

## Article 2.

### Fraudulent and Other Prohibited Practices.

#### **§ 78A-8. Sales and purchases.**

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

- (1) To employ any device, scheme, or artifice to defraud,
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or,
- (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. (1973, c. 1380.)

#### **§ 78A-9. Misleading filings.**

It is unlawful for any person to make or cause to be made, in any document filed with the Administrator or in any proceeding under this Chapter, any statement which is, at the time and in the light of the circumstances under which it is made false or misleading in any material respect. (1973, c. 1380.)

#### **§ 78A-10. Unlawful representations concerning registration or exemption.**

(a) Neither (i) the fact that an application for registration under Article 5 or a registration statement under Article 4 has been filed nor (ii) the fact that a person or security is effectively registered constitutes a finding by the Administrator that any document filed under this Chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a security or a transaction means that the Administrator has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, security, or transaction.

(b) It is unlawful to make, or cause to be made, to any prospective purchaser, customer, or client any representation inconsistent with subsection (a). (1973, c. 1380.)

#### **§ 78A-11. Unlawful telephone rooms.**

It is unlawful for any person to willfully manage, supervise, control, or own, directly or indirectly, either alone or in association with others, any telephone room in this State. For purposes of this section, "telephone room" means an enterprise in which two or more persons engage in telephone communications with members of the public using two or more telephones at one location, or more than one location in a common scheme or enterprise, in violation of G.S. 78A-8 or G.S. 78A-12. It is an affirmative defense to a prosecution under this section that the person acted in good faith and did not directly or indirectly induce an act or acts constituting a violation of G.S. 78A-8 or G.S. 78A-12. (1991, c. 456, s. 1.)

#### **§ 78A-12. Manipulation of market.**

(a) In addition to the prohibitions of G.S. 78A-8, it is unlawful for any person to do any of the following:

- (1) Willfully quote a fictitious price with respect to a security.
- (2) Effect a transaction in a security which involves no change in the beneficial ownership of the security, for the purpose of creating a false or misleading

appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the security.

- (3) Enter an order for the purchase of a security with the knowledge that, at substantially the same time, an order of substantially the same size, and at substantially the same price, for the sale of the security has been, or will be, entered by or for the same person, or an affiliated person, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the security.
- (4) Enter an order for the sale of a security with knowledge that, at substantially the same time, an order of substantially the same size, and at substantially the same price, for the purchase of the security has been, or will be, entered by or for the same person, or an affiliated person, for the purpose of creating a false or misleading appearance of active trading in a security, or a false or misleading appearance of activity with respect to the market for the security.
- (5) Employ any other deceptive or fraudulent device, scheme, or artifice to manipulate the market in a security, including the issuance, with the intent to deceive or defraud, of analyses, reports, or financial statements that are false or misleading in any material respect.

(b) A transaction effected in compliance with the applicable provisions of the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission thereunder is not manipulation of the market under subsection (a) of this section. (1991, c. 456, s. 1; 2003-413, s. 1.)

### **§ 78A -13. Disclosures required in offer and sale of viaticals.**

(a) Disclosures Required Prior to Signing of Purchase Agreement or Transfer of Consideration. – The following disclosures shall be required in the offer and sale of viatical settlement contracts, whether such offer and sale is pursuant to an exemption from registration or pursuant to the registration of such securities, and shall be conspicuously displayed in each viatical settlement purchase agreement or in a separate document signed by the viatical settlement purchaser and by the issuer or its sales agent:

- (1) Disclosures prior to payment of consideration. – On or before the date the viatical settlement purchaser remits consideration pursuant to the purchase agreement, the viatical settlement purchaser shall be provided the following written disclosures:
  - a. The name, principal business, and mailing addresses, and telephone number of the issuer;
  - b. The suitability standards for prospective purchasers as set forth by rule or order promulgated by the Administrator;
  - c. A description of the issuer's type of business organization and the state in which the issuer is organized or incorporated;
  - d. A brief description of the business of the issuer;
  - e. If the issuer retains ownership or becomes the beneficiary of the insurance policy, an audit report from an independent certified public accountant together with a balance sheet and related statements of income, retained earnings, and cash flows that reflect the issuer's

financial position, the results of the issuer's operations, and the issuer's cash flows as of a date within six months before the date of the initial issuance of the securities described in this subdivision. The financial statements shall be prepared in conformity with generally accepted accounting principles. If the date of the audit report is more than 120 days before the date of the initial issuance of the securities described in this subdivision, the issuer shall provide unaudited interim financial statements;

- f. The names of all directors, officers, partners, members, or trustees of the issuer;
- g. A description of any order, judgment, or decree that is final as to the issuing entity of any state, federal, or foreign governmental agency or administrator, or of any state, federal, or foreign court of competent jurisdiction (i) revoking, suspending, denying, or censuring, for cause, any license, permit, or other authority of the issuer or of any director, officer, partner, member, trustee, or person owning or controlling, directly or indirectly ten percent (10%) or more of the outstanding interest or equity securities of the issuer, to engage in the securities, commodities, franchise, insurance, real estate, or lending business or in the offer or sale of securities, commodities, franchises, insurance, real estate, or loans, (ii) permanently restraining, enjoining, barring, suspending, or censuring any such person from engaging in or continuing any conduct, practice, or employment in connection with the offer or sale of securities, commodities, franchises, insurance, real estate, or loans, (iii) convicting any such person of, or pleading nolo contendere by any such person to, any felony or misdemeanor involving a security, commodity, franchise, insurance, real estate, or loan, or any aspect of the securities, commodities, franchise, insurance, real estate, or lending business, or involving dishonesty, fraud, deceit, embezzlement, fraudulent conversion, or misappropriation of property, or (iv) holding any such person liable in a civil action involving breach of a fiduciary duty, fraud, deceit, embezzlement, fraudulent conversion, or misappropriation of property. This subdivision does not apply to any order, judgment, or decree that has been vacated or overturned or is more than 10 years old;
- h. Notice of the purchaser's right to rescind or cancel the investment and receive a refund;
- i. A statement to the effect that any projected rate of return to the purchaser from the purchase of a viatical settlement contract or any fractionalized or pooled interest therein is based on an estimated life expectancy for the person insured under the life insurance policy; that the return on the purchase may vary substantially from the expected rate of return based upon the actual life expectancy of the insured that may be less than, may be equal to, or may greatly exceed the estimated life expectancy; and that the rate of return would be higher if the actual life expectancy were less than, and lower if the actual life expectancy were

- greater than, the estimated life expectancy of the insured at the time the viatical settlement contract was closed;
- j. A statement that the purchaser should consult with his or her tax advisor regarding the tax consequences of the purchase of the viatical settlement contract or any fractionalized or pooled interest therein; and
  - k. Any other information as may be prescribed by rule or order of the Administrator.
- (2) Disclosures prior to closing. – At least five business days prior to the date the purchase agreement is signed, the viatical settlement purchaser shall receive the following written disclosures:
- a. The name, address, and telephone number of the issuing insurance company and the name, address, and telephone number of the state or foreign country regulator of the insurance company;
  - b. The total face value of the insurance policy and the percentage of the insurance policy the purchaser will own;
  - c. The insurance policy number, issue date, and type;
  - d. If a group insurance policy, the name, address, and telephone number of the group and, if applicable, the material terms and conditions of converting the policy to an individual policy, including the amount of increased premiums;
  - e. If a term insurance policy, the term and the name, address, and telephone number of the person who will be responsible for renewing the policy if necessary;
  - f. Whether the insurance policy is beyond the state statute for contestability and the reason therefor;
  - g. The insurance policy premiums and terms of premium payments;
  - h. The amount of the purchaser's money that will be set aside to pay premiums;
  - i. The name, address, and telephone number of the person who will be the insurance policy owner and the person who will be responsible for paying premiums;
  - j. The date on which the purchaser will be required to pay premiums and the amount of the premium, if known;
  - k. A statement of risk factors associated with investment in viatical settlement contracts, including, but not limited, to the following:
    - 1. The purchaser will receive no returns (i.e., dividends and interest) until the insured dies.
    - 2. The actual annual rate of return on a viatical settlement contract is dependent upon an accurate projection of the insured's life expectancy, and the actual date of the insured's death. An annual "guaranteed" rate of return is not determinable.
    - 3. The viaticated life insurance contract should not be considered a liquid purchase since it is impossible to predict the exact timing of its maturity and the funds probably are not available until the death of the insured. There is no established secondary market for resale of these products by the purchaser.

4. The purchaser may lose all benefits or may receive substantially reduced benefits if the insurer goes out of business during the term of the viatical investment.
5. The purchaser is responsible for payment of the insurance premium or other costs related to the policy, if required by the terms of the viatical purchase agreement. These payments may reduce the purchaser's return. If a party other than the purchaser is responsible for the payment, the name and address of that party also shall be disclosed.
6. If the purchaser is responsible for payment of the insurance premiums or other costs related to the policy or if the insured returns to health, the amount of the premiums, if applicable.
7. The name and address of any person providing escrow services and the relationship to the issuer.
8. The amount of any trust fees or other expenses to be charged to the viatical settlement purchaser shall be disclosed.
9. Whether the purchaser is entitled to a refund of all or part of his or her investment under the settlement contract if the policy is later determined to be null and void.
10. A disclosure that group policies may contain limitations or caps in the conversion rights; that additional premiums may have to be paid if the policy is converted; the name of the party responsible for the payment of the additional premiums; and, if a group policy is terminated and replaced by another group policy, that there may be no right to convert the original coverage.
11. A disclosure of the risks associated with policy contestability including, but not limited to, the risk that the purchaser will have no claim or only a partial claim to death benefits should the insurer rescind the policy within the contestability period.
12. A disclosure of whether the purchaser will be the owner of the policy in addition to being the beneficiary, and if the purchaser is the beneficiary only and not also the owner, the special risks associated with that status, including, but not limited to, the risk that the beneficiary may be changed or the premium may not be paid.
13. The experience and qualifications of the person who determines the life expectancy of the insured, i.e., in-house staff, independent physicians, and specialty firms that weigh medical and actuarial data; the information this projection is based on; and the relationship of the projection maker to the viatical settlement provider, if any.
14. Disclosure to an investor shall include distribution of a brochure describing the process of investment in viatical settlements. The NAIC's form for the brochure shall be used unless the Administrator prescribes one by rule or order.

1. Any other information as may be prescribed by rule or order of the Administrator.

(b) Disclosures Required Upon Assignment or Sale of Underlying Insurance Policy. – The issuer shall provide the viatical settlement purchaser with at least the following disclosures no later than at the time of the assignment, transfer, or sale of all or a portion of an insurance policy underlying the viatical settlement contract, and the disclosure shall be contained in a document signed by the viatical settlement purchaser and by the issuer or its sales agent:

- (1) Disclose all the life expectancy certifications obtained by the provider in the process of determining the price paid to the viator.
- (2) State whether premium payments or other costs related to the policy have been escrowed. If escrowed, state the date upon which the escrowed funds will be depleted; whether the purchaser will be responsible for payment of premiums thereafter and, if so, the amount of the premiums; and the name and address of the escrow agent.
- (3) State whether premium payments or other costs related to the policy have been waived. If waived, disclose whether the investor will be responsible for payment of the premiums if the insurer that wrote the policy terminates the waiver after purchase and the amount of those premiums.
- (4) Disclose the type of policy offered or sold, i.e., whole life, term life, universal life, or a group policy certificate, any additional benefits contained in the policy, and the current status of the policy.
- (5) If the policy is term insurance, disclose the special risks associated with term insurance including, but not limited to, the purchaser's responsibility for additional premiums if the viator continues the term policy at the end of the current term.
- (6) State whether the policy is contestable.
- (7) State whether the insurer that wrote the policy has any additional rights that could negatively affect or extinguish the purchaser's rights under the viatical settlement contract, what these rights are, and under what conditions these rights are activated.
- (8) State the name and address of the person responsible for monitoring the insured's condition. Describe how often the monitoring of the insured's condition is done, how the date of death is determined, and how and when this information will be transmitted to the purchaser. (2001-436, s. 7.)

#### **§ 78A-14. Advertising of Viatical Settlement Contracts.**

(a) The purpose of this section is to provide prospective viatical settlement purchasers with clear and unambiguous statements in the advertisement of viatical settlement contracts and to assure the clear, truthful, and adequate disclosure of the benefits, risks, limitations, and exclusions of any contract or purchase agreement offered 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 settlement contracts 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 settlement contracts through the advertising media and material used by issuers of viatical settlement contracts and their sales agents.

(b) This section shall apply to any advertising of viatical settlement contracts intended for dissemination in this State, including Internet advertising viewed by persons located in this State. Where disclosure requirements are established pursuant to federal regulation, this section shall be interpreted so as to minimize or eliminate conflict with federal regulation wherever possible.

(c) Every person offering or selling viatical settlement contracts shall establish and, at all times, maintain a system of control over the content, form, and method of dissemination of all advertisements of these securities. All advertisements, regardless of by whom written, created, designed, or presented, shall be the responsibility of the issuer. A system of control shall include regular routine notification, at least once a year, to agents and others authorized by the issuer who disseminate advertisements of the requirements and procedures for approval before the use of any advertisements not furnished by the issuer.

(d) Advertisements shall be truthful and not misleading in fact or by implication. The form and content of an advertisement of a contract or purchase agreement, product, or service shall be sufficiently complete and clear so as to avoid deception. It shall not have the capacity or tendency to mislead or deceive. Whether an advertisement has the capacity or tendency to mislead or deceive shall be determined by the Administrator from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence within the segment of the public to which it is directed.

(e) Certain viatical settlement contract advertisements are deemed false and misleading on their face and are prohibited. False and misleading viatical settlement advertisements include, but are not limited to, the following representations:

- (1) "Guaranteed", "fully secured", "100 percent secured", "fully insured", "secure", "safe", "backed by rated insurance companies", "backed by federal law", "backed by state law", or "state guaranty funds", or similar representations;
- (2) "No risk", "minimal risk", "low risk", "no speculation", "no fluctuation", or similar representations;
- (3) "Qualified or approved for individual retirement accounts (IRAs), Roth IRAs, 401(k) plans, simplified employee pensions (SEP), 403(b), Keogh plans, TSA, other retirement account rollovers", "tax deferred", or similar representations;
- (4) Utilization of the word "guaranteed" to describe the fixed return, annual return, principal, earnings, profits, investment, or similar representations;
- (5) "No sales charges or fees" or similar representations;
- (6) "High yield", "superior return", "excellent return", "high return", "quick profit", or similar representations;
- (7) Purported favorable representations or testimonials about the benefits of contracts or purchase agreements as an investment, taken out of context from newspapers, trade papers, journals, radio and television programs, and all other forms of print and electronic media.

(f) All information required to be disclosed under this section shall be set out conspicuously and in close conjunction with the statements to which such information relates or under appropriate captions of such prominence that it shall not be minimized, rendered obscure or presented in an ambiguous fashion, or intermingled with the context of the advertisement so as to be confusing or misleading.

(g) An advertisement shall not:

- (1) Omit material information or use words, phrases, statements, references, or illustrations if the omission or use has the capacity, tendency, or effect of

misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any benefit, loss covered, premium payable, or state or federal tax consequence. The fact that the contract or purchase agreement offered is made available for inspection before consummation of the sale, or an offer is made to refund the payment if the purchaser is not satisfied or that the contract or purchase agreement includes a "free look" period that satisfies or exceeds legal requirements, does not remedy misleading statements.

- (2) Use the name or title of a life insurance company or a policy unless the insurer has approved the advertisement.
  - (3) Represent that premium payments will not be required to be paid on the policy that is the subject of a contract or purchase agreement in order to maintain that policy, unless that is the fact.
  - (4) State or imply that interest charged on an accelerated death benefit or a policy loan is unfair, inequitable, or in any manner an incorrect or improper practice.
  - (5) State or imply that a contract or purchase agreement, benefit, or service has been approved or endorsed by a group of individuals, society, association, or other organization unless that is the fact and unless any relationship between an organization and the seller or its agents is disclosed. If the entity making the endorsement or testimonial is owned, controlled, or managed by the seller or its agents, or receives any payment or other consideration from the seller or its agents for making an endorsement or testimonial, that fact shall be disclosed in the advertisement.
  - (6) Contain statistical information unless it accurately reflects recent and relevant facts. The source of all statistics used in an advertisement shall be identified.
  - (7) Disparage insurers, providers, brokers, dealers, salesmen, insurance producers, policies, services, or methods of marketing.
  - (8) Use a trade name, group designation, name of the parent company of an issuer, name of a particular division of the issuer, service mark, slogan, symbol, or other device or reference without disclosing the name of the issuer, if the advertisement would have the capacity or tendency to mislead or deceive as to the true identity of the issuer, or to create the impression that a company other than the issuer would have any responsibility for the financial obligation under a contract or purchase agreement.
  - (9) Use any combination of words, symbols, or physical materials that by their content, phraseology, shape, color, or other characteristics are so similar to a combination of words, symbols, or physical materials used by a government program or agency or otherwise appear to be of such a nature that they tend to mislead prospective purchasers into believing that the solicitation is in some manner connected with a government program or agency.
  - (10) Create the impression that the issuer, its financial condition or status, the payment of its claims, or the merits, desirability, or advisability of its contracts or purchase agreement forms are recommended or endorsed by any government entity.
- (h) The words "free", "no cost", "without cost", "no additional cost", "at no extra cost", or words of similar import shall not be used with respect to any benefit or service unless true. An



advertisement may specify the charge for a benefit or a service, may state that a charge is included in the payment, or use other appropriate language.

(i) Testimonials, appraisals, or analysis used in advertisements must be genuine; represent the current opinion of the author; be applicable to the contract or purchase agreement, product, or service advertised, if any; and be accurately reproduced with sufficient completeness to avoid misleading or deceiving prospective purchasers as to the nature or scope of the testimonials, appraisals, analysis, or endorsement. In using testimonials, appraisals, or analysis, the issuer makes as its own all the statements contained therein, and the statements are subject to all the provisions of this section.

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

(k) When an endorsement refers to benefits received under a contract or purchase agreement, all pertinent information shall be retained for a period of five years after its use.

(l) The name of the issuer shall be clearly identified in all advertisements about the issuer or its contract or purchase agreements, products, or services, and if any specific contract or purchase agreement is advertised, the contract or purchase agreement shall be identified either by form number or some other appropriate description. If an application is part of the advertisement, the name of the issuer shall be shown on the application.

(m) An advertisement may state that issuer is registered in the state where the advertisement appears, provided it does not exaggerate that fact or suggest or imply that a competing issuer may not be so licensed. The advertisement may ask the audience to consult the issuer's web site or contact the department of insurance and/or the state securities regulatory agency to find out if the state requires licensing or registration and, if so, whether the issuer or its sales agents are licensed.

(n) The name of the actual issuer shall be stated in all of its advertisements. An advertisement shall not use a trade name, any group designation, name of any affiliate or controlling entity of the issuer, service mark, slogan, symbol, or other device in a manner that would have the capacity or tendency to mislead or deceive as to the true identity of the actual issuer or create the false impression that an affiliate or controlling entity would have any responsibility for the financial obligation of the issuer.

(o) An advertisement shall not directly or indirectly create the impression that any state or federal governmental agency endorses, approves, or favors:

- (1) Any issuer or its business practices or methods of operation;
- (2) The merits, desirability, or advisability of any contract or purchase agreement;
- (3) Any contract or purchase agreement; or
- (4) Any policy or life insurance company.

(p) If the advertiser emphasizes the speed with which the viatication will occur, the advertising must disclose the average time frame from completed application to the date of offer and from acceptance of the offer to receipt of the funds by the viator. (2001-436, s. 7.)

**§ 78A-15. Reserved for future codification purposes.**