

**Product Outlines
Viatical Settlements
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Viatical Settlements Outline

I) Applicability

A) Definitions

- 1) “Viatical settlement” is defined in Section 7801(c) of the Insurance Law as an agreement entered into between a viatical settlement company and a viator. The agreement shall establish the terms under which the viatical settlement company will pay compensation or anything of value, which compensation or value is less than the expected death benefit of the insurance policy, in return for the viator’s assignment, transfer, sale, devise or bequest of the death benefit or ownership of the insurance policy to the viatical settlement company.
- 2) “Viatical settlement company” is defined in Section 7801(a) of the Insurance Law as an individual, partnership, corporation or other entity not prohibited from acting as a viatical settlement company under section 20 of the Public Health Law that enters into an agreement with a person owning a life insurance policy insuring the life of a person who has a catastrophic or life threatening illness or condition... . (See 1) above for a description of the agreement). Licensed lending institutions, the issuer of the life insurance policy and friends or family members of the policyowner or the insured are excepted from the definition in certain instances.
 - (a) A viatical settlement company must also be licensed in accordance with the requirements of Section 7802 of the Insurance Law and sections 380.2(b) and 380.3 of Regulation 148.

II) Forms Requirements

A) Filing requirements

- 1) No viatical settlement company may use any agreement for a viatical settlement in this state unless it is in writing and has been filed with and approved by the Superintendent. Section 7804(a).
- 2) Two specimen copies of every viatical settlement agreement and every application must be filed with and approved by the Department. Section 380.6(a)(1) and (2).
- 3) A copy of the information booklet and the proposal form shall be placed on file with the Department prior to being used with any

viatical settlement application or agreement. Section 380.6(a)(3) and (4).

- 4) A copy of the pricing memorandum, providing a description of the method and assumptions used in determining the value to be paid to viators, must be enclosed with the submission of the viatical settlement agreement form for approval. Section 380.6(b).
 - (a) A company may request the Department to except from disclosure information contained in the pricing memorandum or subsequent supporting documentation in accordance with section 241.6 of the Department's regulations. Each page covered by such request should be clearly marked "Confidentiality Requested". Section 380.6(b).
 - (b) The submission letter should include the name and telephone number of the contact person who can discuss details of any pricing issues regarding the pricing memorandum.
- 5) Copies of schedules 6, 7 and 8 of the annual financial statements for all years should be enclosed with the submission of the viatical settlement agreement form as well.

B) Required Provisions for Viatical Settlement Contract

- 1) Must permit viator to rescind the viatical settlement agreement within 15 days of the receipt of any viatical settlement proceeds. Section 7804(b)(1) of the Insurance Law and Section 380.6(c)(1) of Regulation 148. The 15 days begins only upon the viator's actual receipt of any settlement proceeds. (Department interpretation)
- 2) The viatical settlement company's rights or interest in the life insurance policy or certificate will terminate immediately upon the viator giving notice of rescission and tendering the settlement proceeds together with any escrow interest received by the viator in accordance with Section 380.6(c)(2). The company may not require the actual return of all settlement proceeds to trigger rescission and termination of the company's rights or interest in the policy. Notice and tender are all that is required for the trigger to occur. (Department interpretation)
- 3) If the viator dies prior to the end of the 15 day period, it will be deemed that the viator rescinded the viatical settlement agreement. Section 380.6(c)(3)
- 4) Immediately upon receipt from the viator of documents to effect the transfer of the insurance policy, the viatical settlement company will pay the proceeds of the settlement to an escrow or trust account in compliance with section 7804(b)(2) of the Insurance Law and section 380.6(c)(4) of Regulation 148.

- 5) There shall be a signed escrow agreement which provides that the trustee or escrow agent shall transfer the proceeds due to the viator, together with any interest thereon, immediately upon receipt of acknowledgement of the transfer by the insurer in accordance with section 7804(b)(2) and section 380.6(c)(5).
- 6) Any fee(s) required to be paid by the viator to the viatical settlement company in conjunction with the viatical settlement contract. Section 380.6(c)(6).
- 7) The contract together with the application shall constitute the entire contract between the parties. Section 380.6(c)(7).
- 8) If the agreement provides for the payment of an additional settlement amount to the viator upon the exercise of a guaranteed insurability option by the viator, the contract shall disclose the amount and terms of any such additional settlement. Section 380.6(c)(8).
 - (a) If the life insurance policy or certificate provides a guaranteed insurability option, it may only be exercised for the benefit of a person who has an insurable interest in the life to be insured pursuant to section 3205 of the Insurance Law. Section 380.6(d). Sections 380.6(c)(8) and 380.6(d) are reconciled by the last sentence of section 3205(b)(1) of the Insurance Law, which permits a contract of life insurance to be immediately transferred or assigned once it has been procured or effectuated. (Department interpretation).
- 9) If the life insurance policy or certificate provides for payment of proceeds on the life of any covered person other than the viator or if the policy or certificate provides for payment of additional benefits in the event of accidental death, and if the viatical settlement company has agreed to continue such benefits, the agreement shall:
 - (a) provide for the payment of such benefits to the personal representative of the person so insured or to a person having an insurable interest in the person so insured. Section 380.6(e).
 - (b) be endorsed by the insurer with the appropriate designation of irrevocable beneficiary or beneficiaries prior to the transfer of policy or certificate ownership. Section 380.6(f).

C) Required Provisions for Application for Viatical Settlement

- 1) The application shall set forth a prominently displayed notice in accordance with section 7807(a) of the Insurance Law and section 380.6(g)(1) of Regulation 148.

- 2) The application shall contain, in compliance with section 7808(a) of the Insurance Law and section 380.6(g)(2) of Regulation 148,:
 - (a) the applicant's consent to the viatical settlement
 - (b) an acknowledgement by the applicant that he or she has a catastrophic or life threatening illness
 - (c) the applicant's representation that he or she has a full and complete understanding of the viatical settlement.
- 3) The application shall contain a provision with respect to the proposal that the viatical settlement company will deliver, in compliance with section 380.6(g)(3).
- 4) The application shall contain, in accordance with section 7808(a) of the Insurance Law and 380.6(g)(4) of Regulation 148,:
 - (a) the applicant's representation that he or she has a full and complete understanding of the benefits of the life insurance policy
 - (b) a release, in compliance with applicable statutory requirements, by the applicant of his or her medical records
 - (c) an acknowledgement that he or she has entered into the viatical settlement freely and voluntarily.
- 5) The application shall, in compliance with section 7808(a) of the Insurance Law and section 380.6(g)(5) of Regulation 148,:
 - (a) be duly witnessed and authorized by a person who does not have a financial or beneficial interest, directly or indirectly, in the viatical settlement transaction. The impartial person must witness the signing of the application by the applicant and must then sign the application as witness (Department interpretation).
 - (b) provide for an acknowledgement of receipt of the information booklet.
- 6) The disclosures required by section 380.8(b), (c), (d) and (e) shall be disclosed either on the application or in the information booklet (see section D)2), 3), 4) and 5) below).
- 7) Any statement to be signed by the applicant as to the truthfulness and correctness of the information in the application shall specifically state that it is to the best of the applicant's knowledge and belief (Department interpretation).
- 8) Prior to the completion of the application, the broker, if any, shall provide a written statement to the applicant describing the manner in which the broker will be compensated. Section 380.8(i).

D) Required Provisions for Information Booklet

- 1) The viatical settlement company shall deliver an information booklet to every applicant, and delivery of the booklet must be acknowledged by the applicant in the application form. Section

7807(b) of the Insurance Law and section 380.8(a) of Regulation 148.

- 2) The booklet must include, in compliance with section 7807(b) of the Insurance Law and section 380.8(a) of Regulation 148:
 - (a) how viatical settlements operate
 - (b) possible alternatives to viatical settlements in accordance with section 380.8(a)(2).
 - (c) tax consequences that may result from entering into a viatical settlement
 - (d) consequences of interruption or loss of assistance as provided by medical or public assistance plans
 - (e) the viator's right to rescind a viatical settlement within 15 days of receipt of the viatical settlement proceeds
 - (f) the identity of any person who will receive any fee or compensation from the viatical settlement company in accordance with section 380.8(a)(6)
 - (g) the viatical settlement company's complete name and main office address.
- 3) The company shall disclose, either on the application or in the information booklet, that the proceeds payable to the viator may not be exempt from the viator's creditors, personal representatives, trustees in bankruptcy and receivers in state and federal courts. Section 380.8(b).
- 4) The company shall disclose, either on the application or in the information booklet, that the payment of proceeds pursuant to the viatical settlement will be made in a lump sum. The disclosure shall state permissible exceptions in accordance with section 7808(c)(3) of the Insurance Law and section 380.8(c) of Regulation 148.
- 5) The company shall disclose, either on the application or in the information booklet, that medical, financial or other personal information obtained from the viator will not be disclosed to any other person or entity without the viator's specific, written consent. Section 7808(c)(4) of the Insurance Law and section 380.8(d) of Regulation 148. See also section 7808(b) of the Insurance Law.
- 6) The company shall disclose, either on the application or in the information booklet, the procedures available concerning the payment of
 - (a) death benefit proceeds for any insured other than the viator or
 - (b) accidental death proceeds. Section 380.8(e).

E) Requirements for Proposal

- 1) The viatical settlement company, upon receipt of an application to viaticate, shall deliver a proposal to the applicant before the agreement is required to be signed. Section 380.8(f).
- 2) The proposal shall disclose all of the information listed in section 380.8(f)(1)-(10). The company must address, with specificity, each of the items listed in section 380.8(f)(1)-(10). (Department interpretation).
- 3) The proposal shall include a notice stating that a detailed description of how the payment amount was determined, including interest rate, expense factors, and the assumed life expectancy used, may be obtained by written request to the viatical settlement company. Section 380.8(g).
- 4) Upon such written request by the applicant, the viatical settlement company shall provide a detailed description stating the assumed life expectancy in months, the interest rate used to discount the amount at risk, the adjustments, if any, for future premiums, dividends and additional amounts, broker's compensation, and retention for other expenses, risk charge and profit. Section 380.8(h).

F) Requirements for Pricing Memorandum

- 1) See also section II)A)4) above.
- 2) The pricing memorandum shall accompany the viatical settlement agreement form filing. **Any subsequent change to the filed method or assumptions for new transactions must be filed with the superintendent at least 30 days prior to use.** The Department is concerned that such changes are not being filed and this issue may be addressed upon examination of the company.
- 3) The memorandum shall include a general description of the method and assumptions used in determining the value to be paid viators.
- 4) The memorandum shall include a description, which may use reasonable ranges, of each of the items set forth in items (1) through (9) of section 380.6(b).
 - (a) Each such item must be discussed.
 - (b) Numerical values must be provided where applicable. The full range of numerical values must be provided for any pricing item for which the value may vary (e.g., broker compensation).
 - (c) The memorandum must fully address any variation in any pricing item or assumption that is outside the ranges provided in the general description and the reason therefore, such as type of insurance contract, amount of insurance contract or viator characteristics, and must include a demonstration that any such variations are not

contrary to the requirements of section 7804(a) or 7808(c)(1) of the Insurance Law. Section 7804(a) requires that the contract or provisions contained therein must not be contrary to the interests of the public, or otherwise misleading or unfair to the viator. The memorandum must indicate how fairness is maintained across viators. Section 7808(c)(1) prohibits discrimination in the availability of viatical settlements on the basis of race, age, sex, national origin, creed, religion, occupation, marital or family status, and discrimination between viators with dependents and those without.

- (d) An explanation must be provided for any item that is not applicable to the company.
- 5) Specific guidance for certain items in Section 380.6(b):
 - (a) Interest – include both the numerical value of the interest rate and a description of how this interest rate is determined.
 - (b) Operating costs – address each item including acquisition and maintenance cost, risk charge and profit margin.
 - (c) Supplemental benefits or riders – address each type listed in item (8) of Section 380.6(b) and any others; indicate the beneficiary and discuss the effect on the price paid to the viator.

III) General Rules

- A) Assignment or Other Transfer of Death Benefit or Life Insurance Policy by Viator to Viatical Settlement Company
 - 1) A viator may not assign, transfer, sell, devise or bequeath to a viatical settlement company:
 - (a) a death benefit for any insured other than the viator; or
 - (b) any accidental death benefit.
 - 2) A viator may not assign death benefits under a joint life insurance or joint survivorship policy unless the other insured has predeceased the viator.
 - 3) No policy of group insurance issued or delivered in this state which permits assignment of a covered person's rights shall restrict the covered person from making assignments other than by gift. Section 7809 of the Insurance Law.
 - (a) If a group policy of life insurance permits assignment by gift, it must also allow assignments for value to the same extent that it allows the assignments by gift. (Department interpretation).

- (b) On the basis of section 7809, the Department would no longer approve a policy/ certificate provision that provides only for gift assignments. (Department interpretation).
 - (c) If assignment of the group policy is permitted in accordance with section 3)a) and b), above, the person insured under such policy may assign his or her rights or benefits under such policy to a viatical settlement company. Section 380.9(e). (Department interpretation).
- 4) Where a change of ownership or irrevocable assignment is used to effectuate the transfer or assignment of the viator's rights or benefits under a policy or certificate to a viatical settlement company, such document shall contain a 15-day grace period coincidental with the viator's right to rescind. Section 380.9 (f).

- B) Viatical companies shall not enter into any agreement or communication with any other viatical settlement company with respect to the terms to be offered to a viator except that a viatical settlement company may assign such settlement or insurance policy only to another licensed viatical settlement company. Section 7808(e) of the Insurance Law.

- C) See section 7808 of the Insurance Law and section 380.9 of Regulation 148 for additional general rules pertaining to the viatical settlement process.