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## The Texas Life Settlements Act: New Requirements for Life Expectancy Providers?

The recently enacted Texas Life Settlements Act (the “Act”) includes new requirements for those who provide life expectancy estimates for use in life settlement transactions. Although it is based on the Life Settlements Model Act published by the National Conference of Insurance Legislators (the “NCOIL Model”), the Act departs from the NCOIL Model by regulating life expectancy providers. The exact impact of the Act on life expectancy providers will not be known for some time as the Commissioner of Insurance (“Commissioner”) is granted broad power to enact regulations to enforce the Act and to exempt life expectancy providers from most provisions of the Act.

In general, life expectancy providers are required to become licensed as brokers and to comply with many of the Act’s requirements for brokers – primarily those requiring registration with and reporting to the Commissioner. The registration and reporting obligations imposed by the Act are neither onerous nor a significant departure from the previous law.

Under the Act, anyone who participates in the business of life settlements in Texas must hold a license from the State. To obtain a license, the life expectancy provider must file an application and pay a fee. The Commissioner must investigate each applicant and may issue a license if the Commissioner determines, among other things, that the applicant is competent, trustworthy and enjoys a good business reputation. The Commissioner may also require an applicant to disclose its shareholders, partners, officers and employees. The Commissioner may refuse to issue a license if the Commissioner believes that any person who may materially influence an applicant’s conduct does not meet the standards imposed by the Act. Notably, the Commissioner has complete discretion not to issue a license, even if all of the statutory requirements are met.

Licensed life expectancy providers have an ongoing duty to report changes in ownership and key personnel to the Commissioner. In addition, life expectancy providers will be required to provide an annual statement on March 1 of each year. The content and form of the annual statement is to be the subject of rule making by the Commissioner.

Life expectancy providers are also required to maintain the confidentiality of medical, financial information of insureds as well as nonpublic personal information solicited or collected in connection with a life settlement transaction. The protection of information regarding insureds is copied directly from the NCOIL Model. As a result, life expectancy providers operating in other states that have adopted the NCOIL Model should have no problems complying with this provision of the Act; although we note that the regulations adopted in Texas to effectuate the Act may differ from those in other NCOIL states.

In a departure from the NCOIL Model, however, the Act expressly requires that anyone involved in a life settlement transaction treat nonpublic information that they solicit or collect in accordance with the provisions applicable to financial institutions for the protection of nonpublic personal information under the Gramm-Leach-Bliley Act and other unidentified state and federal laws “relating to the confidentiality of nonpublic personal information.” Life expectancy providers operating in Texas should therefore confirm that their procedures for handling and protecting nonpublic personal

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information comply with Gramm-Leach-Bliley and other privacy laws. Presumably, the regulations adopted by the Commissioner will shed greater light on exactly what other privacy laws are applicable to those in the life settlement business in Texas.

The Act may also impose other duties on life expectancy providers, which may be difficult for them to meet given their limited role in most life settlement transactions. This difficulty arises from the manner in which the drafters of the Act chose to include life expectancy providers in the statute. The Act did not create a separate license for life expectancy providers, but rather regulates life expectancy providers as brokers. This differs from the NCOIL Model and creates some awkwardness in the application of the Act to life expectancy providers. The NCOIL Model presumes that brokers act solely as representatives of policy owners. Thus, the limitations on and obligations of brokers under the NCOIL Model are written from the perspective of regulating the conduct of a representative. In contrast to brokers, life expectancy providers do not act as a representative of any party; they simply estimate the insureds' life expectancy. Accordingly, the NCOIL Model provides a somewhat awkward fit for life expectancy providers.

The Act attempts to tailor the awkward fit to life expectancy providers by exempting them from requirements that logically would apply only to representatives of owners. For example, life expectancy providers are excluded from the requirements imposed generally on brokers that they provide statutory warnings of the risks of life settlements to owners looking to sell policies and that they disclose their fees or other compensation received in a life settlement transaction. In addition, the Act allows the Commissioner to exempt life expectancy providers from the application of the Act, which provides a mechanism for eliminating any unwanted consequences to life expectancy providers.

Until the regulations effectuating the Act are adopted, there are several areas in which the duties imposed on life expectancy providers are not clearly defined. The first of these is the potential for the Act to create duties running from life expectancy providers to policy owners. Under the NCOIL Model, brokers are representatives of policy owners and owe a fiduciary duty to them. This duty carries over to the Act, suggesting that life expectancy providers would also owe fiduciary duties – a concept which is at odds with the actual role that life expectancy providers play in life settlement transactions. However, the statutory language provides a good argument that the fiduciary duty to owners is limited to brokers acting in a representative capacity, and, thus inapplicable to life expectancy providers. This argument is bolstered by the express exemption from the disclosure obligations of the Act given to life expectancy providers. On the other hand, the Act specifically requires that owners be told that brokers – a term that includes life expectancy providers – owe them a fiduciary duty.

Second, the Act requires participants in the life settlement business to police themselves. Among other things, Texas license holders are required to verify the licensing of everyone else involved in a life settlement transaction. The Act prohibits a broker from allowing any person to perform the functions of a provider without holding a proper license. The converse is true for life expectancy providers. This means that it would be illegal for a life expectancy provider to provide an estimate for use in a life settlement transaction unless it has verified that all transaction participants are duly licensed.

Third, all license holders under the Act (including life expectancy providers) are required to develop and maintain antifraud initiatives that are reasonably calculated to detect, prosecute and prevent fraud. These initiatives must include designated fraud investigators employed by or under contract to the provider and a detailed antifraud plan. The antifraud plan must include procedures for detecting and investigating fraud; for resolving inconsistencies between medical records and insurance applications; for reporting fraudulent acts to the Commissioner and for educating the provider's employees

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regarding the detection and prevention of fraud. In addition, the antifraud plan must include an organizational chart identifying the persons responsible for the antifraud initiative. Each life expectancy provider must submit its plan to the Commissioner, but such plans are exempt from disclosure under the Public Information Act as well as from discovery in a civil action.

The extent to which the Act will impact the operations of life expectancy providers depends significantly on the regulations to be adopted by the Commissioner. Until such regulations are adopted, providers should strictly interpret the Act. Similarly in light of the Act's heightened regulatory requirements, anyone participating in the life settlement industry is well advised to revisit their compliance policies and procedures.

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