

**STATE OF NEW HAMPSHIRE
BUREAU OF SECURITIES REGULATION
DEPARTMENT OF STATE**

IN RE: VIATICAL INVESTMENTS,)
STATUS AS SECURITIES)
) INTERPRETIVE ORDER
)
) INT04-003
)

WHEREAS, a viatical investment typically involves 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, and

WHEREAS, New Hampshire Revised Statutes Annotated (RSA) 421-B:2, XX(a) defines a security, in pertinent part, as "any . . . investment contract . . . or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing", and

WHEREAS, New Hampshire has traditionally determined whether an investment is a security by reference to long-standing principles governing the interpretation of the securities laws by the Bureau of Securities Regulation and predecessor administrators of New Hampshire's Blue Sky laws, and by the courts, and

WHEREAS, the conventional analysis to determine whether an investment is a security is set forth in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946), and

WHEREAS, the premise underlying the *Howey* test is that the statutory definition of a security "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Howey*, 328 U.S. at 299, and

WHEREAS, viatical investments meet the definition of a security put forth in *Howey* to the extent that such investments are plans that involve "an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S. at 301, and

WHEREAS, it is important that all persons involved in the offer and/or sale of viatical investments should be aware of the nature and extent of the registration, licensing, and antifraud provisions of the New Hampshire Uniform Securities Act, as well as the applicability of these provisions to every offer and/or sale of a security, and

WHEREAS, finding it necessary and appropriate and in the public interest and consistent with the intent and purposes of the New Hampshire securities laws, it is hereby

ORDERED, that

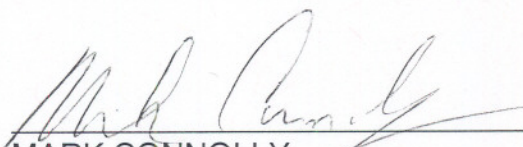
- (1) Viatical investments are a security within the meaning of RSA 421-B:2, XX(a).
- (2) Viatical investments must be registered in this states as securities in accordance with RSA 421-B:11 unless the viatical investments are exempt under RSA 421-B:17 or federal covered securities for which the fee has been paid and documents filed pursuant to RSA 421-B:11.
- (2) Any person engaged in the business of effecting transactions in viatical investments for the account of others or for his own account must be licensed as a broker-dealer pursuant to RSA 421-B:6, I, unless excluded from the definition of "broker-dealer" pursuant to RSA 421-B:2, III.
- (3) Any person or corporation having its principal office in this state, and issuing viatical investments for sale directly to any person who is not a general partner, executive officer, or director of the issuer must be licensed as an issuer-dealer pursuant to RSA 421-B:6, I.
- (4) Any individual, other than a broker-dealer, issuer or issuer-dealer, who represents a broker-dealer, issuer, or issuer-dealer in effecting or attempting to effect purchases or sales of viatical investments must be licensed as an agent pursuant to RSA 421-B:6, I and II, unless excluded from the definition of "agent" pursuant to RSA 421-B:2, II.
- (5) Any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of viatical investments, or as to the advisability of investing in, purchasing or selling viatical investments, or who otherwise meet the definition of an "investment adviser" with regard to viatical investments in RSA 421-B:2, IX must be licensed as an investment adviser pursuant to RSA 421-B:6, I.
- (6) Any partner, officer, director, or a person occupying a similar status or performing similar functions, or other individual, except clerical or ministerial personnel, who is employed by or associated with an investment adviser that is licensed or required to be licensed under Chapter 421-B, commonly referred to as the New Hampshire Uniform Securities Act, or who has a place of business located in this state and is employed by or associated with a federal covered adviser, and who: makes any

recommendations or otherwise renders advice regarding viatical investments; manages accounts or portfolios of clients that include viatical investments; determines which recommendation or advice regarding viatical investments should be given; solicits, offers, or negotiates for the sale of or sells any such investment advisory services; or supervises employees who perform any such functions pursuant to RSA 421-B:2, IX-a must be licensed as an investment adviser representative pursuant to RSA 421-B:6, I and II.

- (7) All other provisions of Chapter 421-B, commonly referred to as the New Hampshire Uniform Securities Act, pertaining to the issue, purchase, or sale of securities, or any other transaction involving securities, including but not limited to the antifraud provisions of Chapter 421-B, shall be applicable to the issue, purchase, or sale of viatical investments, or any other transaction involving viatical investments.

SIGNED,
WILLIAM M. GARDNER
SECRETARY OF STATE
BY HIS DESIGNEE:

Dated: 10-25-04



MARK CONNOLLY
DEPUTY SECRETARY OF STATE
DIRECTOR OF SECURITIES REGULATION