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November 2, 2001

Mr. Larry Simrell, President
THE SECURE GROUP, L.L.C.
4310 South Old Wire Road
Rogers, Arkansas 72758

Re: Whether the brokering of whole life insurance policies
is the sale of viatical settlement contracts as defined
in the Arkansas Securities Act?
Interpretative Opinion No. 01-009

Dear Mr. Simrell:

I am in receipt of a letter dated 5 September 2001 from Don Brady, Esq., your attorney, asking whether your company's business activity is now regulated by this agency as the sale of viatical settlement contracts (viaticals) under the Arkansas Securities Act (the Act) as recently amended by Act 468 of 2001 and simultaneous changes to the Rules of the Arkansas Securities Commissioner (the Rules). You hand delivered that letter along with all the materials you use in your company's business to me on 6 September 2001 at our office. You also met with me in a lengthy meeting on 6 September. In the letter and at the meeting you posed two arguments that your company's business is not covered by these changes.

The statutory change in question came from Act 468 of 2001. This bill made two changes to the Act. First, it included in the definition of security a new definition: "viatical settlement contract or fractionalized or pooled interest therein." Ark. Code Ann. § 23-42-102(15)(A)(xiii) (Supp. 2001). Second, it added the following definition of an issuer of viaticals at Ark. Code Ann. § 23-42-102(9)(E) (Supp. 2001):

With respect to viatical settlement contracts, the term "issuer" means, in the case of a fractional or pooled interest in viatical settlement contracts, the person who creates, for the purpose of sale, the fractional or pooled interest, and in the case of a viatical settlement contract that is not fractionalized or pooled, the person effecting the transaction with the investor in such a contract, but does not include a broker-dealer or agent of a broker-dealer.

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This change in the Act became effective on 13 August 2001.¹ Several changes to the Rules of the Arkansas Securities Commissioner also became effective on that date. The only rule change relevant to this discussion is the definition of viatical settlement contract, found in Rule 102.01(36), Rules of the Arkansas Securities Commissioner, which reads as follows:

An agreement for the purchase, sale, assignment, transfer, devise or bequest of 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.

The rule then lists several exclusions from this definition, only the first of which is tangentially relevant to this discussion. It reads as follows:

The assignment, transfer, sale, devise or bequest of a death benefit, life insurance policy or certificate of insurance by the viator to the viatical settlement provider pursuant to the Viatical Settlements Act, Ark. Code Ann. §§ 23-81-501, et seq. (Supp. 1999)

Rule 102.01(36)(A), Rules of the Arkansas Securities Commissioner.

From the letter from your attorney dated 5 September 2001, the materials you delivered to me on 6 September 2001 and the discussion we had on that date, it appears your business is comprised of selling whole life insurance policies for a commission. You locate a seller of a life insurance policy, who you have represented to be older wealthy individuals who want to sell life insurance policies that were connected with businesses with which the insured no longer has a connection or for some other reason no longer needs, and a purchaser who is interested in purchasing such a life insurance policy. The purchaser buys the policy based on a life expectancy formulated by one of two companies not owned or controlled by you or your company that you represent are independent and reliable. You inform the purchaser that insurance or re-insurance can be purchased on this investment that will pay the purchaser the death benefit should the seller/insured live a stated period of time after the life expectancy formulated for that individual. This insurance can be purchased from companies that are also not owned or controlled by you or your company.

The selling process is accomplished by means of an escrow agent, who is your attorney. The escrow agent holds the policy and the purchase funds until the transfer of the ownership of the policy has been verified. At that time, the escrow agent releases the policy to the purchaser and the funds to the seller and others who take fees from these funds, including your company and the escrow agent. You represent that the fees you take at the transfer of the policy— called Pre-Acquisition and Consulting Fees— is the only money your company makes.

¹In accordance with Ark. Const., Amend. 7, this change became effective ninety (90) days after the General Assembly adjourned sine die. *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995).

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This interpretative opinion is limited to the question of whether your business comes under the definition of viatical settlement contract as defined by § 23-42-102(15)(A)(xiii) and Rule 102.01(36) and, thus, falls under the regulatory auspices of the Act. As noted above, you make two arguments that your company's activities are not covered by the Act and the Rules. First, as your attorney opined in his letter of 5 September, you argue that your business does not fall within the definition of a viatical because you are not selling pooled or fractionalized life insurance policies, only whole policies. Second, as you stated in our conversation on 6 September and in a telephone conversation before that date, you opined that your business does not fall under the definition of viatical because your company never acquires title to the insurance policy.

Even though The Secure Group (Secure) never acquires title to the whole insurance policies it brokers and it never fractionalizes or pools policies and sells parts of them, what Secure does is the selling of viaticals under the definitions set out in § 23-42-102(15)(A)(xiii) and Rule 102.01(36). Statutes are to be interpreted according to their plain language. *Arkansas County v. Desha County*, 342 Ark. 135, 27 S.W.3d 379 (2000). Any provision of a statute is to be construed with reference to the statute as a whole. *Robinson v. Taylor*, 342 Ark. 459, 29 S.W.3d 691 (2000). Rules are construed according to these same rules of construction. *Munson v. State*, 331 Ark. 41, 959 S.W.2d 391 (1998).

It is clear from the plain wording of Rule 102.01(36) that the purchase or sale of any life insurance policy for consideration less than the death benefit of that policy is a viatical settlement contract. No distinction is made there between whole life insurance policies and pooled or fractionalized policies. The absence of such a distinction is borne out by the definition of issuer of a viatical found at § 23-42-102(9)(E), which has alternative definitions for those selling pooled or fractionalized viaticals and those selling whole policies.

It also does not matter that the whole policies Secure sells are never titled in Secure's name. Regardless of the chain of title, those policies or viaticals are brokered and sold through Secure. Sale is defined at Ark. Code Ann. § 23-42-102(13)(A)(i) (Supp. 2001) as "every contract of sale, contract to sell, or disposition of, a security or interest in a security for value," and there is no requirement that the sale be of the seller's interest in the security being sold. Although it might be said that in the situation described above that Secure did not effect a sale of its own interest in a life insurance policy, it undeniably effected the sale of a life insurance policy.

This is also not the initial sale of the insurance policy by the viator to a viatical settlement provider that is excluded from the definition in Rule 102.01(36)(A).² Were the transaction in question here a purchase of a life insurance policy from the viator to hold in inventory for a later

²The term, viator, is not defined in the Act or the Rules. In the Viatical Settlements Act, Ark. Code Ann. §§ 23-81-501, *et seq.* (Supp. 2001), referred to in Rule 102.01(36)(A), viator is defined at Ark. Code Ann. § 23-81-502(k) (Supp. 2001) as a person who is terminally or chronically ill and who sells his or her life insurance policy for consideration less than the death benefit. Because the Act and the Rules do not require the seller of a life insurance policy to be terminally or chronically ill, the definition of viator for purposes of the Act and the Rules is necessarily broader and includes the seller of any life insurance policy for consideration less than the death benefit.

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sale, this transaction would be exempt under Rule 102.01(36)(A). Because this transaction entails also a sale to an ultimate or retail purchaser through the agency of Secure, which receives a commission (even if it is called a fee), it is not exempt under Rule 102.01(36)(A).

It is therefore the opinion of the Staff that the offer and sale of viaticals as set out above is covered by the Act as amended by Act 468 and the accompanying rule changes set out above. Accordingly, the offer and sale of these securities must be made in accordance with the Act. Significantly, the securities themselves and persons selling them must be registered with the Arkansas Securities Department in accordance with Ark. Code Ann. §§ 23-42-301(a) and 23-42-501 (Repl. 1994) or exempt from registration under some provision.

I note in closing that pursuant to Ark. Code Ann. § 23-42-504(a)(12) (Supp. 2001) there has been an exemption created for the sale of viaticals in Rule 504.01(A)(12)(m). If this exemption is used, any person selling viaticals as the agent of the issuer would be exempt from registration because anyone selling securities exempt from registration pursuant to Ark. Code Ann. § 23-42-504 (Supp. 2001) is excluded from the definition of an agent of the issuer pursuant to Ark. Code Ann. § 23-42-102(2)(B)(i)(b) (Supp. 2001).

Please note that this interpretative opinion is based solely upon the representations made to us in your attorney's letter, the written materials you delivered to me on 6 September and the oral representations you made on 6 September and in the telephone conversations we have had, and it applies only to those facts. Different facts or circumstances might and often would require a different response. Lastly, it is important to note that this interpretative opinion applies only to sales in Arkansas. If you are planning on selling viaticals to persons in other states, it is recommended that you obtain a similar interpretative opinion or no action letter from the securities regulatory agency in that state or seek a legal opinion from counsel in that state.

With best regards,
Theodore Holder
ASSISTANT SECURITIES COMMISSIONER