

CHAPTER 45-04-13
VIATICAL SETTLEMENT ADVERTISING

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45-04-13-01. Definitions.

1. "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 sell, assign, devise, bequest, or transfer the death benefit or ownership of a life insurance policy pursuant to a viatical settlement contract.
2. "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.
3. "Commissioner" means the North Dakota insurance commissioner.
4. "Viatical settlement broker" means a person 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.
5. a. "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.

b. "Viatical settlement contract" includes a premium finance loan made for a life insurance policy by a lender to a viator on, before, or after the date of issuance of the policy if:

(1) The loan proceeds are not used solely to pay:

(a) Premiums for the policy; or

(b) The costs of the loan, including interest, arrangement fees, utilization fees and similar fees closing costs, legal fees and expenses, trustee fees and expenses, and third-party collateral provider fees and expenses, including fees payable to letter of credit issuers;

(2) 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

(3) 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.

c. "Viatical settlement contract" does not include:

(1) A policy loan or accelerated death benefit made by the insurer pursuant to the policy's terms;

(2) 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 the loan or, if there is a default on the loan and the policy is transferred, the further assignment of the 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;

(3) A loan made by a lender that does not violate North Dakota Century Code chapter 26.1-20.1, provided that the premium finance loan is not described in subdivision a;

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

- (5) 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;
 - (6) A bona fide business succession planning arrangement:
 - (a) Between one or more shareholders in a corporation or between a corporation and one or more of its shareholders or one or more trusts established by its shareholders;
 - (b) Between one or more partners in a partnership or between a partnership and one or more of its partners or one or more trusts established by its partners; or
 - (c) Between one or more members in a limited liability company or between a limited liability company and one or more of its members or one or more trusts established by its members;
 - (7) 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
 - (8) Any other contract, transaction, or arrangement exempted from the definition of viatical settlement contract by the commissioner based on a determination that the contract, transaction, or arrangement is not of the type intended to be regulated by this chapter.
6. "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. A viatical settlement investment agent is an agent as defined in North Dakota Century Code section 10-04-02.
- a. 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.
 - b. A viatical settlement investment agent is deemed to represent the viatical settlement provider of whom the viatical settlement investment agent is an appointed or contracted agent.

7. "Viatical settlement provider" means a person, other than a viator, that enters into or effectuates a viatical settlement contract with a viator resident in this state. "Viatical settlement provider" does not include:
 - a. A bank, savings bank, savings and loan association, or credit union;
 - b. A licensed lending institution or premium finance 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 policies 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.

8. "Viator" means the owner of a life insurance policy or a certificate holder under a group policy who resides in this state and enters or seeks to enter into a viatical settlement contract. A viator shall not be limited to an owner of a life insurance policy or a certificateholder under a group policy insuring the life of an individual with a terminal or chronic illness or condition except when specifically addressed. "Viator" does not include:
 - a. A licensee under this chapter;
 - b. A qualified institutional buyer as defined, respectively, in rule 144A adopted under the Federal Securities Act of 1933 [48 Stat. 74; 14 U.S.C. 77a et seq.], as amended;

- c. A financing entity;
- d. A special purpose entity; or
- e. A related provider trust.

History: Effective January 1, 2008.

General Authority: NDCC 26.1-33.3-12

Law Implemented: NDCC 26.1-33.3-01, 26.1-33.3-12

45-04-13-02. Applicability.

1. This chapter applies to any advertisement of the business of viatical settlements intended for dissemination in this state and which advertisement is disseminated in any manner by or on behalf of a viatical settlement provider or viatical settlement broker required to be licensed under North Dakota Century Code section 26.1-33.3-02.
2. Every viatical settlement provider and viatical settlement broker required to be licensed under North Dakota Century Code section 26.1-33.3-02 shall establish and at all times maintain a system of control over the content, form, and method of dissemination of all advertisements of its policies. All such advertisements, regardless of by whom written, created, designed, or presented, are the responsibility of the viatical settlement provider or viatical settlement broker. This requirement does not in any way prohibit enforcement of this chapter against individual agents, brokers, and agencies.
3. This chapter does not apply to viatical settlement investment agents or viatical settlement purchasers who are neither licensees nor required to be licensed under North Dakota Century Code chapter 26.1-33.3 nor to viatical settlement purchase agreements as defined in North Dakota Century Code section 26.1-33.3-01.

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45-04-13-03. Disclosure requirements.

1. The advertising of viatical settlements must be done in a manner 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.
2. Every viatical settlement provider and viatical settlement broker shall establish and at all times maintain a system of control over the content,

form, and method of dissemination of all advertisements of its contracts, products, and services. All advertisements, regardless of by whom written, created, designed, or presented, shall be the responsibility of the viatical settlement provider or viatical settlement broker, as well as the individual who created or presented the advertisement. A system of control shall include regular routine notification, at least once a year, to agents and others authorized by the viatical settlement provider or viatical settlement broker who disseminates advertisements of the requirements and procedures for approval prior to the use of any advertisements not furnished by the viatical settlement provider or viatical settlement broker.

3. Advertisements shall be truthful and not misleading in fact or by implication. The form and content of an advertisement of a viatical settlement contract 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 commissioner 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.
4. Certain viatical settlement advertisements are deemed false and misleading on their face and are prohibited. False and misleading viatical settlement advertisements include the following representations:
 - a. "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;
 - b. "No risk", "minimal risk", "low risk", "no speculation", "no fluctuation", or similar representations;
 - c. "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;
 - d. Utilization of the word "guaranteed" to describe the fixed return, annual return, principal, earnings, profits, investment, or similar representations;
 - e. "No sales charges or fees" or similar representations;
 - f. "High yield", "superior return", "excellent return", "high return", "quick profit", or similar representations; and

using testimonials, appraisal, or analysis, a licensee under this chapter makes as its own all the statements contained therein and the statements are subject to all the provisions of this section.

- (1) If the individual making a testimonial, appraisal, analysis, or an endorsement has a financial interest in the party making use of the testimonial, appraisal, analysis, or endorsement, either directly or through a 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.
 - (2) An advertisement shall not state or imply that a viatical settlement contract 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 viatical settlement licensee is disclosed. If the entity making the endorsement or testimonial is owned, controlled, or managed by the viatical settlement licensee, or receives any payment or other consideration from the viatical settlement licensee for making an endorsement or testimonial, that fact shall be disclosed in the advertisement.
 - (3) When an endorsement refers to benefits received under a viatical settlement contract, all pertinent information shall be retained for a period of five years after its use.
6. An advertisement shall not contain statistical information unless it accurately reflects recent and relevant facts. The source of all statistics used in an advertisement shall be identified.
 7. An advertisement shall not disparage insurers, viatical settlement providers, viatical settlement brokers, viatical settlement investment agents insurance producers, policies, services, or methods of marketing.
 8. The name of the viatical settlement licensee shall be clearly identified in all advertisements about the licensee or its viatical settlement contract and if any specific viatical settlement contract is advertised the viatical settlement contract shall be identified either by form number or some other appropriate description. If an application is part of the advertisement, the name of the viatical settlement provider shall be shown on the application.
 9. An advertisement shall not use a trade name, group designation, name of the parent company of a viatical settlement licensee, name of a particular division of the viatical settlement licensee, service mark,

slogan, symbol, or other device or reference without disclosing the name of the viatical settlement licensee if the advertisement would have the capacity or tendency to mislead or deceive as to the true identity of the viatical settlement licensee or to create the impression that a company other than the viatical settlement licensee would have any responsibility for the financial obligation under a viatical settlement contract.

10. An advertisement shall not 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 viators into believing that the solicitation is in some manner connected with a government program or agency.
11. An advertisement may state that a viatical settlement licensee is licensed in the state where the advertisement appears provided it does not exaggerate that fact or suggest or imply that a competing viatical settlement licensee may not be so licensed. The advertisement may ask the audience to consult the licensee's web site or contact the insurance department to find out if the state requires licensing and, if so, whether the viatical settlement provider or viatical settlement broker is licensed.
12. An advertisement shall not create the impression that the viatical settlement provider, its financial condition or status, the payment of its claims, or the merits, desirability, or advisability of its viatical settlement contracts are recommended or endorsed by any government entity.
13. The name of the actual licensee 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 licensee, 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 licensee or create the false impression that an affiliate or controlling entity would have any responsibility for the financial obligation of the licensee.
14. An advertisement shall not directly or indirectly create the impression that any division or agency of the state or of the United States government endorses, approves, or favors:
 - a. Any viatical settlement licensee or its business practices or methods of operation;
 - b. The merits, desirability, or advisability of any viatical settlement contract;

- c. Any viatical settlement contract; or
 - d. Any life insurance policy or life insurance company.
15. If the advertiser emphasizes the speed with which the viatication will occur, the advertising must disclose the average timeframe from completed application to the date of offer and from acceptance of the offer to receipt of the funds by the viator.
 16. If the advertising emphasizes the dollar amounts available to viators, the advertising shall disclose the average purchase price as a percent of face value obtained by viators contracting with the licensee during the past six months.

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