on the investment performance of the assets in which the premium payments are invested. Under a traditional life insurance policy, premium payments are allocated to an insurer's general account and invested, consistent with state law requirements, to enable the insurer to meet its death benefit and cash value guarantees. The investment return on assets in the general account has little or no direct effect on the cash value or the death benefit received. Premium payments under a variable life policy, in contrast, are invested in an insurance company separate account, which generally is not subject to state law investment restrictions. A variable life policy owner typically is offered a variety of investment options (e.g., equity, bond, and money market mutual funds). Death benefits and cash values are directly related to performance of the separate account, although typically there is a guaranteed minimum death benefit.

90 SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959) ("VALIC"); SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967) ("United Benefit").

and which provided no guarantee of fixed income, were not entitled to the Section 3(a)(8) exemption.[91] With regard to marketing, the Supreme Court, in holding an annuity to be outside the scope of Section 3(a)(8), found significant the fact that the contract was "considered to appeal to the purchaser not on the usual insurance basis of stability and security but on the prospect of 'growth' through sound investment management."[92]

In 1973, the SEC determined that variable life insurance is a security and not entitled to the exemption set forth in Section 3(a)(8) of the Securities Act.[93] The SEC acknowledged that a variable life insurance contract "would involve important elements of insurance," in that such a contract "would provide immediate insurance equal to the initial face amount many times the amount of premiums paid . . . ." However, the SEC stated that, unlike traditional life insurance, a variable life insurance contract provides a variable death benefit and a variable cash value. The SEC further stated that these are important features and likely to be emphasized in sales of variable life insurance. "As to these critical features," the SEC concluded, "the contractholder participates directly in the investment experience of the separate account and bears an investment risk."

Variable Life Settlements

Because a variable life insurance contract is a security, the sale of such a contract by its owner would involve a securities transaction subject to the federal securities laws and the SEC's jurisdiction. In addition, the purchase of a variable life insurance contract by an investor, whether or not it is pooled with other contracts, would also be a securities transaction. Accordingly, both the seller of a variable life insurance contract and the investor purchasing the contract are entitled to the full protection of the federal securities laws. These include required disclosures, suitability requirements applicable to broker-dealers, and antifraud protections.

In August 2006 and in July 2009, FINRA issued Notices to Members reminding firms that variable life settlements are securities transactions that are subject to the federal securities laws and all applicable FINRA rules.[94] In particular, the 2009 Notice to Members reminded firms participating in the business of life settlements that they must present balanced and fair information in their advertising and other communications with the public and customers and that they must adhere to applicable suitability obligations, as well as applicable FINRA rules relating to fair and reasonable commissions, and fair fees and disclosure of fees.[95]

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91 VALIC, supra note 90, 359 U.S. at 71-73.

92 United Benefit, supra note 90, 387 U.S. at 211.

93 Securities Act Release No. 5360 (Jan. 31, 1973).

94 FINRA Notice to Members 09-42 (July 2009) ("NTM 09-42"); NASD Notice to Members 06-38 (August 2006). FINRA is the primary self-regulatory organization for registered broker-dealer firms doing business in the United States. FINRA was created in July 2007 through the consolidation of NASD and the member regulation, enforcement, and arbitration functions of the New York Stock Exchange.

95 NTM 09-42, supra note 94.

While life settlements of variable life insurance contracts fall within the scope of the federal securities laws, the Task Force, in the course of its meetings with outside groups, was told that those settlements account for a small part of the life settlements market.

Non-Variable Life Settlements

The federal courts have considered whether fractional interests in non-variable life insurance contracts are securities under the Securities Act.[96] The two primary cases in this area involved viatical settlements. In both cases viatical settlement providers purchased life insurance policies from terminally ill patients and sold fractional interests in the policies (viatical settlement contracts) to investors. The courts took different views regarding the status of the viatical settlement contracts as securities. Both courts considered whether a viatical settlement contract is an investment contract and therefore a security under the three-part test prescribed in the Supreme Court's decision in SEC v. W.J. Howey Co.[97] Under Howey, an investment contract is a security if the following three requirements are satisfied: (1) an investment of money; (2) in a common enterprise; with (3) the expectation of profits derived from the efforts of others. In SEC v. Life Partners, Inc.,[98] the D.C. Circuit concluded that the first two elements of Howey were satisfied, but that the third was not because the promoters' efforts after the purchase were primarily "ministerial" in nature.[99]

Life Partners has been criticized and other courts have rejected Life Partners' distinction between pre- and post-purchase efforts and its conclusion that the success of the investment depends principally on the death of the viator.[100] In 2004, after the SEC obtained emergency relief to stop an ongoing fraudulent securities offering by Mutual Benefits Corporation, the district court declined to follow Life Partners and held that the viatical settlement contracts offered by Mutual Benefits Corp. were securities.[101] In 2005, the case went to the Eleventh Circuit,[102] where the court observed that under Howey and the more recent Supreme Court decision of SEC v. Edwards,[103] courts must construe the term "investment contract" broadly to "encompass virtually any instrument that might be sold as an investment."[104] The Eleventh Circuit rejected the pre- and post-

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96 An interest in a pool of life settlements or a securitization of life settlements would be a security under the Securities Act.

97 328 U.S. 293, 298-99 (1946).

98 87 F.3d 536 (D.C. Cir. 1996), reh'g denied, 102 F.3d 587 (D.C. Cir. 1996).

99 Id. at 545-546. The D.C. Circuit later clarified its decision and stated that they were not adopting an "artificial bright-line rule," but the court went on to discount the pre-purchase efforts, noting that the dispositive factor was the death of the viator, which was not in the promoter's control. SEC v. Life Partners, Inc., 102 F.3d 587 (D.C. Cir. 1996).

100 See Wuliger v. Christie, 310 F. Supp. 2d 897, 904 (N.D. Ohio 2004) (declining to follow Life Partners and observing that the decision has "not altogether been embraced by other circuits").

101 SEC v. Mutual Benefits Corp., 323 F. Supp. 2d 1337 (S.D. Fla. 2004).

102 SEC v. Mutual Benefits Corp., 408 F.3d 737 (11th Cir. 2005).

103 540 U.S. 389 (2004).

104 Mutual Benefits, supra note 102, 408 F.3d at 742.

purchase approach used by the D.C. Circuit in Life Partners, and noted that investors "relied heavily" on Mutual Benefits' pre- and post-purchase activities.[105]

Since the cases brought by the SEC to date involved the sales of fractional interests in life insurance policies or groups of policies, it is unclear whether a federal court would hold that the sale of a single insurance policy wholly to one investor would constitute an offer or sale of a security under the Securities Act. A security is created by pooling a group of life settlements and issuing interests in the pool or by forming a partnership or other investment vehicle to invest in life settlements. While no such transaction has been registered with the SEC and publicly sold, the Task Force is aware of interests that have been sold privately in reliance on an exemption from the Securities Act.

2. The Securities Exchange Act of 1934

Registration Requirements

The Exchange Act generally requires brokers or dealers[106] that effect securities transactions, or that induce or attempt to induce the purchase or sale of securities, to register with the SEC.[107] In addition, broker-dealers are required to become members of at least one self-regulatory organization ("SRO"),[108] and (with few exceptions) the Securities Investor Protection Corporation ("SIPC"). Generally, all registered broker-dealers that deal with the public must become members of FINRA and may also choose to become exchange members.[109] Broker-dealers must also comply with applicable state registration and qualification requirements.[110]

In addition, a broker-dealer generally must register each natural person who is engaged in the securities business as an associated person,[111] with one or more SROs.[112] An associated person who effects or participates in effecting securities transactions also

105 Id. at 744.

106 The Exchange Act generally defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others," and a "dealer" as "any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise." Exchange Act Section (3)(a)(4)(A) and Section (3)(a)(5)(A), 15 U.S.C. 78c(a)(4)(A) and (a)(5)(A).

107 See Exchange Act Section 15(a), 15 U.S.C. 78o.

108 Exchange Act Section 15(b)(8), 15 U.S.C. 78o(b)(8), and Exchange Act Rule 15b9-1, 17 CFR 240.15b9-1.

109 Exchange Act Section 15(b)(8), 15 U.S.C. 78o(b)(8), and Exchange Act Rule 15b9-1, 17 CFR 240.15b9-1. Exchanges may also require FINRA membership. For example, all New York Stock Exchange members must be members of FINRA. See NYSE Rule 2(b).

110 Every state has its own requirements for a person conducting business as a broker-dealer.

111 The Exchange Act defines an "associated person" of a broker-dealer as any partner, officer, director, or branch manager or employee of a broker-dealer, any person performing similar functions, or any person controlling, or controlled by, or under common control with, the broker-dealer. See Section 3(a)(18), 15 U.S.C. 78c(a)(3)(18). However, an "associated person" does not include any such person whose functions are solely clerical or ministerial. Id.

112 See NASD Rule 1021 ("Registration Requirements"); NASD Rule 1031 ("Registration Requirements").

must meet qualification requirements, which may include passing a securities qualification exam.[113]

Business Conduct Obligations

Broker-dealers are subject to a comprehensive set of SEC and SRO requirements that are designed to promote business conduct that would facilitate fair, orderly and efficient markets and protect investors from abusive practices. Some of these requirements are discussed in more detail below. Because of the uncertain status of life settlements under the federal securities laws, the application of these requirements is generally limited to variable life insurance policies and products that are a derivative of or based on life settlements.

Duty of Fair Dealing

Broker-dealers are required to deal fairly with their customers.[114] This duty is derived from the anti-fraud provisions of the federal securities laws.[115] Under the so-called "shingle" theory, by virtue of engaging in the brokerage profession, a broker-dealer makes an implicit representation to those persons with whom it transacts business that it will deal fairly with them, consistent with the standards of the profession.[116] This essential representation proscribes certain conduct, which has been articulated by the Commission and courts over time through interpretive statements and enforcement actions.[117]

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113 See Exchange Act Rule 15b-7-1, 17 CFR 240.15b7-1; NASD Rule 1021 ("Registration Requirements"); NASD Rule 1031 ("Registration Requirements"); NASD Rule 1041 ("Registration Requirements for Assistant Representatives").

114 See also Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) (requiring an SEC study of the standards of conduct applicable to broker-dealers and investment advisers and authorizing the SEC to establish a uniform fiduciary standard of conduct for broker-dealers and investment advisers providing personalized investment advice to retail customers).

115 See SEC, Report of the Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 88-95, at 238 (1st Sess. 1963) ("Report of Special Study"); Richard N. Cea, 44 S.E.C. 8, 18 (1969) (involving excessive trading and recommendations of speculative securities without a reasonable basis); Mac Robbins & Co., 41 S.E.C. 116 (1962) (involving "boiler-room" sales tactics of speculative securities). See also NASD IM-2310-2 ("Fair Dealing with Customers") ("Implicit in all member and registered representative relationships with customers and others is the fundamental responsibility for fair dealing. Sales efforts must therefore be undertaken only on a basis that can be judged as being within the ethical standards of the Association's Rules, with particular emphasis on the requirement to deal fairly with the public.").

116 Charles Hughes & Co. v. SEC, 139 F.2d 434 (2d Cir. 1943), cert. denied, 321 U.S. 786 (1944) (although not expressly referencing the "shingle theory," held that broker-dealer was under a "special duty, in view of its expert knowledge and proffered advice, not to take advantage of its customers' ignorance of market conditions"; failure to disclose substantial mark-ups on OTC securities sold to unsophisticated customers thus constituted fraud).

117 See supra note 115.

Broker-dealers are also required under SRO rules to observe high standards of commercial honor and just and equitable principles of trade.[118] This includes, among other things, having a reasonable basis for recommendations in light of customer financial situation to the extent known to the broker (suitability), engaging in fair and balanced communications with the public, providing timely and adequate confirmation of transactions, providing account statement disclosures, disclosing conflicts of interest, receiving fair compensation both in agency and principal transactions, and giving customers the opportunity for redress of disputes through arbitration.[119]

Duty of Best Execution

Broker-dealers also have a legal duty to seek to obtain best execution of customer orders.[120] This duty derives from common law, and is incorporated in SRO rules and, through judicial and Commission decisions, the anti-fraud provisions of the federal securities laws.[121] The duty of best execution requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances.[122]

Suitability Requirements

As noted above, a central aspect of a broker-dealer's duty of fair dealing is the suitability obligation. The concept of suitability appears in specific SRO rules[123] and has

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118 See FINRA Rule 2010 ("Standards of Commercial Honor and Principles of Trade").

119 See, e.g., NASD Rule 2310 ("Recommendations to Customers (Suitability)"); NASD Rule 2110(d) ("Communications with the Public"); Exchange Act Rule 10b-10 ("Confirmation of Transactions"); MSRB Rule G-15 (confirmation of transactions); NASD Rule 2230 ("Confirmations"); Exchange Act Rule 15c3-2 (account statements); NASD Rules 2340 ("Customer Account Statements"); NASD Rule 2720 ("Public Offerings of Securities With Conflicts of Interest"); NASD Rule 3040 ("Private Securities Transactions of an Associated Person"); NASD Rule 2440 ("Fair Prices and Commissions"); FINRA Rule 5110(c) ("Corporate Financing Rule – Underwriting Terms and Arrangements"); FINRA IM 12000 ("Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes").

120 See, e.g., Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 269-270 (3d Cir. 1998), cert. denied, 525 U.S. 811 (1998); Certain Market Making Activities on Nasdaq, Exchange Act Release No. 40900 (Jan. 11, 1999) (settled case) (citing Sinclair v. SEC, 444 F.2d 399 (2d. Cir. 1971), In re Arleen Hughes, 27 S.E.C 629, 636 (1948), aff'd sub nom., Hughes v. SEC, 174 F.2d 969 (D.C. Cir. 1949)). See also Order Execution Obligations, Exchange Act Release No. 37619A (Sept. 6, 1996) [61 FR 48290] ("Order Handling Rules Release"). See also Regulation NMS, Exchange Act Release No. 51808 (June 9, 2005) [70 FR 37496] ("Regulation NMS Release").

121 See Regulation NMS Release, supra note 120; see also NASD Rule 2320 ("Best Execution and Interpositioning").

122 See Regulation NMS Release, supra note 120.

123 FINRA members' suitability obligations are set out in NASD Rule 2310 ("Recommendations to Customers (Suitability)") and NASD Interpretive Materials ("IMs"), specifically, IM 2310-1 ("Possible Application of SEC Rules 15g-1 through 15g-9"), IM-2310-2 ("Fair Dealing with Customers"), and IM-2310-3 ("Suitability Obligations to Institutional Customers"), as applicable. Aside from the area of options (where there is a specific suitability requirement under NYSE Rule 723), the exchanges address suitability violations under rules imposing a duty of due diligence (e.g., Incorporated NYSE Rule 405 ("Diligence as to Accounts", also known as the "Know Your Customer Rule")).

also been interpreted as an obligation under the anti-fraud provisions of the federal securities laws.[124] In contrast to the concept of suitability under the federal securities laws, which is based in fraud, the SRO rules are grounded in concepts of professionalism, fair dealing, and just and equitable principles of trade.

The anti-fraud provisions of the federal securities laws and the implied obligation of fair dealing thereunder prohibit broker-dealers from, among other things, making unsuitable recommendations and require broker-dealers to investigate an issuer before recommending the issuer's securities to a customer.[125] The fair dealing obligation also requires the broker-dealer to reasonably believe that its securities recommendations are suitable for its customer in light of the customer's financial needs, objectives and circumstances (customer-specific suitability).[126]

Like all other actions for violating anti-fraud provisions, the SEC must establish that the broker's unsuitable recommendation was made with scienter (*i.e.* with a mental state embracing intent to deceive, manipulate or defraud). Scienter can be knowing misconduct as well as reckless misconduct: conduct that is "at the least, conduct which is 'highly unreasonable' and which represents 'an extreme departure from the standards of ordinary care…to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'"[127] In contrast to the federal anti-fraud provisions, FINRA and other SRO rules do not require proof of scienter to establish a suitability violation primarily enforced by the SROs.[128] As noted above, while the concept of suitability under the federal securities laws is grounded in fraud, the SRO rules are grounded in concepts of professionalism, fair dealing, and just and equitable principles of trade, which gives SROs greater latitude in dealing with suitability issues.[129] A violation of the suitability requirements as interpreted under the anti-fraud provisions can also give rise to a private cause of action and civil liability under Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder.[130] Although the SROs' suitability rules do not similarly give rise to a private cause of action, violations of the rules can be addressed through arbitration proceedings.

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124 See Hanly v. SEC, 415 F.2d 589, 596 (2d Cir. 1969); see also Exchange Act Release No. 26100, at n. 75 (Sept. 22, 1988) [53 FR 37778].

125 Id.

126 See Richard N. Cea, Securities Exchange Act Release No. 8662 (Aug. 6, 1969); F.J. Kaufman and Co., Securities Exchange Act Release No. 27535 (Dec. 13, 1989).

127 See Ernst & Ernst v. Hochfelder, 425 US 185 (1976) and Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38, 47 (2d Cir. 1978) (holding that scienter can be reckless conduct).

128 See, e.g., In re Jack H. Stein, Securities Exchange Act Release No. 47335 (Feb. 10, 2003) ("Scienter is not an element for finding a violation of the NASD suitability rule."); In re John M. Reynolds, Securities Exchange Act Release No. 30036 (Dec. 4, 1991) (scienter unnecessary to establish excessive trading under NASD rules).

129 When adopted, the SRO rules, particularly the NASD rule, were regarded primarily as ethical rules, stemming from concepts of "fair dealing" and notions of ''just and equitable principles of trade." Robert Mundheim, Professional Responsibilities of Broker-Dealers: The Suitability Doctrine, 1965 Duke L.J. 445-47; Stuart D. Root, Suitability—The Sophisticated Investor—and Modern Portfolio Management, 1991 Colum. Bus. L. Rev. 287, 290-300.

130 See, e.g., Brown v. E.F. Hutton Group, Inc., 991 F.2d 1020, 1031 (2d Cir. 1993); O'Connor v. R.F. Lafferty & Co., 965 F.2d 893 (10th Cir. 1992); Vucinich v. Paine Webber, Jackson & Curtis, Inc., 803 F.2d 454 (9th Cir. 1986).

In general, there are two approaches to suitability that have developed under both federal case law and FINRA and SEC enforcement actions – "reasonable basis" suitability and "customer-specific" suitability. Under reasonable basis suitability, a broker-dealer has an affirmative duty to have an "adequate and reasonable basis" for any recommendation that it makes.[131] A broker-dealer, therefore, has the obligation to investigate and have adequate information about the security it is recommending. Under customer-specific suitability, a broker-dealer must make recommendations based on a customer's financial situation and needs as well as other security holdings, to the extent known.[132] This requirement has been construed to impose a duty of inquiry on broker-dealers to obtain relevant information from customers relating to their financial situations[133] and to keep such information current.[134]

Specifically, NASD Rule 2310[135] requires that members "have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."[136] In addition, before executing a recommended transaction for a non-institutional customer, members must "make reasonable efforts to obtain information concerning: (1) the customer's financial status; (2) the customer's tax status; (3) the customer's investment objectives; and (4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer."[137]

A broker-dealer's suitability obligations are different for institutional customers than for non-institutional customers. NASD (FINRA) IM-2310-3 sets out factors that are relevant to the scope of a broker-dealer's suitability obligations in making recommendations to an institutional customer.[138] A broker-dealer fulfills its obligation to

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131 See Kaufman, supra note 126 (finding that the broker's recommendations violated suitability requirements because the broker did not have a reasonable basis for the strategy he recommended, wholly apart from any considerations relating to the particular customer's portfolio).

132 See Cea and Kaufman, supra note 126.

133 See NASD Rule 2310. See also Gerald M. Greenberg, 40 S.E.C. 133 (1960) (holding that a broker cannot avoid the duty to make suitable recommendations simply by avoiding knowledge of the customer's financial situation entirely).

134 Exchange Act Rule 17a-3(a)(17)(i) requires, subject to certain exceptions, broker-dealers to update customer records, including investment objectives, at least every 36 months.

135 The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms.

136 NASD Rule 2310.

137 Id.

138 IM-2310-3 states that "for purposes of this interpretation, an institutional customer shall be any entity other than a natural person." Furthermore, while the interpretation is potentially applicable to any institutional customer, the guidance is more appropriately applied to an institutional customer with at least $10 million invested in securities in the aggregate in its portfolio and/or under management.

determine that a recommendation is suitable for an institutional customer if it has reasonable grounds for concluding that the institutional customer is making independent investment decisions and is capable of independently evaluating investment risk.

Fair Prices, Commissions and Charges

Commissions paid in connection with life settlements have been typically high – up to 30% or more of the purchase price of the life settlement.[139] SRO rules generally require broker-dealer compensation for services to be fair and reasonable taking into consideration all relevant circumstances.[140] Broker-dealers are also prohibited from charging unfair or unreasonable underwriting compensation in connection with the distribution of securities.[141] Similarly, a broker-dealer's charges and fees for services performed must be "reasonable" and "not unfairly discriminatory between customers."[142] Charging an unfair commission would also violate a broker-dealer's obligation to observe just and equitable principles of trade.[143]

NASD Rule 2440 provides that, in determining what is a "fair commission or service charge," a broker-dealer should consider all relevant circumstances, including the market conditions with respect to such security at the time of the transaction, the expense of executing the transaction and the value of any service rendered by the broker-dealer due to the broker-dealer's experience in and knowledge of the security and the market therefor.[144] NASD IM-2440-1 also sets out some factors that should be considered in determining the fairness of a commission.[145]

Trading Platforms

Section 3(a)(1) of the Exchange Act[146] defines the term "exchange." Section 5 of the Exchange Act generally requires that exchanges register with the SEC (or be exempted from registration). In 1998 as a response to the development of new technologies and trading systems, the SEC adopted a new framework for the regulation of exchange and exchange-like entities. A fundamental component of the new framework

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139 Investor Alert, Seniors Beware: What You Should Know About Life Settlements, Financial Industry Regulatory Authority, Inc. (Jul. 30, 2009), available at http://www.finra.org/investors/protectyourself/investoralerts/annuitiesandinsurance/p018469; NASD Notice to Members 06-38, Member Obligations with Respect to the Sale of Existing Variable Life Insurance Policies to Third Parties, Financial Industry Regulatory Authority, Inc. (Aug. 2006), available at http://www.finra.org/Industry/Regulation/Notices/2006/p017133.

140 See NASD Rule 2440 and IM-2440-1.

141 See FINRA Rule 5110(c).

142 NASD Rule 2430.

143 See NASD Rule 2010 and IM-2440-1.

144 NASD Rule 2440.

145 IM-2440-1 identifies the following factors that should be considered: the type of security; the availability of the security in the market; the price of the security; the amount of money involved in a transaction; disclosure of the commission; the broker-dealer's pattern of mark-ups, and the nature of the broker-dealer's business.

146 15 U.S.C. 78c(a)(1).

was Rule 3b-16 under the Exchange Act, which interprets key provisions of the statutory term "exchange."

An "exchange" under Section 3(a)(1) includes a "market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange."[147] Rule 3b–16 defines these terms to mean "any organization, association, or group of persons that: (1) brings together the orders of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade."[148] Rule 3b–16 explicitly excludes those systems that the SEC believes perform only traditional broker-dealer activities, including: (1) systems that merely route orders to other facilities for execution; (2) systems operated by a single registered market maker to display its own bids and offers and the limit orders of its customers, and to execute trades against such orders; and (3) systems that allow persons to enter orders for execution against the bids and offers of a single dealer.[149]

As the SEC noted at the time of the rule's adoption, Rule 3b-16 addresses the blurring of traditional classifications between exchanges and broker-dealers and the increase in the number of "alternative trading systems." An entity that meets the criteria of Rule 3b-16 is offered a choice. It may either register as a national securities exchange pursuant to Sections 5 and 6 of the Exchange Act, or register as a broker-dealer.

3. Enforcement Actions

In recent years, the SEC has brought a number of successful actions alleging fraud in connection with life settlement securities. Those enforcement actions have typically involved misrepresentations to investors about the profitability and safety of the underlying life insurance policies, including the life expectancies of the insured persons. Many of the cases have also been Ponzi schemes whereby investor funds have been used to pay promised investment returns or simply misappropriated. The cases have also generally involved a significant amount of investor harm in that the schemes have ranged from tens of millions of dollars to at least one billion dollars in the case of Mutual Benefits.[150] In addition, many of the investor victims in these cases were senior citizens.

The SEC's successful actions in connection with life settlement securities have come despite an early setback in the Life Partners[151] case.

The Mutual Benefits case, which is the largest SEC life settlement securities case to date, involved the sale of $1 billion dollars in fractionalized interests in life settlements to approximately 30,000 investors. The SEC brought an emergency action against

147 15 U.S.C. 78c(a)(1).
148 17 CFR 240.3b-16(a).
149 17 CFR 240.3b-16(b).
150 Mutual Benefits, supra note 102.
151 Life Partners, supra note 98.

Mutual Benefits, charging that it promised investors fixed returns ranging from 12% to 72%, while falsely representing life expectancy figures as having been verified by an independent physician. In reality, more than 90% of Mutual Benefits' policies had surpassed their life expectancies. In order to deal with shortfall resulting from these maturing policies, Mutual Benefits effectuated a premium payment scheme, similar to a traditional Ponzi scheme, paying premium obligations of specific investors with monies escrowed for future obligations of other investors. The SEC also charged that at least $26 million in funds collected by Mutual Benefits was misappropriated by company insiders and their relatives.

The SEC obtained settled orders totaling more than $30 million from the defendants in Mutual Benefits, along with the appointment of a receiver who took control of the company and liquidated its assets for the benefit of investors. Several individuals involved in the scheme, including several of the company's principals, were subsequently charged criminally. As previously discussed, the Mutual Benefits case was also significant because, following a preliminary injunction hearing, the district court, in a decision later affirmed by the U.S. Court of Appeals for the Eleventh Circuit, declined to follow Life Partners and held that the life settlement contracts sold by Mutual Benefits were securities.

In addition to Mutual Benefits, the SEC has brought a number of other enforcement actions involving the sales of life settlement securities. In addition to the description below of some of those cases, a list of those cases is attached to this report as Appendix C.

The SEC filed a life settlement case in May 2000 involving a Ponzi scheme which defrauded over 5,000 investors nationwide out of between $80 million to $130 million in investor funds.[152] The SEC charged Federick C. Brandau, principal of Financial Federated Title & Trust, Inc. ("Financial Federated"), Ray Levy, principal of American Benefits Services, Inc. ("ABS") and Jeffrey Paine, an attorney who acted as escrow agent to ABS. Levy, through ABS and a network of independent sales agents, offered and sold life settlement investments on behalf of Brandau and Financial Federated, who purported to purchase life insurance policies at a discount from terminally ill individuals ("viators"). The life settlement investments were touted to be, among other things, fully secured, non-speculative financial investments which paid a 42% return on a 36-month investment. However, unbeknownst to the investors, Brandau and Financial Federated only purchased approximately $6.5 million worth of insurance policies and misappropriated the remaining funds.

In 2002, the SEC brought an emergency action against Larry W. Tyler and his company Advanced Financial Services ("AFS"), charging that they fraudulently enticed 480 mostly elderly investors into purchasing at least $30 million in investments backed by life settlements.[153] Tyler personally reaped over $5.2 million in undisclosed commissions in connection with the fraud. Tyler and AFS deceived investors with false

152 SEC v. Frederick C. Brandau, et.al., Litigation Release No. 16546 (May 9, 2000).
153 SEC v. Larry W. Tyler, et.al., Litigation Release No. 17376 (February 25, 2002).

guarantees about the investment's liquidity, above-market returns and fixed maturity dates. In 2004, Tyler was also indicted criminally and, after pleading guilty to the charges in the indictment, was sentenced to eight years in federal prison.[154]

After the Mutual Benefits case, the SEC brought three cases in 2006 and 2007 involving life settlements. The 2006 case against ABC Viaticals involved the sale of at least $100 million in life settlements to over 4,000 investors worldwide.[155] ABC Viaticals and its principals falsely promised guaranteed returns ranging from 27% to 150%. The SEC charged that the company and its principals never fully funded escrow accounts to pay premiums on the policies, misappropriated millions of dollars in investor funds, and used a bonding company they knew would not perform when the bonds came due. ABC Viaticals' principals were convicted in 2007 on various criminal charges, including mail and wire fraud, for their roles in another life settlement investment fraud.

In April 2007, the SEC charged Lydia Capital, a registered investment adviser, and its two principals in a scheme to defraud more than 60 investors who invested approximately $34 million in an unregistered offering of a hedge fund they managed.[156] The investments in the hedge fund were intended to be used to acquire a portfolio of life insurance policies in the life settlements market. While the fund did acquire interests in some policies, Lydia Capital and its principals misled investors about, among other things, the fund's performance and they misappropriated at least $2 million of investor funds.

Later that year, in August 2007, the SEC filed an emergency action against Secure Investment Services, Inc. and its principals in a $25 million scheme involving hundreds of senior and other investors who bought fractional ownership interests in life insurance policies.[157] The SEC charged that Secure Investment Services and its principals orchestrated a Ponzi scheme that falsely promised safe, secure and profitable interests in life settlements. They promised returns up to 125% when the person insured by the policy died. Instead, the principals used investors' money for their own personal use and to cover the premiums on other insurance policies owned by other groups of investors. The investors were further misled by life expectancy estimates supposedly certified by a physician who was, in reality, a convicted felon falsely holding himself out as a physician.

Most recently, in March 2010, the SEC brought a case against American Settlement Associates and its principals for raising over $3.5 million in fractional ownership interests in a life settlement policy.[158] Instead of reserving investor funds to pay future policy premiums, the SEC's complaint alleged that the funds were misappropriated for business and personal use by the company's principals. The SEC

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154 Id.
155 SEC v. ABC Viaticals et. al., Litigation Release No. 20035 (March 9, 2007).
156 SEC v. Lydia Capital et. al., Litigation Release No. 20102 (May 3, 2007).
157 SEC v. Secure Investment Services, et. al., Litigation Release No. 20252 (August 23, 2007).
158 SEC v. American Settlement Associates, LLC, et. al., Litigation Release No. 21458 (March 22, 2010).

complaint also alleged that the investments were falsely touted as being protected by a bonding company.

The SEC continues to investigate possible securities laws violations involving life settlements.

FINRA has also brought actions concerning life settlement investments. FINRA has brought approximately 13 actions against registered representatives who were selling life settlement investments. All of FINRA's actions were for violating FINRA rules by either engaging in an outside business or engaging in private securities transactions without complying with the relevant FINRA rules for such conduct. A list of FINRA actions is attached as Appendix D.

B. Application of State Insurance and Securities Laws

1. State Insurance Laws

NAIC and NCOIL have each adopted model state statutes addressing life settlements.[159] The model acts have a number of provisions in common. Charts comparing the NAIC and NCOIL model acts and describing the differences between them are attached as Appendix E. In particular, both model acts:

- require that life settlement brokers and providers operating within a state be licensed by the state insurance regulator;[160]
- require that the state insurance regulator investigate applicants for licenses and set forth criteria for the regulator to consider in determining whether to grant a license;
- require that life settlement contract forms and disclosure forms be filed with and approved by the state insurance regulator;
- contain reporting requirements applicable to life settlement providers and provisions to protect the privacy of the insured;
- provide the regulator with examination powers with respect to life settlement providers and brokers as well as remedial powers, including authority to revoke provider or broker licenses, to issue cease-and-desist orders, and to seek injunctive relief;

159 VIATICAL SETTLEMENTS MODEL ACT (National Association of Insurance Commissioners 2007) ("NAIC model act"); NCOIL model act, supra note 7.

160 A life settlement broker is defined in both model acts as a person who, on behalf of the policy owner, negotiates a life settlement contract between the owner and the life settlement provider. A life settlement provider is defined as one who enters into or effectuates a life settlement contract with the policy owner.

- set forth certain disclosures that a life settlement provider or broker must make to the owner of a life insurance policy in connection with entering into a life settlement contract, including disclosures regarding possible alternatives to life settlement contracts, such as accelerated death benefits, possible tax consequences for proceeds of the life settlement contract, and the insured's rescission rights following execution of the contract; and

- require that a life settlement broker provide the owner of a policy with a description of all offers relating to a proposed life settlement contract, as well as the amount of the broker's compensation.

Both model acts have provisions designed to deter STOLI. In certain respects, the NAIC model act and the NCOIL model act differ in their approaches, particularly in that the NCOIL model expressly defines and prohibits STOLI as a fraudulent practice, while the NAIC model addresses STOLI by placing limitations on how soon a policy may be settled after purchase. The NAIC model act imposes a five-year waiting period between the time of issuance of a life insurance policy and the time of entering into a life settlement contract. The NAIC model act provides certain exceptions that would permit earlier settlement of the contract, such as in cases where the policy owner is terminally or chronically ill. The NAIC model act also permits life settlements after two years of issuance of a policy where certain conditions are met during the two-year period. These conditions, which are aimed at excluding STOLI transactions, include provisions relating to lack of premium financing, absence of an understanding that another person will purchase the policy, and that neither the insured nor the policy are evaluated for life settlement (i.e., no life expectancy evaluation within the two-year period in connection with a planned life settlement).

Unlike the NAIC model act, the NCOIL model act contains a definition of STOLI, and provides that STOLI is a prohibited practice and a "fraudulent life settlement act," and as such, could subject a provider, broker, or other person to criminal penalties or other sanctions.[161] The NCOIL model act states that it is a prohibited practice and a "fraudulent life settlement act" to issue, solicit, market or otherwise promote the purchase of an insurance policy for the purpose of or with an emphasis on settling the policy.[162]

Like the NAIC model act, the NCOIL model act also imposes a waiting period from the issuance of a life insurance policy to the time of entering into a life settlement

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161 The NCOIL model act defines STOLI as a

> practice or plan 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. STOLI 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 himself or itself, and where, at the time of inception, there is an arrangement or agreement, whether verbal or written, to directly or indirectly transfer the ownership of the policy and/or the policy benefits to a third party.

NCOIL model act, supra note 7, at §2.Y.

162 NCOIL model act, supra note 7, at §13.A.4.

contract, but instead of five years, it imposes a two-year waiting period, subject to certain exceptions such as terminal or chronic illness of the policy owner.

The NAIC model act also requires that the provider or investment agent (investment agent defined as an agent of the provider who solicits or arranges funding for the purchase of a life settlement) make certain disclosures to life settlement purchasers; i.e. investors. These include disclosures that return depends on accurate projection of the insured's life expectancy, that the contract should not be considered liquid, and that the purchaser may lose benefits if the insurer goes out of business. In addition, the provider or investment agent must disclose risks associated with policy contestability.

Five states have adopted the NAIC model act in a uniform and substantially similar manner, according to a state adoption table prepared by NAIC. [163] The NAIC adoption table cites 13 states as having adopted portions of the NAIC model act.[164] The NAIC adoption table also cites states that have undertaken "related state activity" in the area of life settlements.[165] In all, 44 states are identified as having adopted legislation relating to life settlements under state insurance law.[166] Among states that have recently enacted life-settlement related legislation, the majority have followed the NCOIL model act or have combined elements of the NAIC and NCOIL model acts. [167] The NAIC identifies approximately 30 states where life settlement legislation, including anti-STOLI legislation, has been enacted since spring of 2008.[168] Of these, 14 tracked the NCOIL model act provisions,[169] and 12 states enacted hybrid legislation, combining elements of the NAIC and NCOIL model acts.[170]

Unlike other market participants, life expectancy underwriters are not subject to significant regulation at the state level. As noted above, life expectancy underwriters are specialized independent companies that issue life expectancy reports that estimate the life expectancy of an individual (typically the insured individual on whose life a life

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163 NAIC, Viatical Settlements Model Act (Apr. 2010). States listed in the table as having adopted the NAIC model act in a uniform and substantially similar manner are Nebraska, North Dakota, Oregon, Vermont, and West Virginia.

164 States listed in the table as having adopted portions of the NAIC model act are Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Minnesota, Nevada, Ohio, Oklahoma, Rhode Island, Tennessee, and Washington.

165 The NAIC adoption table cites examples of "related state activity" as including an older version of the NAIC model, legislation or regulation derived from other sources, bulletins, and administrative rulings.

166 A few of the states identified regulate only viaticals (sale of a life insurance policy by a person who is terminally or chronically ill) and not all life settlements. After the date of the currently available NAIC adoption table, New Hampshire's Governor signed legislation regulating life settlements. 2009 N.H. House Bill 660 (June 14, 2010); see N.H. Governor Signs STOLI Ban, Life Settlements Bill Into Law, BestWire (June 21, 2010). Thus, a total of 45 states have adopted some form of legislation under state insurance law relating to life settlements.

167 NAIC, Viatical Settlements/STOLI, 2010 Legislation (June 4, 2010).

168 Id.

169 Id. Those states are Arizona, Arkansas, California, Connecticut, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maine, Rhode Island, Utah, and Washington.

170 Id. Those states are Illinois, Iowa, Minnesota, Montana, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Vermont, West Virginia, and Wisconsin.

insurance policy involved in a life settlement is based). Only two states, Florida[171] and Texas,[172] regulate life expectancy underwriters by requiring them to register with state insurance regulators and provide information about their business. Any reports filed by a life expectancy underwriter are public information and can be obtained from the state's insurance department. The majority of states, however, do not regulate life expectancy underwriters.

2. State Securities Laws

Almost all states treat life settlements as securities under state laws. Some states, however, exclude from the definition of security the original sale from the insured or policy owner to the provider.[173] A majority of states include life settlements in their statutory definition of "security," either directly in that definition, or as part of the definition of "investment contract."[174] In a number of other states that do not include life settlements in their statutory definition of security or investment contract, courts or state regulators found life settlements to be a security under an investment contract analysis.[175] A few other states have concluded that life settlements are securities pursuant to a statement of policy issued by state securities regulators.[176] Only two states have not made a determination as to whether life settlements are securities under state law.[177]

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171 Fla. Stat. ch. 626.992 (2009).

172 28 Tex. Admin. Code § 3.1703 (2009).

173 Ky. Rev. Stat. Ann. § 292.310(20) (2010) ("'Life settlement investment' does not include: (a) [a]ny transaction between an owner and a life settlement provider as defined by [Sections 304.15-020 and 304.15-700 to 304.15-720 of the Kentucky Revised Statute]…"). See also, Iowa Code § 502.102(31A) (2009); Me. Rev. Stat. Ann. 32, § 16102(32) (2009); Neb. Rev. Stat. § 8-1101(17) (2010); N.J. Stat. Ann. § 49:3-49(w) (2010); N.C. Gen. Stat. § 78A-2(13) (2009); N.D. Cent. Code § 10-04-02(21) (2009); Ohio Rev. Code Ann. § 1707.01(HH) (2010); Utah Code Ann. § 61-1-13(1)(v) (2009); Wis. Stat. § 551.102(32) (2009); North American Securities Administrators Association, Guidelines Regarding Viatical Investments (Oct. 1, 2002), available at http://www.nasaa.org/content/Files/NASAA_Guidelines_Regarding_Viatical_Investments.pdf.

174 The states that include life settlements in the statutory definition of "security" are Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia and Wisconsin.

175 The states in which life settlements were found to be securities under an investment contract analysis are Delaware, Louisiana, Maryland, Massachusetts, New Hampshire, New York, Oregon, Virginia, and Washington. A Texas state court concluded that life settlements are not investment contracts and, therefore, not securities under Texas securities laws. Griffitts v. Life Partners, Inc., No. 10-01-00271-CV, 2004 Tex. App. LEXIS 4844 (Tex. Ct. App. May 26, 2004). However, the Texas Securities Board evaluates whether life settlements are a security on a case-by-case basis and recently issued a cease and desist order in which it found life settlements to be a security under Texas securities laws. In the Matter of Retirement Value, LLC, ENF-10-CDO-1686 (Tex. St. Sec. Board Mar. 29, 2010).

176 Through their state securities regulators, Alabama, Pennsylvania, and Rhode Island issued policy statements concluding that life settlements are securities under an investment contract analysis.

177 Connecticut and Wyoming have not made a determination as to whether life settlements are securities under state law and no courts in those states have addressed the issue.

Statutory Definition

The 2002 revision to the Uniform Securities Act, a model statute designed to guide each state in drafting its state securities law, defined life settlements as a security by including life settlements within the definition of an investment contract.[178] The Drafting Committee responsible for the most recent revisions to the Uniform Securities Act indicated that the addition of life settlements to the definition of an investment contract was intended to "make unequivocally clear that viatical settlements and similar agreements, which otherwise satisfy the definition of an investment contract, are securities" and was intended as a rejection of the holding in SEC v. Life Partners Inc..[179] The Uniform Securities Act of 2002 has been enacted in whole or in part in a number of states, including Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Oklahoma, South Carolina, South Dakota, Vermont and Wisconsin. A number of other states that have not adopted the Uniform Securities Act of 2002 also include life settlements in the definition of security. California, for example, defines "security" to mean, among other things, any "…viatical settlement contract or a fractionalized or pooled interest therein; life settlement contract or a fractionalized or pooled interest therein . . . ."[180]

In general, statutes that define life settlements as securities do not make a distinction between life settlements of entire life insurance policies or fractional interests in life insurance policies.[181] In the few instances where statutory definitions reference a life settlement of both an entire life insurance policy and a fractional interest in a life insurance policy, both types are included in the definition of security.[182]

Investment Contract Analysis

Life settlements have been found to be securities by state courts or securities regulators in states in which the statutory definition of security or investment contract does not explicitly include life settlements. In Maryland, for example, a court found that life settlements constitute an investment contract, and thus a security, under Section 11-101(r) of the Maryland Securities Act.[183]

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178 UNIF. SEC. ACT § 102(28)(E) (amended 2002) ("includes as an 'investment contract,' among other contracts, an interest in a limited partnership and a limited liability company and an investment in a viatical settlement or similar agreement.").

179 Id. at § 102(28)(E), cmt. n.28.

180 Cal. Corp. Code § 25019 (2009).

181 See Colo. Rev. Stat. Ann. § 11-51-201(17) (2009) ("'Security' means any … viatical settlement investment…").

182 See, e.g., Cal. Corp. Code § 25019, supra note 180. See also Guidelines Regarding Viatical Investments, supra note 173 (describing that life settlements involve the purchase by an investor of "a whole or fractional interest in the policy" and concludes that life settlements are securities).

183 Melanie Senter Lubin v. Beneficial Assurance, Ltd., et al., No. 24-C-02-006515, 2006 Md. Cir. Ct. LEXIS 25, at *12-21(Md. Cir. Ct. July 21, 2006).

Statement of Policy

The state securities regulators in three states have concluded, in either bulletins or other guidance, that life settlements are securities. In Alabama, the Alabama Securities Commission issued a policy statement in which it concluded that "viatical settlements are securities as that term is defined under the Alabama law and that it is appropriate for the Commission to assert its regulatory jurisdiction."[184] In Pennsylvania, the Pennsylvania Securities Commission issued a "Compliance Notice to the Viatical Industry," which found that life settlements are investment contracts and thus securities under Section 102(t) of the Pennsylvania Securities Act of 1972.[185] The Compliance Notice was subsequently affirmed by the Commonwealth Court of Pennsylvania.[186] Similarly, the Rhode Island Department of Business Regulation, Securities Division, issued a "Policy Statement on Viatical Settlement Contracts" that found that life settlements are securities under Rhode Island law.[187]

184 Alabama Securities Commission, Policy Statement on Viatical Settlement Contracts (May 27, 1999), available at http://www.asc.state.al.us/Policies/Viaticals.htm.

185 Pennsylvania Securities Commission, Compliance Notice to the Viatical Industry (Dec. 22, 2000), available at http://www.pabulletin.com/secure/data/vol30/30-52/2248.html.

186 Mark A. Steller v. Pennsylvania Securities Commission, 877 A.2d 518 (Pa. Commw. Ct. 2005).

187 Rhode Island Department of Business Regulation, Securities Division, Policy Statement on Viatical Settlement Contracts (Feb. 14, 2001).

V. Recommendations

A. The Commission Should Consider Recommending to Congress that It Amend the Definition of Security under the Federal Securities Laws to Include Life Settlements

The Task Force recommends that the Commission consider recommending to Congress that it amend the definition of "security" under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 to include life settlements. The D.C. Circuit[188] and the Eleventh Circuit[189] are split regarding the status of fractional interests in life settlements as securities under the federal securities laws. In addition, no court has made a determination regarding the status of a single life settlement as a security, as opposed to a fractional interest, under the federal securities laws. On the other hand, almost all states have taken action to clarify that life settlements, whether single life settlements or fractional interests in life settlements, are securities under state securities laws.[190] The Task Force believes that this amendment to the definition of "security" would bring clarity to the status of life settlements under the federal securities laws and provide a more consistent treatment for life settlements under both federal and state securities laws.[191]

The Task Force believes that any amendment of the definition of "security" under the Securities Act, the Exchange Act and the Investment Company Act should cover both viatical settlements and life settlements since there is little difference between the two types of settlements, other than the life expectancy of the insured.[192] The Task Force also believes that any amendment of the definition of "security" should be broad enough to cover both single life settlements and fractional interests in life settlements.[193] Finally, the Task Force recommends that any amendment to the definition of "security" specifically exclude from the federal securities laws the sale of the policy by the insured or original policy owner as we do not believe the entire statutory and regulatory framework should apply to an individual who decides to settle his life insurance

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188 Life Partners, supra note 98.

189 Mutual Benefits, supra note 102.

190 See discussion supra Section IV.B.2.

191 The Task Force understands that defining life settlements as securities would bring life settlements under the Securities Investor Protection Act ("SIPA") and believes that some consideration should be given to whether life settlements should be carved out of SIPA's definition of security.

192 California law defines "security" to include both a "viatical settlement contract" and a "life settlement contract." Cal. Corp. Code § 25019 (2009). Kentucky's definition of "life settlement investment," which is a security under Kentucky law, does not make a distinction based on the life expectancy of the insured. Ky. Rev. Stat. Ann. § 292.310(20) (2010) ("'Life settlement investment' means the contractual right to receive any portion of the death benefit or ownership of a life insurance policy or certificate, for consideration that is less than the expected death benefit of the life insurance policy or certificate.").

193 See, e.g., Cal. Corp. Code § 25019 (2009) ("viatical settlement contract or a fractionalized or pooled interest therein; life settlement contract or a fractionalized or pooled interest therein"). See also Guidelines Regarding Viatical Investments, supra note 173 (describing that life settlements involve the purchase by an investor of "a whole or fractional interest in the policy").

policy.[194] However, the Task Force does believe that investors seeking to invest in life settlements and policy owners seeking to settle their insurance policies would benefit by having all producers, settlement brokers and providers, including those producers and settlement brokers representing the insured or policy owner, regulated under the federal securities laws. Alternatively, any legislative action could provide authority for, and direct the SEC to, exempt the policy owner who is selling the policy from the federal securities laws to the extent consistent with investor protection and the public policy purposes of the federal securities laws.[195] While the SEC has exemptive authority under the federal securities laws, the Task Force recognizes that legislative action and direction may be appropriate given the unique nature of this product.

With respect to the Securities Exchange Act of 1934, the amendment of the definition of "security" would bring market intermediaries in the life settlements market within the regulatory framework of the SEC and FINRA. There are several benefits to this approach. Market intermediaries, including producers, settlement brokers and providers would be required to register with the SEC and an SRO, such as FINRA. These registered market intermediaries would become subject to a comprehensive set of SEC and SRO requirements that are designed to protect investors from abusive practices and to promote business conduct that facilitates fair, orderly and efficient markets. Among these requirements are a duty to deal fairly with customers, a duty to seek to obtain best execution of customer orders, suitability requirements, and a requirement that compensation for services be fair and reasonable.[196] These requirements would apply to market intermediaries involved in a life settlement and would benefit not only the investor acquiring the life settlement, but also the insured individual or policy owner seeking to settle his policy.

The uncertain status of life settlements under the federal securities laws has resulted in FINRA limiting the application of its guidance to settlements of variable life insurance policies and products that are a derivative of or based on life settlements.[197] That limitation leaves participants in the majority of the life settlements market without federal law protections against excessive commissions, unsuitable recommendation, or failures by settlement brokers or providers to obtain the best price for a policyholder settling a contract. The uncertain status has also led some market participants to be able to structure transactions in a way that arguably falls outside of the federal securities laws placing them beyond the reach of registration, remedies under the securities laws, and fair dealing and investor protections standards.[198] In addition, securities regulators at both the federal and state level often face challenges from defendants who argue, pointing to

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194 This exclusion could also apply to the sale of a variable life insurance policy by the insured or original policy owner.

195 A number of states currently exempt the initial sale by the insured to the life settlement provider from the definition of security. See supra note 173. The approach the Task Force recommends is for the insured or policy owner to be exempt from the federal securities laws, but require all producers, life settlement brokers and providers to comply with those laws.

196 See discussion supra Section IV.A.2. for a description of the duties of registered broker-dealers under the federal securities laws.

197 See discussion supra Section IV.A.2.

198 See Life Partners Annual Report, supra note 28.

the Life Partners decision in the D.C. Circuit, that life settlements or fractional interests in life settlements are not securities.[199]

An amendment to the definition of "security" under the Securities Act of 1933 would mean that all offers and sales of life settlements, whether single life settlements or fractional interests in life settlements, would need to be registered with the SEC, unless an exemption from such registration requirement is available.[200] In addition, any misstatement in the offers and sales of life settlements, whether registered or offered pursuant to an exemption, would be covered by the antifraud provisions in the Securities Act. Similarly, such an amendment to the Securities Exchange Act would extend the protections of Rule 10b-5 to purchasers and sellers of life settlements. In addition, amending the definition of "security" to include life settlements would require trading platforms that facilitate transactions in life settlements to register as a national securities exchange pursuant to Sections 5 and 6 of the Exchange Act, or register as a broker-dealer.[201]

With respect to the Investment Company Act, Section 3(a)(1) of the Act defines "investment company" in part as any issuer which "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities." Thus, if the definition of "security" in the Investment Company Act is amended to include life settlements, a pool of life settlements issuing interests in the pool would be an investment company under the Investment Company Act, unless it falls within an exemption.[202] Investors in the pool would benefit from the comprehensive federal regulatory framework the Act establishes for investment companies. This framework is designed to:

- Prevent insiders from managing the company to their benefit and to the detriment of investors;
- Prevent the issuance of securities having inequitable or discriminatory provisions;
- Prevent the management of investment companies by irresponsible persons;

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199 See e.g., Mutual Benefits, supra note 102; Steller, supra note 186.

200 There would also be a private right of action for material misstatements or omissions in registration statements relating to life settlements, as well as a private right of action against a person who offers or sells a life settlement in violation of the registration requirements, or a person who offers or sells a life settlement by means of a prospectus that includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statement, in light of the circumstances under which they were made, not misleading.

201 See discussion supra Section IV.A.2. for a description of the requirements that would apply to trading platforms facilitating transactions in life settlements.

202 Exemptions could include Section 3(c)(1) of the Act (issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities) or Section 3(c)(7) of the Act (issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities.).

- Prevent the use of unsound or misleading methods of computing earnings and asset value;
- Prevent changes in the character of investment companies without the consent of investors;
- Prevent investment companies from engaging in excessive leveraging; and;
- Ensure the disclosure of full and accurate information about the companies and their sponsors.[203]

To accomplish these ends, the Investment Company Act requires the safekeeping and proper valuation of funds assets, restricts greatly transactions with affiliates, limits leveraging, and imposes governance requirements as a check on fund management.

B. The Commission Should Instruct the Staff to Continue to Monitor that Legal Standards of Conduct Are Being Met by Brokers and Providers

The Task Force recommends that the Commission consider how best to leverage and build upon FINRA's important work with respect to life settlements. In particular, with regard to life settlement transactions involving a securities transaction, the Commission should instruct the Staff to help ensure that settlement brokers and providers, as well as other participants in the settlement transaction, are adequately discharging their obligations under the federal securities laws and FINRA rules. These obligations would include any suitability duties owed both to the individual settling the insurance policy and to any investors in subsequent transactions associated with that settlement. Action by FINRA and the SEC could include examination and enforcement efforts, consideration of whether existing licensing requirements should be expanded, and investor education efforts.

C. The Commission Should Instruct the Staff to Monitor for the Development of a Life Settlement Securitization Market

Although no securitizations of life settlements have been registered with the SEC and offered to the public, a limited number of privately offered life settlement securitizations have been completed. [204] Market participants meeting with the Task Force uniformly indicated that for a life settlement securitization market to develop, pools containing large numbers of life insurance policies to diversify risk will be required. Some market participants indicated a concern that an increased demand for life settlement securitizations would lead to a rise in STOLI transactions. Since the payment by the issuing insurance company of the death claim underlying a life settlement is perhaps the key component of this investment, the increased use of STOLI in life settlement securitizations could dramatically impact the investment's value.

Since life settlement securitizations to date have been offered and sold in reliance on exemptions from registration, information about those transactions is not generally

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203 See Section 1(b) of the Investment Company Act.

204 See discussion supra Section III.C.

available. Nevertheless, the SEC and the market would benefit from having access to more information about the sales of these securities in the private markets. The SEC has proposed revisions to its rules to require issuers of structured finance products, which would include securitizations backed by life settlements, that sell securities without registration under the Securities Act in reliance on Regulation D or that rely on Rule 144A for resales of the securities to make a notice filing describing the offering.[205] The notice would include information regarding major participants in the securitization, the date of the offering and initial sale, the type of securities being offered, the basic structure of the securitization, the assets in the underlying pool, and the principal amount of securities being offered. The Staff would be in a better position to monitor developments in the market for life settlement securitizations if this or a similar proposal were adopted.[206]

D. The Commission Should Encourage Congress and State Legislators to Consider More Significant and Consistent Regulation of Life Expectancy Underwriters

The estimated life expectancy of the insured constitutes a critical component of the life settlement transaction. Among other things, the estimate affects the amount paid to the policy owner, the expected timing of the payment to the investor, and the value of any securitization. Misestimating life expectancy, unintentionally or otherwise, would have a significant, negative effect on the entire transaction. In light of the crucial role that life expectancy underwriters play in the settlement process, the Commission should consider highlighting to Congress and state legislators that investors and market participants could benefit from more significant and consistent regulation. Such regulation could cover areas including licensing and qualifications of underwriters, privacy of customer information, and physician review standards. The need for a federal agency to play a role in this regulation would depend on whether the definition of "securities" under the federal securities law is amended to include life settlements, and on the further development of the market for life settlement securitizations.

E. The Commission Should Instruct the Staff to Consider Issuing an Investor Bulletin Regarding Investments in Life Settlements

The Task Force recommends that the Commission instruct the Staff to consider issuing an Investor Bulletin regarding investments in life settlements. In the course of its work, the Task Force has learned important information about life settlements from a variety of sources. The Task Force believes that investors or potential investors in life settlements would benefit from this information and recommends that the Commission consider issuing an Investor Bulletin on the subject. In addition to providing background on the life settlement process, the Bulletin could describe the parties involved in life settlements and highlight some of the considerations and risks that investors in life settlements should keep in mind.

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205 See Asset-Backed Securities Release, supra note 3.

206 Under the proposal, a notice would only be required to be filed if the issuer relies on Rule 506 or Rule 144A under the Securities Act. Therefore, the SEC would not receive a notice from all privately issued life settlement securitization issuers.

Appendix A: Task Force Membership

Office of the Chairman
Jennifer McHugh, Senior Advisor to the Chairman

Division of Corporation Finance
Paul Belvin, Associate Director
Paula Dubberly, Associate Director
Sebastian Gomez Abero, Attorney-Advisor
Jessica Kane, Attorney-Advisor

Division of Enforcement
Joan McKown, Chief Counsel
Glenn Gordon, Associate Regional Director, Miami Regional Office

Division of Investment Management
Susan Nash, Associate Director
Keith Carpenter, Senior Special Counsel

Division of Risk, Strategy, and Financial Innovation
Jonathan Sokobin, Deputy Director

Division of Trading and Markets
Paula Jenson, Deputy Chief Counsel
John Fahey, Branch Chief

Office of the Chief Accountant
Paul Beswick, Deputy Chief Accountant

Office of Compliance Inspections and Examinations
Suzanne McGovern, Assistant Director

Office of the General Counsel
David Fredrickson, Assistant General Counsel
Sarah Buescher, Attorney

Office of Investor Education and Advocacy
Mary Head, Deputy Director

Appendix B:
Groups and Individuals Who Met with the Task Force

- AARP
- American Council of Life Insurers (ACLI)
- Drinker Biddle & Reath LLP
- Cantor Fitzgerald, L.P.
- Coventry First LLC
- DBRS, Inc.
- Fasano Associates, Inc.
- Financial Industry Regulatory Authority (FINRA)
- Group of Outside Counsels (Clifford Chance LLP, Greenberg Traurig, LLP, Mayer Brown LLP, Locke Lord Bissell & Liddell LLP, Stroock & Stroock & Lavan LLP, O'Melveny & Myers LLP, Katten Muchin Rosenman LLP, Sidley Austin LLP)
- Institutional Life Markets Association (ILMA)
- Invescor, Ltd.
- Life Insurance Settlement Association (LISA)
- Life Settlement Financial, LLC
- Life Settlement Institute
- Minnesota Insurance and Securities Regulator (Department of Commerce)
- National Association of Insurance Commissioners (NAIC) and State Insurance Regulators (Ohio, Connecticut, Iowa)
- North American Securities Administrators Association, Inc. (NASAA)
- Prudential Financial, Inc.
- Standard & Poor's Financial Services LLC
- The Insurance Forum
- Transamerica Life Solutions, LLC
- U.K. Financial Services Authority (FSA)
- U.S. Government Accountability Office (GAO)

Appendix C: SEC Enforcement Actions

1. **SEC v. American Settlement Associates, LLC, et al.**, Litigation Release No. 21458 (March 22, 2010).

   - Commission alleges American Settlement Associates, Charles C. Jordan and Kelly T. Gipson sold fractional ownership interests in a life settlement policy to certain investors, raising almost $3.5 million, and failed to use investor money as promised to cover future premium payments, but instead used investor money to pay defendants' business and personal expenses.

2. **SEC v. Secure Investment Services, Inc., American Financial Services, Inc., Lyndon Group, Inc., Donald F. Neuhaus, and Kimberly A. Snowden**, Litigation Release No. 20362 (November 13, 2007).

   - Commission charges against defendants Neuhaus, his daughter Snowden, and their company Secure Investment Services, Inc., based on allegations that they orchestrated a Ponzi scheme that falsely promised safe and profitable viatical investments in life insurance policies while failing to disclose the dire financial condition of the investment venture. Many investors were elderly and invested their retirement savings. Neuhaus and Snowden misled investors by providing them with life expectancy estimates certified by a convicted felon who falsely held himself out as a physician.

3. **SEC v. Lydia Capital, LLC et al.**, Litigation Release No. 20102 (May 3, 2007).

   - Commission charges against defendants Manterfield and Andersen alleging that they engaged in a scheme to defraud more than 60 investors who invested approximately $34 million in Lydia Capital Alternative Investment Fund LP, a hedge fund. Defendants told investors that they intended to use the hedge fund's assets to acquire a portfolio of life insurance policies in the life settlement market.

4. **SEC v. ABC Viaticals, Inc., C. Keith LaMonda and Jesse W. LaMonda Jr., defendants, and LaMonda Management Family Limited Partnership, Structured Life Settlements, Inc., Blue Water Trust and Destiny Trust, relief defendants**, Litigation Release No. 20035 (March 9, 2007).

   - ABC Viaticals, Inc. (ABC), and its former President, Keith LaMonda and his brother, Jesse LaMonda, allegedly conducted fraudulent and unregistered offers and sales of fractionalized interests in life settlements.
   - ABC raised at least $100 million from over 4,000 investors worldwide from the sale of life settlements with "guaranteed" returns from 27% to 150%. ABC claimed that investor funds were controlled by an independent escrow agent, however, the LaMondas exercised de facto control over all funds held and

siphoned millions of dollars of investor funds into their own pockets or entities they controlled.

5. **SEC v. Larry W. Tyler, Advanced Financial Services, Inc., et al.**, Litigation Release No. 19398 (September 28, 2005).

- The Commission alleged that Tyler raised at least $30 million from investors and personally realized over $5.2 million in undisclosed commissions, by fraudulently enticing more than 480 elderly investors into purchasing investments issued by his company. Tyler used investors' funds to buy viaticals and hid the fact that the viaticals could not fulfill the promises and guarantees that he had made to investors.

6. **SEC v. Mutual Benefits Corp., et al.**, Litigation Release No. 18698 (May 6, 2004).

- The SEC filed an emergency federal civil action seeking to halt an alleged billion dollar fraudulent securities offering affecting 29,000 investors worldwide.
- The defendants raised over $1 billion from more than 29,000 investors through a fraudulent, unregistered offering of securities in the form fractionalized interests in viatical and life settlements. In raising money, MBC falsely represented to investors that its life expectancy figures were the product of a review by an independent physician, failed to disclose that about 65% of its outstanding life insurance policies were sold to investors using fraudulent life expectancy figures generated by MBC, and omitted to tell investors that more than 90% of its policies have already surpassed their assigned life expectancy.

Related Actions/Events

SEC v. Mutual Benefits Corp., et al., Litigation Release No. 19274 (June 20, 2005).

- The SEC filed an Amended Complaint in its pending civil injunctive action against Mutual Benefits Corp. ("MBC") and its principals, adding Steven Steiner as an additional defendant.
- Steiner touted the safety and humanitarian nature of viatical settlement investments, assured investors that life expectancies are determined by doctors prior to their being placed on policies, and made glowing remarks about MBC as the leader in the viatical industry. Steiner also wrote articles in newspapers and business journals (provided in investor packets) touting viatical settlement investments, new regulations designed to protect investors, and specifically referring to MBC as a superior operation and clean company with "thousands" of satisfied customers. Steiner failed to disclose, among other things, that over 90% of the viatical settlements were beyond their projected life

expectancies, that his brothers (defendants Joel and Leslie Steinger) were the de facto principals of MBC, his brothers' prior disciplinary history, or that cease-and-desist orders had been issued against MBC.

7. **SEC v. Ameer Khan**

8. **SEC v. Raquel Kohler**

9. **SEC v. Stephen Ziegler**

(All described in Litigation Release No. 20459 (February 15, 2008)).

- Defendants were charged with violations of the federal securities laws arising from their involvement in Mutual Benefits Corp.'s offering fraud which raised more than $1 billion from approximately 30,000 investors. Khan served as president and sole shareholder of Viatical Services, Inc., a purportedly independent company that claimed to track policies sold to Mutual Benefits' investors. Kohler was the former chief financial officer of Mutual Benefits and a licensed certified public accountant. Ziegler served as Mutual Benefits' regulatory counsel.

10. **In the Matter of Raquel Kohler, CPA**, AP File No. 3-12958 (February 15, 2008).

- On September 24, 2007, Defendant Kohler, the Chief Financial Officer of Mutual Benefits Corporation, was found guilty of one count of conspiracy to commit securities fraud.
- Kohler was sentenced to 60 months imprisonment and ordered to pay restitution in the amount of $471,000,000. The Commission, finding Kohler convicted of a felony within the meaning of Rule 102(e)(2) ordered that Kohler be suspended from appearing or practicing before the Commission.

11. **In the Matter of Stephen Ziegler**, AP File No. 3-12959 (February 15, 2008).

- On September 24, 2007, Defendant Ziegler was found guilty of one count of conspiracy to commit securities fraud.
- Ziegler was sentenced to 60 months imprisonment and ordered to pay restitution in the amount of $826,839,642. The Commission, finding Ziegler convicted of a felony within the meaning of Rule 102(e)(2) ordered that Ziegler be suspended from appearing or practicing before the Commission.

12. **SEC v. Wellness Technologies, Inc. and Jesse Dean Bogdonoff**, Litigation Release No. 18375 (September 29, 2003).

- Bogdonoff recommended that the Tonga Trust Fund (a trust fund established by the government of Tonga) invest $20 million with a newly established

company that sold investments in viatical contracts. Bogdonoff falsely told the trustees that this investment carried "no market risk," despite the risk that the Tonga Trust Fund could lose all of its investment.

13. **SEC v. Viatical Capital, Inc., d/b/a Life Settlement Network, Life Investment Funding Enterprises, Inc., Charles Douglas York, and Robert Kingston Coyne**, Litigation Release No. 18346 (September 11, 2003).

- Defendants engaged in a scheme to solicit investments in various limited liability companies that invested in viatical settlements. Many of the viatical settlements in Viatical Capital's portfolio were fraudulently obtained and were acquired from an unlicensed viatical settlement provider.

14. **SEC v. Frederick C. Brandau, Raphael "Ray" Levy and Jeffrey Paine**, Litigation Release No. 16546 (May 9, 2000).

- The SEC sought permanent injunctions, civil penalties and disgorgement from defendants who engaged in a massive Ponzi scheme defrauding over 5000 investors nationwide of between $80 million to $130 million. Levy offered and sold viatical investments on behalf of Brandau and Financial Federated, who purported to purchase life insurance policies from terminally-ill viators at a discount. The viatical investments were touted to be, among other things, fully secured, non-speculative financial investments which paid a 42% return on a 36-month investment. However, unbeknownst to the investors, Brandau and Financial Federated only purchased approximately $6.5 million worth of insurance policies and misappropriated the remaining funds.

15. **In the Matter of Philip A. Lehman and Tower Equities, Inc.**, Securities Act of 1933 Release No. 7889 (September 7, 2000), AP File No. 3-10024.

- The Commission instituted public administrative proceedings and cease and desist proceedings against Defendants Philip A. Lehman and Towers Equities for making various misrepresentations of material facts including that Tower Venture would invest loan proceeds in viatical insurance policies for which investors could expect to earn a return of approximately 33% after one year. Since the defendants had no agreements with any viatical companies to purchase viatical insurance policies, they had no reasonable basis for this representation.

16. **SEC v. Thomas J. Kearns, individually and doing business as Financial Associated Service, and Kearns Financial Services, Inc.**, Litigation Release No. 16610 (June 26, 2000).

- TRO, asset freeze and other expedited action against Kearns individually and doing business as Financial Associated Service, and Kearns Financial Services. Kearns sold insurance and insurance-related products to seniors,

establishing a relationship of trust with them and gaining access to information regarding their assets and financial condition. He then solicited them to invest in promissory notes, annuities, viatical settlements and other investments.

17. **SEC v. David W. Laing and PCO, Inc., d/b/a Personal Choice Opportunities**, Litigation Release No. 15558 (November 13, 1997).

- The SEC charged defendants with fraudulently obtaining approximately $95 million from investors nationwide by promising them substantial profits through the company's purchases of viatical settlements. Rather than investing in the viatical settlements, however, the defendants misappropriated the investors' funds.

18. **In the Matter of Michael D. Gibson, Gregory C. Moore, Jay D. Liebowitz and David McClure**, Respondents, Securities Exchange Act Release No. 38539 (April 22, 1997), AP File No. 3-9124.

- Defendant David McClure, a registered principal and vice president of the O.N. Equities Sales Company settled to charges that he failed reasonably to supervise Michael D. Gibson who was misrepresenting his involvement with viatical settlements.

19. **SEC v. Life Partners**, Litigation Release No. 14209 (August 25, 1994).

- SEC alleged that the defendants violated the antifraud and securities registration and reporting requirements in the sale of viatical securities. On appeal, the DC Circuit held that the investments were not securities.

Appendix D: FINRA Enforcement Actions

1. **Patrick Allen Thomas** (CRD #1668667, Registered Representative, Huntington Beach, California) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Thomas consented to the described sanction and to the entry of findings that he participated in private securities transactions without providing prior written or oral notification to, and receiving approval from, his member firm. (NASD Case #C02020058)

   http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p007451.pdf

2. **Gary Allen Hanson** (CRD #1909594, Registered Representative, Colorado Springs, Colorado) submitted a Letter of Acceptance, Waiver and Consent in which he was suspended from association with any FINRA member in any capacity for nine months. In light of Hanson's financial status, no monetary sanctions have been imposed. Without admitting or denying the findings, Hanson consented to the described sanction and to the entry of findings that, while associated with a member firm, he participated in outside business activities, for commissions and compensation, and failed to provide the firm with prompt written notice. The suspension is in effect from February 17, 2009, through November 16, 2009. (FINRA Case #2007010999601)

   http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p118481.pdf

3. **Steven Ernest Henley** (CRD #4262164, Registered Representative, Caldwell, Idaho) submitted a Letter of Acceptance, Waiver and Consent in which he was suspended from association with any NASD member in any capacity for three months. Without admitting or denying the allegations, Henley consented to the described sanction and to the entry of findings that he participated in an outside business activity for compensation without giving his member firm prompt written notice. Henley's suspension began November 21, 2005, and will conclude at close of business February 20, 2006. (NASD Case #E3B20030307-01)

   http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p015733.pdf

4. **Leonard Levite Daigle** (CRD #2722527, Registered Representative, Grand Rapids, Minnesota) submitted a Letter of Acceptance, Waiver and Consent in which he was suspended from association with any NASD member in any capacity for six months. In light of Daigle's financial status, no monetary sanction was imposed. Without admitting or denying the findings, Daigle consented to the described sanction and to the entry of findings that he engaged in private securities transactions and failed to provide his member firm with detailed written

notice of the transactions and his proposed role therein, and without receiving prior written approval from his member firm to engage in the transactions. The suspension in any capacity is in effect from September 5, 2006 through March 4, 2007. (NASD Case #20050001401-01)

http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p017398.pdf

5. **Dennis Scott Comerford** (CRD #51684, Registered Representative, Fort Worth, Texas) submitted a Letter of Acceptance, Waiver and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the findings, Comerford consented to the described sanction and to the entry of findings that he participated in private securities transactions, for compensation, without providing prior written notice to, and obtaining approval from, his member firm. The findings also stated that Comerford failed to timely respond to NASD requests for information. (NASD Case #2005001351601)

http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p018298.pdf

6. **Berri Grove Powers** (CRD #366851, Registered Representative, McMurray, Pennsylvania) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Powers consented to the described sanction and to the entry of findings that he engaged in business activities, for compensation, outside the scope of his employment with a member firm and failed to provide prompt written notice to the firm. The findings also stated that Powers failed to respond to NASD requests for information. **(NASD Case #C9A010030)**

http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p007517.pdf

7. **David Lloyd Garver** (CRD #1027088, Registered Representative, Lebanon, Pennsylvania) submitted a Letter of Acceptance, Waiver, and Consent in which he was suspended from association with any NASD member in any capacity for three months. In light of the financial status of Garver, no monetary sanction has been imposed. Without admitting or denying the allegations, Garver consented to the described sanction and to the entry of findings that he engaged in an outside business activity, for compensation, without providing prompt written notice to his member firm. Garver's suspension began April 5, 2004, and will conclude July 4, 2004. (NASD Case #C9A040004)

http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p007434.pdf

8. **Steven John Balog** (CRD #857771, Registered Principal, Woodbine, Maryland) submitted a Letter of Acceptance, Waiver and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the findings, Balong consented to the described sanction and to the entry of findings that he engaged in outside business activities, for compensation, without providing prompt written notice to his member firm. (NASD Case #E9A2004049802)

http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p017184.pdf

9. **Kevin John White** (CRD #2219143, Registered Principal, Hudson, New York) submitted a Letter of Acceptance, Waiver and Consent in which he was fined $5,000, suspended from association with any NASD member in any capacity for six months and ordered to disgorge $32,000 in commissions in partial restitution to public customers. The fine and restitution amounts must be paid before White reassociates with any NASD member firm following the suspension, or before requesting relief from any statutory disqualification. Without admitting or denying the findings, White consented to the described sanctions and to the entry of findings that he participated in private securities transactions without providing prior written notice to, or obtaining prior written approval from, his member firm. The suspension in any capacity will be in effect from September 5, 2006 through March 4, 2007. (NASD Case #2005003211201)

http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p017654.pdf

10. **DOE v. Fergus, Blake and Devine**, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3 (NAC 2001) – NAC Decision

- Registered representatives engaged in private securities transactions without providing prior written notice to and obtaining prior written approval from the NASD member firm with which they were associated. Held, findings affirmed and sanctions modified.

- We called this matter pursuant to NASD Rule 9312 to review the findings and sanctions of the June 13, 2000 decision of an NASD Regulation, Inc. ("NASD Regulation") Hearing Panel against respondents Timothy James Fergus ("Fergus"), Frank Thomas Devine ("Devine"), and Richard Alan Blake ("Blake"). We affirm the Hearing Panel's findings that Fergus, Devine, and Blake engaged in private securities transactions without providing prior written notification to and obtaining approval from their employer, in violation of Conduct Rules 3040 and 2110. We modify the Hearing Panel's sanctions by increasing the suspension period for each respondent and otherwise affirm the remaining sanctions. Accordingly, we order that Fergus

pay an $8,000 fine, be suspended for 60 days in any capacity, and requalify by examination as an investment company and variable contracts products representative; that Devine pay a $34,825.42 fine ($25,000 plus disgorgement of $9,825.42 in commissions), be suspended for 90 days in any capacity, and requalify by examination as an investment company and variable contracts products representative; and that Blake pay a $35,000 fine, be suspended for 180 days in any capacity, and requalify by examination as an investment company and variable contracts products representative. We also order the respondents each to pay $1,414.28 in costs imposed by the Hearing Panel.

http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p007026.pdf

11. **DOE v. Avery**, Complaint No. C8A020032, 2003 NASD Discip. LEXIS 7 (Office of Hearing Officers Decision 2003)

- Respondent is suspended from association with any member firm in any capacity for 90 days and ordered to disgorge commissions in the amount of $28,559 for participating in private securities transactions and outside business activities, for compensation, without giving prior written notice to the NASD member firm with which he was associated, in violation of NASD Conduct Rules 2110, 3030, and 3040.

http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/ohodecisions/p006543.pdf

12. **DOE v. Thomas Gorter**, Complaint No. C8A040014.

- **Thomas Joseph Gorter** (CRD #1008601, Registered Representative, Brandenburg, Kentucky) submitted an Offer of Settlement in which he was fined $5,000 and suspended from association with any NASD member in any capacity for two months. Without admitting or denying the allegations, Gorter consented to the described sanctions and to the entry of findings that he participated in private securities transactions in which he neglected to give written notice to his employing NASD member firm, and failed to receive written approval from his firm prior to engaging in such activity. Gorter's suspension began December 19, 2005, and will conclude at the close of business on February 18, 2006. (NASD Case #C8A040114/E8A2002095903)

http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p015857.pdf

13. **DOE v. Donald Kiley**, Complaint No. 20050033124.

- **Donald Walter Kiley (CRD #2630201, Registered Representative, De Pere, Wisconsin)** submitted an Offer of Settlement in which he was fined $5,000 and suspended from association with any FINRA member in any capacity for three months. Without admitting or denying the allegations, Kiley consented to the described sanctions and to the entry of findings that he received $20,382.07 in compensation for participating in the sale of life settlements totaling $160,601.24, and failed to give prior written notice to, or receive prior written approval from, his member firm. The findings stated that the compliance manual for Kiley's member firm explicitly prohibited the sale of viatical and life settlements. The suspension is in effect from February 2, 2009, through May 1, 2009. **(FINRA Case #2005003312401)**

http://www.finra.org/web/groups/industry/@ip/@enf/@da/documents/disciplinaryactions/p118153.pdf

Appendix E: Charts Comparing the NAIC and NCOIL Model Acts

NAIC/NCOIL Model Act Summary of Major Differences

	NAIC Viatical Settlements Model Act	NCOIL Life Settlements Model Act
Viatical/Life Settlement Contract Definition	"Viatical settlement contract" definition does not include the trust language found in the NCOIL Model's definition of "life settlement contract".	"Life settlement contract" definition includes the following language regarding trusts: "life settlement contract includes 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."
Stranger-Originated Life Insurance Definition	NAIC model does not include this definition.	"Stranger-originated life insurance" or "STOLI" is a practice or plan 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. STOLI 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 himself or itself, and where, at the time of inception, there is an arrangement or agreement, whether verbal or written, to directly or indirectly transfer the ownership of the policy and/or the policy benefits to a third party. Trusts, that are created to give the appearance of insurable interest, and are used to initiate policies for investors, violate insurable interest laws and the prohibition against wagering on life. STOLI arrangements do not include those practices set forth in Section 2L(2) of this Act.
Rescission Disclosure in Required Disclosures to Viators/Owners	As part of the required disclosures, the NAIC Model includes a disclosure stating that a viator has the right to rescind a settlement contract before the earlier of 60 days from its execution or 30 days of receipt of the viatical settlement proceeds.	As part of the required disclosures, the NCOIL Model includes a disclosure stating that an owner has a right to terminate a settlement contract within 15 days of the date it is executed by all parties and the owner has received the required disclosures.

	NAIC Viatical Settlements Model Act	NCOIL Life Settlements Model Act
Disclosures to Insurers	NAIC Model provisions are not similar to the NCOIL model provisions. The NAIC model requires providers and brokers, prior to initiation of a plan, transaction or series of transactions, to fully disclose to an insurer a plan, transaction or series of transactions, to which the viatical settlement broker or provider is a party, to originate, renew, continue or finance a life insurance policy with the insurer for the purpose of engaging in the business of viatical settlements at anytime prior to, or during the first 5 years after, issuance of the policy.	NCOIL Model permits insurers to make specified disclosures to applicants and the insured at the time of application for a new policy or an amendment to the application when the policy premiums will be financed in a certain manner.
Settlement Waiting Period Provisions	NAIC model provides for a 5-year waiting period on the settlement of policies unless the viator can meet certain conditions that would permit a policy to be settled at any time due to life changing experiences, including: (1) chronic or terminal illness (i.e., genuine viatical settlements); (2) death of the spouse; (3) divorce; (4) retirement; (5) physical or mental disability; or (6) personal insolvency. A policy can be settled after 2 years if: (1) the policy owner posts cash or collateral for a loan against the policy or limits the loan to the net cash surrender value of the policy; (2) there is no agreement evidencing intent to settle the policy prior to two years from policy issuance; and (3) there has been no evaluation of the insured or the policy for settlement prior to two years from policy issuance.	NCOIL model provides for a 2 year prohibition on settling a policy unless the owner certifies to the provider that: (1) the policy was issued upon the owner's exercise of conversion rights; or (2) the owner submits independent evidence that one or more of the following conditions have been met within the 2-year period: (a) chronic or terminal illness; (b) disposal of ownership interests in a closely held corporation; (c) death of the spouse; (d) divorce; (e) retirement; (f) physical or mental disability; or (g) personal bankruptcy or insolvency.

5/2/2008

This chart does not constitute a formal legal opinion by the NAIC staff and should not be relied upon as such. Every effort has been made to provide correct and accurate information to assist the reader in targeting useful information. For further details, the NAIC Viatical Settlements Model Act and the NCOIL Life Settlements Model Act should be consulted.

NAIC/NCOIL Model Act Section-by-Section Comparison Chart

Section 1. Short Title (NAIC)/Section 1. Short Title (NCOIL)	
NAIC Viatical Settlements Model Act	This Act may be cited as the Viatical Settlements Act. Includes a drafting note that states may elect to use terminology referring to life settlements rather than viatical settlements. Also, in Section 2A, a drafting note is included stating that, throughout this document, text related to investments in viatical settlements is in brackets. It should be considered for inclusion in states where securities regulators do not regulate the investment side of the transaction or adapted for inclusion in the securities code.
NCOIL Life Settlements Model Act	This Act may be cited as the Life Settlement Act. Includes a drafting note defining stranger-originated life insurance (STOLI).
Section 2. Definitions (NAIC)/Section 2. Definitions (NCOIL)	
A. Advertising (NAIC)/A. Advertisement (NCOIL)	
NAIC Viatical Settlements Model Act	"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 directly before the public, in this state, for the purpose of creating an interest in or inducing a person to [purchase or] sell, assign, devise, bequest or transfer the death benefit or ownership of a life insurance policy pursuant to a viatical settlement contract.
NCOIL Life Settlements Model Act	Defined in a similar manner.
B. Broker (NCOIL)	
NAIC Viatical Settlements Model Act	Defines "viatical settlement broker" in Section 2M in a similar manner as the definition of "broker."
NCOIL Life Settlements Model Act	"Broker" means a person who, on behalf of an owner and for a fee, commission or other valuable consideration, offers or attempts to negotiate life settlement contracts between an owner and providers. A broker only represents the owner and owes a fiduciary duty to act according to the owner's instructions and in the best interest of the owner, notwithstanding the manner in which the broker is compensated. "Broker" does not include an attorney, certified public accountant or financial planner retained in the type of practice customarily performed in their capacity to represent the owner whose compensation is not paid directly or indirectly by the provider or any other person, except the owner.

B. Business of viatical settlements (NAIC)/C. Business of life settlements (NCOIL)	
NAIC Viatical Settlements Model Act	"Business of viatical settlements" means an activity involved in, but not limited to, the offering, soliciting, negotiating, procuring, effectuating, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, hypothecating or in any other manner, acquiring an interest in a life insurance policy by means of a viatical settlement contract.
NCOIL Life Settlements Model Act	Defined in a similar manner as an activity involved in, but not limited to, offering to enter into, soliciting, negotiating, procuring, effectuating, monitoring, or tracking, of life settlement contracts.
C. Chronically ill (NAIC)/D. Chronically ill (NCOIL)	
NAIC Viatical Settlements Model Act	"Chronically ill" means: (1) being unable to perform at least two activities of daily living (i.e., eating, toileting, transferring, bathing, dressing or continence); (2) requiring substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment; or (3) having a level of disability similar to that described in paragraph (1) as determined by the Secretary of Health and Human Services.
NCOIL Life Settlements Model Act	Defined in a similar manner.
D. Commissioner (NAIC)/E. Commissioner (NCOIL)	
NAIC Viatical Settlements Model Act	"Commissioner" means the insurance commissioner of this state. Drafting note states use the title of the chief insurance regulatory official wherever the term "commissioner" appears.
NCOIL Life Settlements Model Act	Defined in a similar manner.
E. Financing entity (NAIC)/F. Financing entity (NCOIL)	
NAIC Viatical Settlements Model Act	"Financing entity" means an 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 that is the subject of a viatical settlement contract, but: (a) whose principal activity related to the transaction is providing funds to effect the viatical settlement or purchase of one or more viaticated policies; and (b) who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of viatical settlement contracts. "Financing entity" does not include a non-accredited investor or a viatical settlement purchaser.
NCOIL Life Settlements Model Act	Defined in a similar manner.

G. Financing transaction (NCOIL)	
NAIC Viatical Settlements Model Act	No similar definition.
NCOIL Life Settlements Model Act	"Financing transaction" means a transaction in which a licensed provider obtains financing from a financing entity including, without limitation, any secured or unsecured financing, any securitization transaction, or any securities offering which either is registered or exempt from registration under federal and state securities law.
F. Fraudulent viatical settlement act (NAIC)/H. Fraudulent life settlement act (NCOIL)	
NAIC Viatical Settlements Model Act	"Fraudulent viatical settlement act" includes: (1) acts or omissions committed by any person who, knowingly or with intent to defraud, for the purpose of depriving another of property or for pecuniary gain, commits, or permits its employees or its agents to engage in acts as specified; (2) in the furtherance of a fraud or to prevent the detection of a fraud, any person who commits or permits its employees or its agents to commit or permit certain enumerated acts as specified; (3) embezzlement, theft, misappropriation or conversion of monies, funds, premiums, credits or other property of a viatical settlement provider, insurer, viator, insurance policy owner or any other person engaged in the business of viatical settlements or insurance; (4) recklessly entering into, negotiating, brokering, otherwise dealing 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 person or the persons intended to defraud the policy's issuer, the viatical settlement provider or the viator; (5) facilitating the change of state of ownership of a policy or certificate or the state of residency of a viator to a state or jurisdiction that does not have a law similar to this Act for the express purpose of evading or avoiding the provisions of this Act; or (6) attempting to commit, assisting, aiding or abetting in the commissioner of, or conspiracy to commit the acts or omissions specified in this subsection.
NCOIL Life Settlements Model Act	Defined in a similar manner except NCOIL definition does not include the specific provisions in paragraphs (4) and (5). Also, the NCOIL definition includes an act to enter into any practice or plan which involves STOLI.
G. Life insurance producer (NAIC)/K. Life insurance producer (NCOIL)	
NAIC Viatical Settlements Model Act	"Life insurance producer" means any person licensed in this state as a resident or nonresident insurance producer who has received qualification or authority for life insurance coverage or a life line of coverage pursuant to [insert reference to applicable producer licensing statute, with specific reference to a life insurance or equivalent line of authority].
NCOIL Life Settlements Model Act	Defined in a similar manner.

I. Insured (NCOIL)	
NAIC Viatical Settlements Model Act	No similar definition. Defines the term "viator" in Section 2T.
NCOIL Life Settlements Model Act	"Insured" means the person covered under the policy being considered for sale in a life settlement contract.
J. Life expectancy (NCOIL)	
NAIC Viatical Settlements Model Act	No similar definition.
NCOIL Life Settlements Model Act	"Life expectancy" means the arithmetic mean of the number of months the insured under the life insurance policy to be settled can be expected to live as determined by a life expectancy company considering medical records and appropriate experiential data.
L. Life settlement contract (NCOIL)	
NAIC Viatical Settlements Model Act	Defines the term "viatical settlement contract" in Section 2N, which is defined similarly in some aspects to the definition of "life settlement contract," but not in others. It does not include specific language found in the NCOIL definition that includes 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 within the definition of "life settlement contract."

NCOIL Life Settlements Model Act	"Life settlement contract" means a written agreement entered into between a provider and an owner, establishing the terms under which compensation or any thing of value will be paid, which compensation or thing of value is less than the expected death benefit of the insurance policy or certificate, in return for the owner's assignment, transfer, sale, devise or bequest of the death benefit or any portion of an insurance policy or certificate of insurance for compensation, provided, however, that the minimum value for a life settlement contract shall be greater than a cash surrender value or accelerated death benefit available at the time of an application for a life settlement contract. "Life settlement contract" also includes 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. "Life settlement contract" also includes: (a) a written agreement for a loan or other lending transaction, secured primarily by an individual or group life insurance policy; or (b) a premium finance loan made for a policy on or before the date of issuance of the policy where: (i) the loan proceeds are not used solely to pay premiums for the policy and any costs or expenses incurred by the lender or the borrower in connection with the financing; or (ii) the owner receives on the date of the premium finance loan guarantee of the future life settlement value of the policy; or (iii) the owner 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. "Life 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) a premium finance loan, as defined herein, 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; (c) a collateral assignment of a life insurance policy by an owner; (d) a loan made by a lender that does not violate [insert reference to state's premium finance law], provided such loan is not described in Paragraph (1) above, and is not otherwise within the definition of life settlement contract; (e) 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; (f) 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; (g) a bona fide business succession planning arrangement: (i) between one or more shareholders in a corporation or between a corporation and one or more of its shareholders or one or more trust established by its shareholders; (ii) between one or more partners in a partnership or between a partnership and one or more of its partners or one or more trust established by its partners; or (iii) 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 trust established by its members; (h) 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 (i) any other contract, transaction or arrangement from the definition of life settlement contract that the commissioner determines is not of the type intended to be regulated by the Act.
M. Net death benefit (NCOIL)	
NAIC Viatical Settlements Model Act	No similar definition.

NCOIL Life Settlements Model Act	"Net death benefit" means the amount of the life insurance policy or certificate to be settled less any outstanding debts or liens.
N. Owner (NCOIL)	
NAIC Viatical Settlements Model Act	Defines the term "viator" in Section 2T, which is defined similarly to the definition of "owner".
NCOIL Life Settlements Model Act	"Owner" means the owner of a life insurance policy or a certificate holder under a group policy, with or without a terminal illness, who enters or seeks to enter into a life settlement contract. For purposes of this article, an owner shall not be limited to an owner of a life insurance policy or certificate holder under a group policy that insures the life of an individual with a terminal or chronic illness or condition except where specifically addressed. "Owner" does not include: (1) any provider or other licensee under this Act; (2) a qualified institutional buyer as defined in Rule 144A of the federal Securities Act of 1933, as amended; (3) a financing entity; (4) a special purpose entity; or (5) a related provider trust.
O. Patient identifying information (NCOIL)	
NAIC Viatical Settlements Model Act	No similar definition.
NCOIL Life Settlements Model Act	"Patient identifying information" means an insured's address, telephone number, facsimile number, electronic mail address, photograph or likeness, employer, employment status, social security number, or any other information that is likely to lead to the identification of the insured.
H. Person (NAIC)/R. Person (NCOIL)	
NAIC Viatical Settlements Model Act	"Person" means a natural person or a legal entity, including, without limitation, an individual, partnership, limited liability company, association, trust, or corporation.
NCOIL Life Settlements Model Act	Defined in a similar manner.
I. Policy (NAIC)/P. Policy (NCOIL)	
NAIC Viatical Settlements Model Act	"Policy" means an individual or group policy, group certificate, contract or arrangement of life insurance owned by a resident of this state, regardless of whether delivered or issued for delivery in this state.

NCOIL Life Settlements Model Act	Defined in a similar manner.
Q. Premium finance loan (NCOIL)	
NAIC Viatical Settlements Model Act	No similar definition.
NCOIL Life Settlements Model Act	"Premium finance loan" is a loan made primarily for the purposes of making premium payments on a life insurance policy, which loan is secured by an interest in such life insurance policy.
S. Provider (NCOIL)	
NAIC Viatical Settlements Model Act	Defines the term "viatical settlement provider" in Section 2P, which is defined similarly to "provider".
NCOIL Life Settlements Model Act	"Provider" means a person, other than an owner, who enters into or effectuates a life settlement contract with an owner. "Provider" does not include: (1) a bank, savings bank, savings and loan association, credit union; (2) a licensed lending institution or creditor or secured party pursuant to a premium finance loan agreement which takes an assignment of a life insurance policy or certificate issued pursuant to a group life insurance policy as collateral for a loan; (3) the insurer of a life insurance policy or rider to the extent of providing accelerated death benefits or riders under [refer to law or regulation implementing or accelerated death benefits provision] or cash surrender value; (4) any natural person who enters into or effectuates no more than one agreement in a calendar year for the transfer of a life insurance policy or certificate issued pursuant to a group life insurance policy, for compensation or anything of value less than the expected death benefit payable under the policy; (5) a purchaser; (6) any authorized or eligible insurer that provides stop loss coverage to a provider, purchaser, financing entity, special purpose entity, or related provider trust; (7) a financing entity; (8) a special purpose entity; (9) a related provider trust; (10) a broker; or (11) an accredited investor or qualified institutional buyer as defined in respectively in regulation D, rule 501 or rule 144A of the federal securities act of 1933, as amended, who purchases a life settlement policy from a provider.
T. Purchased policy (NCOIL)	
NAIC Viatical Settlements Model Act	Defines the term "viaticated policy" in Section 2S, which is defined similarly to "purchased policy" and to "settled policy" in Section 2W in the NCOIL model.

NCOIL Life Settlements Model Act	"Purchased policy" means a policy or group certificate that has been acquired by a provider pursuant to a life settlement contract.
U. Purchaser (NCOIL)	
NAIC Viatical Settlements Model Act	Defines the term "viatical settlement purchaser" in Section 2R, which is defined, in some aspects, similarly to "purchaser." The definition of "viatical settlement purchaser" in Section 2R specifies that it does not include: (a) licensee under this Act; (b) an accredited investor or qualified institutional buyer as defined, respectively, in Rule 501(a) or Rule 144A promulgated under the Federal Securities Act of 1933, as amended; (c) a financing entity; (d) a special purpose entity; or (e) a related provider trust.
NCOIL Life Settlements Model Act	"Purchaser" means a person who pays compensation or anything of value as consideration for a beneficial interest in a trust which is vested with, or for the assignment, transfer or sale of, an ownership or other interest in a life insurance policy or a certificate issued pursuant to a group life insurance policy which has been the subject of a life settlement contract.
J. Related provider trust (NAIC)/V. Related provider trust (NCOIL)	
NAIC Viatical Settlements Model Act	"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 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.
NCOIL Life Settlements Model Act	Defined in a similar manner.
W. Settled policy (NCOIL)	
NAIC Viatical Settlements Model Act	Defines the term "viaticated policy" in Section 2S, which is defined similarly to "settled policy" and to "purchased policy" in Section 2T in the NCOIL model.

NCOIL Life Settlements Model Act	"Settled policy" means a life insurance policy or certificate that has been acquired by a provider pursuant to a life settlement contract.
K. Special purpose entity (NAIC)/X. Special purpose entity (NCOIL)	
NAIC Viatical Settlements Model Act	"Special purpose entity" means a corporation, partnership, trust, limited liability company or other similar entity formed solely to provide either directly or indirectly access to institutional capital markets: (1) for a financing entity or licensed viatical provider; or (2) (i) in connection with a transaction in which the securities in the special purpose entity are acquired by the viator or by "qualified institutional buyers" as defined in Rule 144 promulgated under the Securities Act of 1933, as amended; or (ii) the securities pay a fixed rate of return commensurate with established asset-backed institutional capital markets.
NCOIL Life Settlements Model Act	Defined in a similar manner.
Y. Stranger-originated life insurance or STOLI (NCOIL)	
NAIC Viatical Settlements Model Act	No similar definition.
NCOIL Life Settlements Model Act	"Stranger-originated life insurance" or "STOLI" is a practice or plan 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. STOLI 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 himself or itself, and where, at the time of inception, there is an arrangement or agreement, whether verbal or written, to directly or indirectly transfer the ownership of the policy and/or the policy benefits to a third party. Trusts, that are created to give the appearance of insurable interest, and are used to initiate policies for investors, violate insurable interest laws and the prohibition against wagering on life. STOLI arrangements do not include those practices set forth in Section 2L(2) of this Act.
L. Terminally ill (NAIC)/Z. Terminally ill (NCOIL)	
NAIC Viatical Settlements Model Act	"Terminally ill" means having an illness or sickness that an reasonably be expected to result in death in twenty-four (24) months or less.
NCOIL Life Settlements Model Act	Defined in a similar manner.

M. Viatical settlement broker (NAIC)	
NAIC Viatical Settlements Model Act	"Viatical settlement broker" means a person, including a life insurance producer as provided for in Section 3 of this Act, who working exclusively 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 or one or more viatical settlement brokers. Notwithstanding the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the viator, and not the insurer or the viatical settlement provider, 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.
NCOIL Life Settlements Model Act	Defines the term "broker" in Section 2B, which is defined similarly to "viatical settlement broker."

N. Viatical settlement contract (NAIC)	
NAIC Viatical Settlements Model Act	(1) "Viatical settlement contract" means a written agreement between a viator and a viatical settlement provider or any affiliate of the 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. (2) "Viatical settlement contract" includes a premium finance loan made for a life insurance policy by a lender to viator on, or before or after the date of issuance of the policy where: (a) the viator or the insured receives on the date of the premium finance loan a guarantee of a future viatical settlement value of the policy; or (b) the viator or the insured agrees on the date of the premium finance loan to sell the policy or any portion of its death benefit on any date following the issuance of the policy. (3) "Viatical settlement contract" does not include: (a) a policy loan or accelerated death benefit made by the insurer pursuant to the policy's terms; (b) loan proceeds that are used solely to pay: (i) premiums for the policy; (ii) the costs of the loan, including, without limitation, interest, arrangement fees, utilization fees and similar fees, closing costs, legal fees and expenses, trustee fees and expenses, and third party collateral provider fees and expenses, including fees payable to letter of credit issuers; (c) a loan made by a bank or other licensed 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 the default itself is not pursuant to an agreement or understanding with any other person for the purpose of evading regulation under this Act; (d) a loan made by a lender that does not violate [insert reference to state's insurance premium finance law], provided that the premium finance loan is not described in Paragraph (2) of this subsection; (e) an agreement where all parties (x) are closely related to the insured by blood or law or (y) 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; (f) any designation, consent or agreement by the 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; (g) a bona fide business succession planning arrangement: (i) between one or more shareholders in a corporation or between a corporation and one or more of its shareholders or one or more trust established by its shareholders; (ii) between one or more partners in a partnership or between a partnership and one or more of its partners or one or more trust established by its partners; or (iii) 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 trust established by its members; (h) 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 (i) 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 the Act.
NCOIL Life Settlements Model Act	Defines the term "life settlement contract" in Section 2L, which is defined similarly in some aspects to the definition of "viatical settlement contract," but not in others.

O. Viatical settlement investment agent (NAIC)	
NAIC Viatical Settlements Model Act	An optional definition. "Viatical settlement investment agent" means a person who is an appointed or contracted agent of a licensed viatical settlement provider who solicits or arranges the funding for the purchase of a viatical settlement by a viatical settlement purchaser and who is acting on behalf of a viatical settlement provider. (1) A viatical settlement investment agent shall not have any contact directly or indirectly with the viator or insured or have knowledge of the identity of the viator or insured. (2) A viatical settlement investment agent is deemed to represent the viatical settlement provider of whom the viatical settlement investment agent is an appointed or contract agent.
NCOIL Life Settlements Model Act	No similar definition.
P. Viatical settlement provider (NAIC)	
NAIC Viatical Settlements Model Act	(1) "Viatical settlement provider" means a person, other than a viator, who enters into or effectuates a viatical settlement contract with a viator resident of this state. (2) "Viatical settlement provider" does not include: (a) a bank, savings bank, savings and loan association, credit union or other licensed lending institution that takes an assignment of a life insurance policy solely as collateral for a loan; (b) a premium financing company making premium finance loans and exempted by the commissioner from the licensing requirement under the premium finance laws that takes an assignment of a life insurance policy solely as collateral for a loan; (c) the issuer of the life insurance policy; (d) an authorized or eligible insurer that provides stop loss coverage or financial guaranty insurance to a viatical settlement provider, purchaser, financing entity, special purpose entity or related provider trust; (e) a natural person who enters into or effectuates no more than one agreement in a calendar year for the transfer of life insurance polices for any value less than the expected death benefit; (f) a financing entity; (g) a special purpose entity; (h) a related provider trust; (i) a viatical settlement purchaser; or (j) any other person that the commissioner determines is not the type of person intended to be covered by the definition of viatical settlement provider.
NCOIL Life Settlements Model Act	Defines the term "provider" in Section 2S, which is defined, in some aspects, similarly to "viatical settlement provider".
Q. Viatical settlement purchase agreement (NAIC)	
NAIC Viatical Settlements Model Act	Optional definition. "Viatical settlement purchase agreement" means a contract or agreement, entered into by a viatical settlement purchaser, to which the viator is not a party, to purchase a life insurance policy or an interest in a life insurance policy that is entered into for the purpose of deriving an economic benefit.
NCOIL Life Settlements Model Act	No similar definition.

R. Viatical settlement purchaser (NAIC)	
NAIC Viatical Settlements Model Act	(1) "Viatical settlement purchaser" means a person who provides 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. (2) "Viatical settlement purchaser" does not include: (a) licensee under this Act; (b) an accredited investor or qualified institutional buyer as defined, respectively, in Rule 501(a) or Rule 144A promulgated under the Federal Securities Act of 1933, as amended; (c) a financing entity; (d) a special purpose entity; or (e) a related provider trust.
NCOIL Life Settlements Model Act	Defines the term "purchaser" in Section 2U, which is defined, in some aspects, similarly to "viatical settlement purchaser".
S. Viaticated policy (NAIC)	
NAIC Viatical Settlements Model Act	"Viaticated policy" means a life insurance policy or certificate that has been acquired by a viatical settlement provider pursuant to a viatical settlement contract.
NCOIL Life Settlements Model Act	Defines the terms "purchased policy" in Section 2T and "settled policy" in Section 2W. Both are defined in a similar manner as "viaticated policy."
T. Viator (NAIC)	
NAIC Viatical Settlements Model Act	"Viator" means the owner of a life insurance policy or a certificate holder under a group policy who resides in this state and who enters or seeks to enter into a viatical settlement contract. For purposes of this Act, a viator shall not be limited to an owner of a life insurance policy or certificate holder under a group policy insuring the life of an individual with a terminal or chronic illness or condition except where specifically addressed. If there is more than one viator on a single policy and the viators are residents of different states, the transaction shall be governed by the law of the state in which the viator having the largest percentage ownership resides or, if the viators hold equal ownership, the state of residence of one viator agreed upon in writing by all the viators. "Viator" does not include: (1) any licensee under this Act, including a life insurance producer acting as a viatical settlement broker pursuant to this Act; (2) a qualified institutional buyer as defined, respectively, in Rule 144A of the federal Securities Act of 1933, as amended; (3) a financing entity; (4) a special purpose entity; or (5) a related provider trust.
NCOIL Life Settlements Model Act	Defines the term "owner" in Section 2N, which is similar to the definition of "viator".

Section 3. License and Bond Requirements (NAIC)/Section 3. Licensing Requirements (NCOIL)	
NAIC Viatical Settlements Model Act	Every person operating as a settlement broker or provider shall obtain a license from the insurance commissioner of the state of residence of the viator. Every person operating as a settlement investment agent shall obtain a license from the insurance commissioner of the state of residence of the settlement purchaser. The licenses must be renewed annually. Insurance producers licensed at least one year and attorneys, certified public accountants and accredited financial planners are permitted to operate as settlement brokers without having to obtain a license. Insurers are held harmless from errors or omissions of viatical settlement brokers and providers. The commissioner shall investigate applicants for licenses for provider operational plans; competence and trustworthiness; reputation, experience and training; financial responsibility; standing in the state of the licensee's domicile; and satisfaction of anti-fraud plans. Financial responsibility shall be evidenced through either a surety bond executed and issued by an insurer authorized to issue surety bonds in the state or a deposit of cash, certificates of deposit or securities or any combination thereof in the amount of $250,000. Any surety bond issued shall be in the favor of the state and shall specifically authorize recovery by the commissioner on behalf of any person in the state who sustained damages as the result of erroneous acts, failure to act, conviction of fraud or conviction of unfair practices by the viatical settlement provider or broker. The commissioner shall accept, as evidence of financial responsibility, proof that financial instruments in accordance with the model act's requirements have been filed in one state where the applicant is licensed as a viatical settlement provider or broker. Viatical settlement brokers shall complete on a biennial basis 15 hours of training. However, a life insurance producer who is operating as a viatical settlement broker is not subject to this requirement.
NCOIL Life Settlements Model Act	Similar provisions. However, the NCOIL model act does not include a bond requirement as evidence of financial responsibility.

Section 4. License Revocation and Denial (NAIC)/Section 4. Licensing Suspension, Revocation or Refusal to Renew (NCOIL)	
NAIC Viatical Settlements Model Act	The commissioner may refuse to issue, suspend, revoke or refuse to renew the license of a viatical settlement provider or broker if the commissioner finds: (1) material misrepresentation in the application; (2) the licensee or any officer, partner, member or key management personnel has been convicted of fraudulent or dishonest practices, is subject to a final administrative action or is otherwise shown to be untrustworthy or incompetent; (3) the viatical settlement provider demonstrates a pattern of unreasonable payments to viators; (4) the licensee or any officer, partner, member or key management personnel has been found guilty of, or has pleaded guilty or *nolo contendere* to, any felony, or to a misdemeanor involving fraud or moral turpitude; (5) the viatical settlement provider has entered into any viatical settlement contract that has not been approved pursuant to this Act; (6) the viatical settlement provider has failed to honor contractual obligations; (7) the licensee no longer meets the requirements of initial licensure; (8) the viatical settlement provider has assigned, transferred or pledged a viaticated policy to a person other than a viatical settlement provider licensed in this state, viatical settlement purchaser, an accredited investor or qualified institutional buyer, financing entity, special purpose entity, or related provider trust; or (9) the licensee or any officer, partner, member or key management personnel has violated any provision of this Act. The commissioner may suspend, revoke or refuse to renew the license of a viatical settlement broker or a life insurance producer operating as a viatical settlement broker if the commissioner finds that the viatical settlement broker or life insurance producer has violated the provisions of this Act or has otherwise engaged in bad faith conduct with one or more viators.
NCOIL Life Settlements Model Act	Similar provisions. However, the NCOIL model act provides for license denial, revocation or nonrenewal if the provider demonstrates a pattern of unreasonably withholding payments to policy owners. The NAIC model act provides for the same action if a viatical settlement provider demonstrates a pattern of unreasonable payments to viators.
Section 5. Approval of Viatical Settlement Contracts and Viatical Settlement Disclosure Statements (NAIC)/Section 5. Contract Requirements (NCOIL)	
NAIC Viatical Settlements Model Act	Prior approval of the commissioner is required for all viatical settlement contract and disclosure statement forms. The forms must meet the requirements of Sections 8, 10, 13 and 14B of the Act. At the commissioner's discretion, the commissioner may require the submission of advertising material.
NCOIL Life Settlements Model Act	Similar provisions for contracts and disclosure statement forms. The NCOIL model act also includes a provision prohibiting an insurer from requiring an owner, insured, provider or broker to sign any form, disclosure, consent, waiver or acknowledgement as a condition of responding to a request for verification of coverage or in connection with the transfer of a policy pursuant to a life settlement contract unless it has been expressly approved by the commissioner for use in connection with life settlement contracts in the state.

Section 6. Reporting Requirements and Privacy (NAIC)/Section 6. Reporting Requirements and Privacy (NCOIL)	
NAIC Viatical Settlements Model Act	Viatical settlement providers must file an annual report with the commissioner on or before March 1 containing such information as the commissioner may prescribe by regulation. Individual transaction data or data that could compromise the privacy of personal, financial or medical information of the viator or insured shall be filed on a confidential basis. Except as otherwise allowed or required by law, a viatical settlement provider, viatical settlement broker, viatical settlement investment agent, 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: (1) is necessary to accomplish a transaction regulated by the Act and prior written consent of the viator and insured has been obtained; (2) is provided in response to an investigation or examination by the commissioner or any other governmental officer or agency or pursuant to the requirements of Section 14C; (3) is a term of or a condition to the transfer of a policy by one viatical settlement provider to another; (4) is 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; (5) is necessary to allow the viatical settlement provider or broker or their representatives to make authorized contacts with the viator to determine his or her health status; or (6) is required to purchase stop loss coverage or financial guaranty insurance.
NCOIL Life Settlements Model Act	Similar provisions. However, the NCOIL model act includes some differences. For any policy settled within 5 years of policy issuance, each provider must file with the commissioner on or before March 1 of each year a statement containing the information prescribed by the commissioner by regulation. At a minimum, the annual statement must specify the total number, aggregate face amount and life settlement proceeds of policies settled during the immediately preceding calendar year, together with a breakdown of the information by policy issue year. The statement shall also include the names of the insurance companies whose policies have been settled and the brokers that have settled such policies. Any provider that willfully fails to file an annual statement or willfully fails to reply within 30 days to a written inquiry by the commissioner concerning the annual statement, shall, in addition to other penalties, be subject to a penalty of up to $250 per day of delay not exceeding $25,000 in the aggregate for each such failure.

Section 7. Examination or Investigations (NAIC)/Section 7. Examination (NCOIL)	
NAIC Viatical Settlements Model Act	The commissioner may examine a licensee and investigate persons engaged in the business of viatical settlements as often as the commissioner in his or her discretion deems appropriate. Any findings of fact and conclusions reached pursuant to an examination become *prima facie* evidence in any subsequent legal or regulatory action. Licensees shall retain for five years copies of records and documents related to Act requirements, including proposed and executed contracts, purchase agreements, underwriting documents, forms, applications, checks, and documents relating to funds transferred, deposited or released. Documents retained by persons beyond the five years must be produced upon request of the commissioner. Licensee examinations shall be warranted and defined in scope. They shall observe the guidance of the NAIC *Examiners Handbook* or other appropriate guidelines. Licensees shall provide to examiners timely, convenient and free access to all materials relating to its assets, business and affairs. Refusal to cooperate in an examination is grounds for suspension or non-renewal of license. The commissioner may issue subpoenas, administer oaths and examine persons under oath, and petition the judiciary to compel appearance, testimony and production of evidence. Failure to comply with a relevant court order is punishable as contempt of court. The commissioner may retain professional examination assistance as needed, the reasonable cost of which shall be borne by the licensee. Examiners shall file with the commissioner a verified report within 60 days following the completion of the examination. The commissioner shall transmit the report to the licensee permitting a written submission or rebuttal within 30 days. 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. Examination information is not subject to subpoena or discovery or admissible in evidence in a private civil action if it is obtained in the course of investigating the financial condition or market conduct of a licensee. The commissioner may 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. Regulatory, examination and NAIC personnel are not permitted to testify in private civil action concerning materials obtained or reviewed during examination. However, such materials or reports may be disclosed to other state and regulatory officials agreeing to protect confidentiality requirements of the Act. An examiner may not have a conflict of interest with, or interest in, the licensee subject to examination. However, this does not automatically preclude an examiner from being a viator, an insured in a viaticated insurance policy or a beneficiary in an insurance policy that is proposed to be viaticated. The cost of examinations may be determined and assessed pursuant to law. No liability or cause of action arises from the conduct of examinations performed in good faith pursuant to the Act. The commissioner may investigate suspected fraudulent viatical settlement acts and persons engaged in the business of viatical settlements.
NCOIL Life Settlements Model Act	Similar provisions.

Section 8. Advertising (NCOIL)	
NAIC Viatical Settlements Model Act	See Section 13 of the NAIC model act.
NCOIL Life Settlements Model Act	A broker, or provider licensed under the Act, may conduct or participate in advertisements in the state. Such advertisements shall comply with all advertising and marketing laws or rules and regulations promulgated by the commissioner that are applicable to life insurers or to brokers, and providers licensed under the Act. The advertisements must be accurate, truthful and not misleading in fact or by implication. No person or trust shall: (1) directly or indirectly, market, advertise, solicit or otherwise promote the purchase of a policy for the sole purpose of or with an emphasis on settling the policy; or (2) use the words "free", "no cost" or words of similar import in the marketing, advertising, soliciting or otherwise promoting of the purchase of a policy.

Section 8. Disclosure to Viator (NAIC)/Section 9. Disclosure to Owners (NCOIL)	
NAIC Viatical Settlements Model Act	A viatical settlement provider or broker must disclose ten varieties of information to a viator upon his or her application for a policy settlement. These disclosures are intended to alert the viator to obligations that might arise from the settlement, as well as a change in status of rights and protections that might occur from the settlement. These disclosures must occur by the time the settlement application is signed by all parties. A disclosure must be provided that the viator has the right to rescind the settlement contract before the earlier of 60 days from its execution or 30 days of receipt of the viatical settlement proceeds. The rescission is effective only if both notice of the rescission is given and the viator repays all of the proceeds and any premiums, loans and interest paid on account of the viatical settlement within the rescission period. The disclosures include notice that proceeds shall be sent to the viator within three business days after the provider has received written acknowledgment from the insurer that the policy interest has been transferred and a beneficiary designated. The viator must also learn that, following the execution of the settlement contract, the viator may be contacted by a settlement provider licensed in the state of the viator's residence -- or by a provider's authorized representative – as often as once very three months if the insured has a life expectancy of more than one year from settlement, or once every month if the insured's life expectancy is less than a year. The disclosure to the viator shall include distribution of a brochure describing the process of viatical settlements. The NAIC's form for the brochure shall be used unless another form is developed and approved by the commissioner. A viatical settlement provider shall also disclose six additional types of information to the viator no later than the viatical settlement contract is signed by all parties. These disclosures shall be conspicuously displayed in the contract or in a separate document and provide the following information: (1) the affiliation, if any, between the viatical settlement provider and the issuer of the policy to be viaticated; (2) the name, business address and telephone number of the viatical settlement provider; (3) any affiliations or contractual arrangements between the viatical settlement provider and the viatical settlement purchaser; (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; (5) state the dollar amount of the current death benefit payable to the viatical settlement provider under the policy or certificate; and (6) state whether the funds will be escrowed with an independent third party. A viatical settlement broker shall also separately disclose to the viator an additional five types of information in writing no later than the viatical settlement contract is signed by all parties. These disclosures establish *broker* contact information and affiliations between the broker and others connected with the settlement. The broker must also provide a full, complete and accurate description of all offers, counter-offers, acceptances and rejections relating to the proposed viatical settlement contract. Also, they include disclosure of the amount and method of calculating the broker's compensation and, where any portion of the settlement compensation is taken from a proposed settlement offer, the total amount of the offer and the percentage of the offer comprised by the broker's compensation. The insured shall be notified in writing of any transfer of ownership or change in beneficiary designation made by a settlement provider with regard to the settled policy within 20 days. This is to inform the insured who is literally holding a contract on his or her life. Numerous viatical settlement provider disclosure responsibilities toward viatical settlement purchasers not otherwise provided in state or federal law also are established. These disclosures are intended to improve consumer protections for settlement investors. Invalidation of a settlement purchase agreement by the purchaser within three days of receiving the disclosures is permitted.

NCOIL Life Settlements Model Act	Similar provisions. Except some of the time frames are different such as the time frame for rescinding a life settlement contract. Also, there is a required disclosure regarding a requirement that providers and brokers print separate signed fraud warnings on their applications and life settlement contracts. There is also a required disclosure regarding the possibility that a change in ownership could limit the insured's ability in the future to purchase future life insurance.
Section 9. Disclosure to Insurer (NAIC)/Section 10. Disclosure to Insurer (NCOIL)	
NAIC Viatical Settlements Model Act	Prior to initiation of a plan, transaction or series of transactions, a viatical settlement provider or broker must fully disclose to an insurer a plan, transaction or series of transactions, to which the viatical settlement broker or provider is a party, to originate, renew, continue or finance a life insurance policy with the insurer for the purpose of engaging in the business of viatical settlements at anytime prior to, or during the first 5 years after, issuance of the policy.
NCOIL Life Settlements Model Act	Provisions are not similar. Without limiting the ability of an insurer from assessing the insurability of the applicant and determining whether to issue a policy, and in addition to other questions an insurer may ask an applicant, an insurer may inquire in the application 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. If, as described in Section 2L, 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 policy and loan, the application shall be rejected as a violation of Section 13 of the Act. If the financing does not violate Section 13 in this manner, the insurer: (a) may disclose to the applicant and the insured at application or at the time of an amendment to the policy, but no later than the delivery of the policy, certain statements regarding the potential ramifications of such a loan arrangement where the policy is used as collateral and the policy does change ownership at some point in the future to satisfy the loan; and (b) make require certain certifications from the applicant and/or the insured such as: "I have not entered into any agreement or arrangement providing for the future sale of this life insurance policy; 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 the borrower has an insurable interest in the insured."

Section 10. General Rules (NAIC)/Section 11. General Rules (NCOIL)	
NAIC Viatical Settlements Model Act	A viatical settlement provider entering into a viatical settlement contract must first obtain: (a) if the viator is the insured, a written statement from a licensed physician that the viator is of sound mind and free of undue influence in entering into a settlement; and (b) a document in which the insured consents to release of medical and other personal information. Within 20 days after the viator executes all of the documents necessary to transfer any rights under the policy or within 20 days of entering into any agreement to viaticate the policy, the viatical settlement provider shall give written notice to the insurer that the policy has or will become a viaticated policy. Insurer verification of insurance also is provided. The insurer must indicate whether it intends to investigate insurance contract validity or the possibility of fraud within 30 days. 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 he or she has a full and complete understanding of the benefits of the life insurance policy, acknowledges that he or she 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. The viator may rescind the settlement contract within 60 days from execution or 30 days of receipt of proceeds by the viator. This right of rescission is conditional on certain actions, including timely repayment of viatical settlement proceeds received. Death of the insured during the rescission period is deemed to rescind the settlement contract, subject to timely repayment of any proceeds received, among other requirements. Viatical settlement purchasers are also provided rights to rescind a viatical settlement investment contract within three days of receiving mandated disclosures. Time frames for fund transfers and transaction responsibilities of viatical settlement providers, viators, escrow agents, related provider trusts, are established. Failure to pay a viator funds due in timely fashion permits a viator to invalidate the settlement. A viatical settlement provider or broker licensed in the state of the viator's residence -- or a broker's or provider's representative – is authorized to contact the viator every three months to ascertain his or her health status if the insured has a life expectancy of more than one year from settlement, or every month if the life expectancy is less than one year. Viatical settlement providers and brokers are responsible for the actions of their authorized representatives.

NCOIL Life Settlements Model Act	The NCOIL model act includes similar provisions. However, the NCOIL model act includes additional provisions such as a provision specifically prohibiting an insurer from unreasonably delaying effecting the change of ownership or beneficiary with any viatical settlement contract lawfully entered into in the state or with a resident of the state. Also, the NCOIL model act provides for a shorter rescission period. In addition, this section in the NCOIL model includes provisions similar to the provisions included in Section 11 of the NAIC model act. The NCOIL model act provides for a 2 year prohibition on settling a policy unless the owner certifies to the provider that: (1) the policy was issued upon the owner's exercise of conversion rights; or (2) the owner submits independent evidence that one or more of the following conditions have been met within the 2-year period: (a) chronic or terminal illness; (b) disposal of ownership interests in a closely held corporation; (c) death of the spouse; (d) divorce; (e) retirement; (f) physical or mental disability; or (g) personal bankruptcy or insolvency.
Section 11. Prohibited Practices (NAIC)/Section 13. Prohibited Practices (NCOIL)	
NAIC Viatical Settlements Model Act	It is a violation to enter into a viatical contract prior to policy application or for 5 years from its issuance. However, a viator can certify to a provider that certain conditions warrant policy settlement regardless of this prohibition. The Model Act in this section limits different transactions in one of four ways depending on their circumstances. It prohibits *absolutely* any person from entering into a viatical settlement contract prior to the application for or issuance of a policy. It allows the settlement of an insurance policy *at any time* for circumstances of personal hardship including: (1) chronic or terminal illness (i.e., genuine viatical settlements); (2) death of the spouse; (3) divorce; (4) retirement; (5) physical or mental disability; or (6) personal insolvency. It permits the settlement of insurance policies after *two years* if: (1) The policy owner posts cash or collateral for a loan against the policy or limits the loan to the net cash surrender value of the policy; (2) there is no agreement evidencing intent to settle the policy prior to two years from policy issuance; and (3) there has been no evaluation of the insured or the policy for settlement prior to two years from policy issuance. It permits the settlement of all other insurance policies *five years* after policy issuance because these policies do not satisfy any of the other provisions that would permit settlement prior to five years. Copies of the independent evidence required to establish the hardship permitting immediate settlement of a policy shall be sent to the insurer. If the settlement provider submits the required evidence and viator certification to the insurer, it is deemed to conclusively establish satisfaction of the requirements of this section. Upon receipt of a properly completed request for change of ownership or beneficiary of a policy, the insurer shall confirm within 30 days that the change has been effected or otherwise specify why the changes cannot be processed. An insurer shall not unreasonably delay such policy change or otherwise interfere with a lawful viatical settlement contract.

NCOIL Life Settlements Model Act	The provisions of this section do not mirror the NAIC model act. They are similar to the provisions in Section 12 of the NAIC model act. This section in the NCOIL model act also includes additional provisions not found in Section 12 of the NAIC model act, such as: (1) a provision prohibiting any person from issuing, soliciting, marketing or otherwise promoting the purchase of an insurance policy for the purpose of or with an emphasis on settling the policy; and (2) a provision prohibiting any person from entering into a premium finance agreement with any person or agency, or any person affiliated with such person or agency, pursuant to which such person shall receive any proceeds, fees or other consideration, directly or indirectly, from the policy or owner of the policy or any other person with respect to such policy that are in addition to the amounts required to pay the principal, interest and service charges related to policy premiums pursuant to the premium finance agreement or subsequent sale of such agreement; provided, further, that 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 to his or her estate if he or she is not living at the time of the determination of overpayment.
Section 12. Prohibited Practices and Conflicts of Interest (NAIC)	
NAIC Viatical Settlements Model Act	The section provides that it is a fraudulent viatical settlement act, with respect to any viatical settlement contract or insurance policy: (1) no viatical settlement broker knowingly shall solicit an offer from, effectuate a viatical settlement with or make a sale to any viatical settlement provider, viatical settlement purchaser, viatical settlement investment agent, financing entity or related provider trust that is controlling, controlled by, or under common control with such viatical settlement broker; or (2) no viatical settlement provider knowingly may enter into a viatical settlement contract with a viator, if, in connection with such contract, anything of value will be paid to a viatical settlement broker that is controlling, controlled by, or under common control with such viatical settlement provider or the viatical settlement purchaser, viatical settlement investment agent, financing entity or related provider trust that is involved in such viatical settlement contract. The commissioner may require by regulation that viatical settlement providers file all viatical settlement promotional, advertising and marketing materials prior to entering into a viatical settlement contact. Viatical settlement marketing materials expressly referencing that insurance is "free" are prohibited. Any marketing material reference that would cause a viator to reasonably believe insurance is free constitutes a violation under the Act. A life insurance producer, insurer, viatical settlement provider or broker or viatical settlement investment agent may not make any statement or representation to the applicant or policyholder in connection with the sale or financing of a life insurance policy in effect that the insurance is free or without cost to the policyholder for any period of time unless provided in the policy itself.
NCOIL Life Settlements Model Act	The NCOIL model act does not have a similar section. However, portions of Section 12 of the NAIC model are similar to provisions in Section 13 of the NCOIL model act.

Section 13. Advertising for Viatical Settlements [and Viatical Settlements Purchase Agreements] (NAIC)	
NAIC Viatical Settlements Model Act	The purpose of this section is to provide prospective viators and viatical settlement purchasers with clear and unambiguous statements in the advertisements of viatical settlements and to assure the clear, truthful and adequate disclosure of the benefits, risks, limitations and exclusions of any viatical settlement contract or viatical settlement purchase agreement bought or sold. This purpose is intended to be accomplished by the establishment of guidelines and standards of permissible and impermissible conduct in the advertising of viatical settlements to assure that product descriptions are presented in a manner that prevents unfair, deceptive or misleading advertising and is conducive to accurate presentation and description of viatical settlements through the advertising media and material used by viatical settlement licensees. The specific provisions in this section carry out these purposes.
NCOIL Life Settlements Model Act	See Section 8 of the NCOIL model act for specific advertising requirements.
Section 14. Fraud Prevention and Control (NAIC)/Section 14. Fraud Prevention and Control (NCOIL)	
NAIC Viatical Settlements Model Act	Fraudulent settlement acts, interference with the provisions of the model act, and participation of convicted felons in the business of viatical settlements are prohibited. Warnings must be included in viatical settlement contracts, applications and viatical investment contracts that the presentation of false information is a crime. Persons having knowledge or even reasonable suspicion that a fraudulent viatical settlement act has been or will be committed must report such information to the commissioner in a manner prescribed by the commissioner. In the absence of malice, a person furnishing such information is immune from civil liability or a cause of action if the information is provided to or received from: (1) the commissioner or the commissioner's employees, agents or representatives; (2) federal, state or local law enforcement or regulatory officials or their employees, agents or representatives; (3) a person involved in the prevention and detection of fraudulent viatical settlement acts or that person's agents, employees or representatives; (4) the NAIC, NASD, NASAA or their employees, agents or representatives, or other regulatory body overseeing life insurance, viatical settlements, securities or investment fraud; or (5) the life insurer that issued the policy covering the life of the insured. Furnished information is confidential and insulated from discovery or subpoena. Viatical settlement providers and brokers must have viatical settlement antifraud initiatives in place reasonably calculated to detect, prosecute and prevent fraudulent viatical settlement acts. This provision specifies what these antifraud initiatives must include. Antifraud plans submitted to the commissioner are considered privileged and confidential and are not be considered a public record or subject to discovery or subpoena in a civil or criminal action.
NCOIL Life Settlements Model Act	Similar provisions.

Section 15. Injunctions; Civil Remedies; Cease and Desist (NAIC)/Section 15. Injunctions; Civil Remedies; Cease and Desist (NCOIL)	
NAIC Viatical Settlements Model Act	Injunctive relief is provided for a violation of any provision of the Act or any regulation implementing the Act in addition to other penalties and enforcement authority. A person damaged by another violating the Act may bring a civil action against that person. A violation of the Act relating to settlement purchasers renders the purchase agreement voidable. The commissioner may issue a cease and desist order against a person violating the Act, any regulation or order adopted by the commissioner or any written agreement entered into with the commissioner. Civil penalties and restitution may be imposed upon a person violating the Act in addition to the penalties and other enforcement provisions of the Act. A person convicted of a violation of the Act constituting misdemeanor or felony theft shall pay restitution to persons aggrieved, in addition to a fine or imprisonment, but not in lieu of imprisonment. The enforcement provisions and penalties apply to viator only if the viator commits a fraudulent settlement act.
NCOIL Life Settlements Model Act	Similar provisions.
Section 16. Penalties (NCOIL)	
NAIC Viatical Settlements Model Act	No equivalent section.
NCOIL Life Settlements Model Act	It is a violation of the Act for any person, provider, broker or any other party related to the business of life settlements, to commit a fraudulent life settlement act. For criminal liability purposes, a person that commits a fraudulent life settlement act is guilty of committing insurance fraud and is subject to additional penalties under the state's law regarding insurance fraud. The commissioner is given authority to impose a civil penalty and the amount of the claim for each violation upon any person, including persons and their employees licensed under the Act, who has committed a fraudulent life settlement act or violated any other provision of the Act. The license of a person licensed under this Act that commits a fraudulent life settlement act shall be revoked for a specified period.
Section 16. Unfair Trade Practices (NAIC)/Section 17. Unfair Trade Practices (NCOIL)	
NAIC Viatical Settlements Model Act	Violation of any provision of the Act, including the commission of a fraudulent viatical settlement act, constitutes an unfair trade practice, as provided in a state's unfair trade practices act, subject to the penalties contained in that Act.
NCOIL Life Settlements Model Act	Similar provision.

Section 17. Authority to Promulgate Regulations (NAIC)/Section 12. Authority to Promulgate Regulations; Conflict of Laws (NCOIL)	
NAIC Viatical Settlements Model Act	The commissioner may: (1) promulgate regulations to implement the Act; (2) establish standards for evaluating reasonable viatical settlement contract payments to viators who are terminally or chronically ill; (3) establish licensing requirements, fees and standards for continued licensure of viatical settlement licensees; (4) require a bond or other mechanism for financial accountability for viatical settlement providers and brokers; and (5) adopt rules governing the relationship and responsibilities of all entities during the viatication of a life insurance policy or certificate.
NCOIL Life Settlements Model Act	Similar provisions. Provides authority for the commissioner to promulgate regulations to implement the provisions of the Act. Also, provides for conflict of law provisions in the situation where there is more than one owner of the policy who live in different states and the situation where the provider who enters into a life settlement contract in a state with an owner who is a resident of another state. If there is a conflict in the laws that apply to an owner or a purchaser in any individual transaction, the laws of the state that apply to the owner shall take precedence and the provider is required to comply with those laws.
Section 18. Severability (NAIC)	
NAIC Viatical Settlements Model Act	If any portion of this Act or any amendments thereto, or its applicability to any person or circumstance is held invalid by a court, the remainder of this Act or its applicability to other persons or circumstances shall not be affected.
NCOIL Life Settlements Model Act	No equivalent section.
Section 19. Effective Date (NAIC)/Section 18. Effective Date (NCOIL)	
NAIC Viatical Settlements Model Act	This Act shall take effect on [insert date]. A viatical settlement provider, viatical settlement broker [or viatical settlement investment agent] transacting business in this state may continue to do so pending approval or disapproval of the provider, broker [or investment agent's] application for a license as long as the application is filed with the commissioner by [insert date].
NCOIL Life Settlements Model Act	Permits a provider lawfully transacting business in the state prior to the Act's effective date to continue to do so pending approval or disapproval of that person's licensing application as long as the application is filed no later than 30 days after the commissioner publishes an application form and provider licensing instructions. While the application is pending, the applicant may use any form of life insurance contract that has been filed with the commissioner pending the commissioner's approval. The applicant must generally comply with all other requirements of the Act. Similar provisions are provided for brokers.

1/02/2008

This chart does not constitute a formal legal opinion by the NAIC staff and should not be relied upon as such. Every effort has been made to provide correct and accurate information to assist the reader in targeting useful information. For further details, the NAIC Viatical Settlements Model Act and the NCOIL Life Settlements Model Act should be consulted.