

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

Jan D. Smida,
CRD No. 4052976,

Respondent.

DISCIPLINARY PROCEEDING
No. 2008013405801

Hearing Officer: Andrew H. Perkins

**ORDER ACCEPTING OFFER OF
SETTLEMENT**

Date: September 15, 2011

INTRODUCTION

Disciplinary Proceeding No. 2008013405801 was filed on November 17, 2010 by the Department of Enforcement of the Financial Industry Regulatory Authority (FINRA) (Complainant). Respondent Jan D. Smida submitted an Offer of Settlement (Offer) to Complainant dated September 13, 2011. Pursuant to FINRA Rule 9270(e), the Complainant and the National Adjudicatory Council (NAC), a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs (ODA) have accepted the uncontested Offer. Accordingly, this Order now is issued pursuant to FINRA Rule 9270(e)(3). The findings, conclusions and sanctions set forth in this Order are those stated in the Offer as accepted by the Complainant and approved by the NAC.

Under the terms of the Offer, Respondent has consented, without admitting or denying the allegations of the Complaint, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party, to the entry of findings and violations consistent with the allegations of the Complaint, and to the imposition of the sanctions set forth below, and fully understands that this Order will become part of

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Respondent's permanent disciplinary record and may be considered in any future actions brought by FINRA.

BACKGROUND

In November 1999, Respondent first became registered with FINRA as an Investment Company and Variable Contracts Products Representative. Since that time, he has been registered in that capacity through NYLife Securities LLC. On January 12, 2005, Respondent also became registered as a General Securities Representative. In addition, Respondent has been registered since November 2007 as an Investment Advisor Representative through a member firm that is an affiliate of his employer member firm.

FINDINGS AND CONCLUSIONS

It has been determined that the Offer be accepted and that findings be made as follows:

SUMMARY

1. Respondent recommended and sold a variable universal life insurance policy with a face amount of \$1 million (the \$1 million VUL) to his 77 year-old customer. The monthly premium on the \$1 million VUL was \$7,000, equaling \$84,000 per year. Respondent's recommendation was inconsistent with a reasonable expectation that the customer had the financial ability to meet the monthly premium commitment, which would have consumed the majority of the customer's income. At Respondent's recommendation, the customer paid the initial and subsequent premiums on the \$1 million VUL through periodic partial withdrawals from three variable annuities that she previously had purchased from Respondent, utilizing partial withdrawal forms that Respondent prepared and submitted. Because of the partial withdrawals, the customer incurred approximately \$1,812 of surrender charges.

2. Respondent recommended the \$1 million VUL transaction without having reasonable grounds for believing that such transaction was suitable for the customer in view of the customer's financial situation, investment objectives and needs and based on the arrangements that Respondent made for partial withdrawals from the customer's variable annuities to pay the premiums. By recommending an unsuitable transaction, Respondent violated NASD Conduct Rules 2310 and 2110, and IM-2310-2.

FACTS

3. Respondent recommended and sold the \$1 million VUL to his customer, D.K., on June 7, 2007.
4. Respondent prepared the application for the \$1 million VUL. According to that application, D.K. had an annual income of approximately \$125,000, an amount computed by Respondent. Most of this amount represented unrealized gains on variable annuities owned by the customer, whose earned income and Social Security income was less than \$50,000.
5. The \$1 million VUL application included questions about the "source of funds" used to purchase the policy, and whether the policy was intended to "replace" existing life insurance or annuity contracts. In particular, the application asked whether D.K. used partial withdrawals from variable annuities to finance the purchase of the policy, and whether she was considering using funds from an existing annuity to pay premiums due on the \$1 million VUL. Respondent did not answer the "source of funds" questions on the application, and checked "no" to each of the questions in the "replacement" section of the application inquiring about D.K.'s intent to use funds from her variable annuities to pay premiums due on the \$1 million VUL. Respondent

signed the application, certifying to the accuracy of his answers.

6. Respondent received a sales commission of \$25,200 for his sale of the \$1 million VUL to D.K.
7. Contrary to his representations on the \$1 million VUL application, on the same day that he prepared that application, Respondent also completed a "partial withdrawal request form" for the withdrawal of money from a variable annuity that D.K. previously had purchased from Respondent. Respondent instructed the variable annuity issuer to deposit the proceeds of the partial withdrawal into D.K.'s checking account. Respondent submitted a check from D.K.'s checking account with the \$1 million VUL application for the initial premium due on the policy. D.K.'s check was written on June 7, 2007, the same day that Respondent prepared the \$1 million VUL application. The variable annuity issuer also withheld \$4,000 from D.K.'s partial withdrawal proceeds for federal and state taxes arising from the withdrawal.
8. On June 27, 2007, Respondent prepared another partial withdrawal request form. Like the partial withdrawal form that he completed on June 7, the June 27 form included a question asking whether the withdrawal proceeds would be used to pay premiums on another policy issued by that issuer. In answer to this question, Respondent began to enter the identification number of the \$1 million VUL policy number, but then crossed-out his entry.
9. The June 27 form facilitated D.K.'s partial withdrawal from a second variable annuity that she previously had purchased from Respondent. Pursuant to Respondent's instructions on the form, the issuer transferred the proceeds to D.K.'s checking account. D.K. used monthly withdrawals from the second variable annuity for each

of the next four months to pay the premiums due on the \$1 million VUL. The variable annuity issuer also withheld money each month for federal and state taxes arising from the withdrawals.

10. In December 2007, Respondent prepared a form for ongoing monthly partial withdrawals from a third variable annuity that D.K. previously had purchased from Respondent. In December 2007 and January, February, and March 2008, D.K. used withdrawal proceeds from the third variable annuity to pay premiums due on the \$1 million VUL. D.K. paid fees, known as "surrender charges," on each of those withdrawals. The surrender fees totaled \$1,812.76.
11. In April 2008, D.K., alarmed by the tax consequences of the withdrawals from her variable annuities, sent a written complaint to the company that issued the \$1 million VUL and the annuities stating that she could not afford the VUL's annual premium of \$84,000. The issuer thereafter suspended the partial withdrawals from D.K.'s third variable annuity. Had D.K. not written to the issuer, it would have continued to process monthly partial withdrawals and impose surrender fees.
12. As Respondent knew, the partial withdrawals from D.K.'s third variable annuity would have depleted that policy of all of its value within two years. Moreover, as Respondent knew, the \$1 million VUL would have lapsed within a year had D.K. discontinued her premium payments, and she would have forfeited all of the money that she paid toward that policy.

UNSUITABLE RECOMMENDATION
(NASD Conduct Rules 2110 and 2310 and IM-2310-2)

13. Respondent recommended and sold the \$1 million VUL to D.K. without having reasonable grounds for believing that the transaction was suitable for her in view of D.K.'s financial situation, investment objectives and needs. Respondent's recommendation was inconsistent with a reasonable expectation that the customer had the financial ability to meet the monthly premium commitment, which exceeded the customer's earned and Social Security income. On Respondent's recommendation, and through arrangements that he made, the initial and subsequent monthly premium payments were paid by partial withdrawals from three variable annuities that D.K. previously had purchased from Respondent. As a result of those partial withdrawals, D.K. incurred \$1,812.76 in surrender charges.

14. By recommending an unsuitable transaction, Respondent violated NASD Conduct Rules 2310 and 2110, and IM-2310-2.

Based on the foregoing, Respondent violated NASD Conduct Rules 2310 and 2110, and IM-2310-2.

Based on these considerations, the sanctions hereby imposed by the acceptance of the Offer are in the public interest, are sufficiently remedial to deter Respondent from any future misconduct, and represent a proper discharge by FINRA, of its regulatory responsibility under the Securities Exchange Act of 1934.

SANCTIONS

It is ordered that Respondent be fined \$30,200, which includes the disgorgement of commissions received of \$25,200, and suspended from association with any FINRA member in any capacity for 15 business days.

Respondent agrees to pay the monetary sanction upon notice that the Offer has been accepted and that such payments are due and payable. Respondent has submitted an Election of Payment form showing the method by which he proposes to pay the fine imposed.

The sanctions imposed herein shall be effective on a date set by FINRA staff.

SO ORDERED.

FINRA

Signed on behalf of the
Director of ODA, by delegated authority



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