

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2012032749001**

**TO: Department of Enforcement
Financial Industry Regulatory Authority ("FINRA")**

**RE: David Andrew Herlicka, Respondent
CRD No. 2627602**

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Respondent David Andrew Herlicka ("Respondent" or "Herlicka") submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, FINRA will not bring any future actions against Respondent alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. Respondent hereby accepts and consents, without admitting or denying the findings, 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, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by FINRA:

BACKGROUND

From September 1996 until August 2011, Herlicka was employed by New York Life Securities LLC (the "Firm"), a FINRA regulated broker-dealer, as an insurance agent. He became registered with the Firm as a General Securities Representative (Series 7) beginning in 2000. Subsequently Herlicka was registered with the Firm as an Investment Company Products/Variable Contracts Representative (Series 6) beginning in 1997, and as an Investment Company Products/Variable Contracts Principal (Series 26) beginning in 2004. On August 2, 2011, Herlicka voluntarily resigned from the Firm. Thereafter the Firm terminated Herlicka's registration on August 5, 2011.

Thereafter, during the period from November 16, 2011 through January 29, 2014, the Firm filed a series of amended Uniform Termination Notices of Securities Industry Registration (amended Forms U5) reporting numerous customer

complaints about Herlicka. Although Herlicka has not been associated with another FINRA regulated broker-dealer since August 2, 2011, pursuant to Article V, Section 4 of FINRA's By-Laws, Herlicka remains subject to FINRA's jurisdiction until January 28, 2016, based on the filing of an amended Form U5, dated January 29, 2014.

RELEVANT DISCIPLINARY HISTORY

Herlicka has no prior relevant disciplinary history in the securities industry.

OVERVIEW

From 2003 through 2011 (the "Relevant Period"), Herlicka, either independently or working in conjunction with another registered representative, made unsuitable trade recommendations to seven customers in connection with the sales of VULs. Herlicka, either independently or working in conjunction with another registered representative, also made misstatements, and failed to adequately disclose information regarding VULs, including the existence of surrender fees, to these same seven customers and one additional investor. Herlicka recorded false information regarding customer net worth and annual income on VUL applications for four of these customers. In 2011 Herlicka also effected an unauthorized trade of a VUL for an additional customer.

FACTS AND VIOLATIVE CONDUCT

During the period from 2004 through August 2011, Herlicka worked in the Firm's Bedford, New Hampshire branch office (the "Bedford Office"). Herlicka's business included recommending and selling variable annuities and VULs, among other things.

One feature of a VUL policy is that the owner can allocate a portion of his premium payments to a separate sub-account in order to accumulate cash value through investments. Monthly charges, including a cost of insurance charge and administrative fees, are deducted from the policy's cash value. The cash value of the policy may increase or decrease based on the performance of the sub-account investments. The VUL policy terminates (lapses) if at any time the net cash surrender value is insufficient to pay the monthly deductions. Upon termination of the policy, the remaining cash value becomes worthless.

Customers RD and KD

In August 2003, Herlicka and another registered representative working in the Bedford Office sold two VULs to Customers RD and KD. Herlicka attended

meetings with RD, KD and the other registered representative. Herlicka and the other registered representative shared commissions.

RD was a 52 year-old owner of a small moving company earning approximately \$140,000 annually. KD was 55 years old and worked as RD's assistant, earning approximately \$13,000 annually. Both had little investment experience. At the time RD and KD paid their initial premiums on these VULs, they had no other investments or savings.

Herlicka, and another registered representative from the Bedford Office, recommended that RD and KD each purchase a VUL. Herlicka and another representative sold RD and KD a VUL with face amounts of \$500,000 and \$250,000, respectively.

The investment component of the VUL policy purchased by RD and KD consisted of segregated sub-accounts where part of their premium payments was invested in mutual funds. Herlicka, and another registered representative from the Bedford Office, represented to RD and KD that they would not have to worry about being able to afford their premiums because they could use the funds invested in the VUL sub-accounts to pay the premiums. This statement was inaccurate and misleading since Herlicka failed to disclose to RD and KD that such action would adversely affect the net cash surrender value of their policies, and if the net cash surrender value of their policies was insufficient to cover the monthly deductions, their policies would lapse.

RD's planned premium was \$12,000 annually. RD needed liquidity to take care of the unexpected costs of his business. KD's planned premium was \$6,000 annually, while her annual income was approximately \$13,000. KD's planned premium was nearly 50% of her gross income.

The VULs Herlicka recommended to RD and KD were unsuitable since the premiums they needed to pay to prevent their policy from lapsing were higher than they could afford given their financial situation and needs. In addition, the VULs did not meet their liquidity needs.

In June 2012, both RD's and KD's VULs lapsed because they could no longer afford the premium payments. As a result, they lost the remaining cash value of their policies, and later made a complaint against Herlicka to the Firm regarding their VUL purchases.

Customer MW

In or about December 2008, Herlicka, along with another registered representative from the Bedford Office, sold Customer MW a VUL with a face value of \$2,000,000. The other representative had primary responsibility for servicing the customer, but he and Herlicka shared the commissions. At the time, Customer MW was a 51 year-old nurse with three dependents, with two children and a spouse on long-term disability. MW's annual income was approximately

\$90,000. The other registered representative sold an immediate annuity to MW's husband, in part, to fund the payment of the premiums for the \$2,000,000 VUL. Both Customer MW and her husband had limited investment experience.

Herlicka and another registered representative sold Customer MW a VUL with a face amount higher than what she wanted at the time. Herlicka and the other representative recommended to MW that it was good to start with a policy having a higher face value, and then adjust the face value downward later. This statement was inaccurate and misleading since Herlicka and the other representative failed to disclose that a decrease in the face amount would result in a surrender charge applicable to the amount of the decreased face amount.

Unaware of any possible surrender fees, Customer MW decreased the face value of her VUL from \$2 million to \$750,000 in or about September 2011. She was assessed a surrender fee of \$5,830.10 for this policy change. Customer MW's planned premium was \$3,759 each quarter, or \$15,036 annually. Customer MW's planned premium was approximately 16% of her annual gross income. This VUL was unsuitable since the premiums MW needed to pay to prevent her policy from lapsing were higher than she could afford given her financial situation.

Customer VW

Customer VW, MW's mother, was a 72 year-old retiree when she met Herlicka through another registered representative in the Bedford Office. After the death of her husband in December 2005, VW was living on a \$24,000 teacher's pension. Her assets consisted of her primary residence, a separate Florida trailer, two CDs worth approximately \$8,000, and two variable annuities purchased by her husband worth \$59,870 and \$75,521. VW was an unsophisticated investor with limited investment experience.

On or about October 27, 2006, based on Herlicka's recommendation, VW purchased a VUL with a face value of \$500,000. This product had a surrender period of 15 years. The scheduled annual premium for VW's VUL was \$30,000. This VUL was unsuitable for VW, because the scheduled premiums were higher than she could afford given her financial situation and needs, including her limited pension income. In addition, Herlicka failed to disclose that if the VUL sub-accounts performed poorly, payment of planned premiums might be insufficient to prevent the net cash surrender value from declining to the point where the VUL was in danger of lapse.

Following Herlicka's recommendation, VW subsequently increased the face value of her VUL to \$1,500,000. This resulted in an increase of her scheduled annual premium from \$30,000 to \$90,000, which she could not afford.

On or about August 24, 2006, Herlicka made inaccurate entries on VW's VUL application by recording VW's annual income as \$100,000, when her pension was only \$24,000 per year, and additional income from her CDs was minimal.

Customer JT

In 2007, JT was a 48 year old, married nurse with two children and an annual income of approximately \$250,000. His wife was also a nurse earning an annual income of approximately \$38,000. Their household net worth, excluding their home, was approximately \$500,000. JT's two children were in high school. JT, VW's son-in-law, met with Herlicka and another registered representative from the Bedford Office.

In February 2007, based on the recommendation of Herlicka and another registered representative from the Bedford Office, JT purchased a VUL with a \$1 million face amount. JT later increased the face amount to \$2 million after Herlicka told him that he could reduce the face amount later. Herlicka, however, failed to disclose that reduction of the face amount would trigger a surrender charge. On or about September 8, 2010, JT reduced the face amount of his VUL from \$2 million to \$1 million, thereby triggering a surrender charge. In addition, Herlicka failed to disclose that the mortality and expense fee for his VUL would increase over time.

On or about November 29, 2006, Herlicka made false entries on JT's VUL application by inaccurately recording JT's net worth as \$2 million, when his household net worth was actually about \$750,000.

Customers KR and CPR

KR and CPR are a married couple who met Herlicka and another registered representative in the Bedford Office in approximately 2008. KR and CPR were 46 and 44 years old, respectively. At the time their children were 11 and 13 years old. KR and CPR were both employed in a family-owned funeral home earning a combined income of approximately \$100,000. Although KR and CPR had an ownership interest in the funeral home, CPR's mother was the primary owner.

In May 2008, Herlicka, with another registered representative in the Bedford Office, recommended and sold a VUL to each KR and CPR. Herlicka and the other representative told them that they could fund their VUL premiums by using the investment profits from a variable annuity each previously purchased. This statement was inaccurate and misleading since Herlicka failed to disclose that if the VUL sub-accounts performed poorly, payment of the planned premiums might be insufficient to prevent the net cash surrender value from declining to the point where the VUL was in danger of lapse.

On May 22, 2008, both KR and CPR each signed a VUL application for a VUL with a face value of \$1 million. These VUL policies were issued in July 2008.

On or about May 22, 2008, when KR and CPR signed their applications, the entries for income and net worth were blank. Subsequently, Herlicka falsely recorded KR's liquid net worth as \$1 million on the VUL application, when his household liquid net worth was approximately \$75,000.

The combined annual planned premiums for KR's and CPR's VULs totaled approximately \$24,000. The VULs that were recommended to KR and CPR were unsuitable since the premiums they needed to pay to prevent their policies from lapsing were higher than they could afford given their financial situation and needs, including saving for college for their two children.

Customer SS

SS purchased a term life insurance policy from ABC Life Insurance Company in 2008 when he was a 46 year old, married technician, with an annual income of about \$55,000. His wife was employed by a pharmacy, earning approximately \$38,000 per year. They had two children. SS was an unsophisticated customer with limited investment experience.

In March 2009, another registered representative in the Bedford Office recommended and sold to SS a VUL with a face value of \$400,000 as a replacement policy for his term life insurance. In February 2011, Herlicka, and another registered representative in the Bedford Office, recommended that SS increase the face value of his prior VUL from \$400,000 to \$1 million. After SS agreed to increase the face value on his VUL, his planned premiums were \$18,000 per year. This was approximately 32% of his annual gross income. The VUL recommended to SS was unsuitable since the premiums he needed to pay to prevent his policy from lapsing was higher than he could afford given his financial situation and needs, including his need to support two children.

In addition, Herlicka and the other registered representative failed to disclose that if the VUL sub-accounts performed poorly, payment of planned premiums might be insufficient to prevent the net cash surrender value from declining to the point where the VUL was in danger of lapse. SS complained to the Firm about his VUL purchase on December 23, 2013.

Unsuitable VUL Recommendations

NASD Conduct Rule 2310(a) states that "in recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."

FINRA Rule 2010 and NASD 2110 require that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."¹

¹ On December 15, 2008, FINRA Rule 2010 superseded NASD Rule 2110, however, the relevant text of the rule remained the same.

Herlicka violated NASD Rules 2310 and 2110 and IM 2310-2(b)(5) for certain recommendations during the period from August 2003 until December 15, 2008 to Customers RD and KD, MW, VW, KR and CPR, that were unsuitable for them based on their financial situation and needs, as described above. Herlicka violated NASD Rules 2310, FINRA Rule 2010 and IM 2310-2(b)(5) when he recommended the increase in face value of SS's VUL in February 2011, that was unsuitable for him based on his financial situation and needs, as described above.

Inaccurate Representations and Failure to Disclose Risks and Fees

In connection with sales of VULs, Herlicka made inaccurate statements and failed to make disclosures regarding: the risk of withdrawing funds from VULs; the risk of policy lapse; the increase in mortality and expense fees over time; and the existence of surrender charges to Customers RD, KD, MW, VW, JT, KR and CPR during the period from August 2003 until December 15, 2008, in violation of NASD Rule 2110, as described above. Herlicka also violated FINRA Rule 2010 by failing to disclose a material fact in connection to his sale of a VUL to Customer SS in February 2011.

Unauthorized Trade

In or about February 2011, Herlicka, and another registered representative in the Bedford Office, recommended that Customer DS purchase a NYLIAC Variable Universal Life Accumulator, with a face amount of \$2 million. DS never agreed to the purchase of this VUL. Instead, DS informed Herlicka that he wanted time to research the comparative benefits of investing in IRAs instead.

On or about May 25, 2011, despite the fact that Herlicka knew that DS had not agreed to purchase a VUL, Herlicka and another registered representative in the Bedford Office, effected a surrender of a variable annuity that DS already owned, and used the proceeds to purchase a VUL on his behalf with a face value of \$1,500,000.

Based on the foregoing, Herlicka violated FINRA Rule 2010 and NASD IM 2310-2 for both the purchase of a VUL for DS and the surrender of his variable annuity.

Causing the Creation of Inaccurate Books and Records

NASD Rule 3110(a) requires member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations, and statements of policy promulgated thereunder, and with the Rules of this Association and as prescribed by the Securities Exchange Act of 1934, Rule 17a-3." In turn, Exchange Act Rule 17a-3(a)(17) requires member firms to make and keep for each account with a natural person as a customer, the customer's name, tax identification number, address, telephone number, date of birth, employment status, annual income, net worth,

and investment objectives.

During the Relevant Period, the Firm required its registered representatives to record the customers' net worth and annual income on their VUL applications, based on information obtained from their customers. Herlicka made false entries, or signed applications with false entries made by another registered representative, on Firm VUL policy applications for Customers VW, JT, KR and CPR by inflating the net worth of Customers JT, KR and CPR, and inflating the annual income of Customer VW.

Based on the foregoing, Herlicka violated NASD Rules 3110(a) and 2110 in that he caused his Firm to create and maintain inaccurate books and records, in violation of Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-3 promulgated thereunder.

B. I also consent to the imposition of the following sanctions:

1. A suspension in all capacities for a period of 18 months, and
2. A fine of \$97,484.01, which includes the disgorgement of commissions received of \$77,484.01.

The fine shall be due and payable either immediately upon reassociation with a member firm following the 18 month suspension noted above, or prior to any application or request for relief from any statutory disqualification resulting from this or any other event or proceeding, whichever is earlier.

I specifically and voluntarily waive any right to claim that I am unable to pay, now or at any time hereafter, the monetary sanction(s) imposed in this matter.

I understand that if I am barred or suspended from associating with any FINRA member, I become subject to a statutory disqualification as that term is defined in Article III, Section 4 of FINRA's By-Laws, incorporating Section 3(a)(39) of the Securities Exchange Act of 1934. Accordingly, I may not be associated with any FINRA member in any capacity, including clerical or ministerial functions, during the period of the bar or suspension (see FINRA Rules 8310 and 8311).

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

II. WAIVER OF PROCEDURAL RIGHTS

I specifically and voluntarily waive the following rights granted under FINRA's Code of Procedure:

- A. To have a Complaint issued specifying the allegations against me;
- B. To be notified of the Complaint and have the opportunity to answer the

allegations in writing;

- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, I specifically and voluntarily waive any right to claim bias or prejudgment of the General Counsel, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

I further specifically and voluntarily waive any right to claim that a person violated the ex parte prohibitions of FINRA Rule 9143 or the separation of functions prohibitions of FINRA Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

III.

OTHER MATTERS

I understand that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against me; and
- C. If accepted:
 - 1. this AWC will become part of my permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against me;
 - 2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about my disciplinary record;
 - 3. FINRA may make a public announcement concerning this agreement and

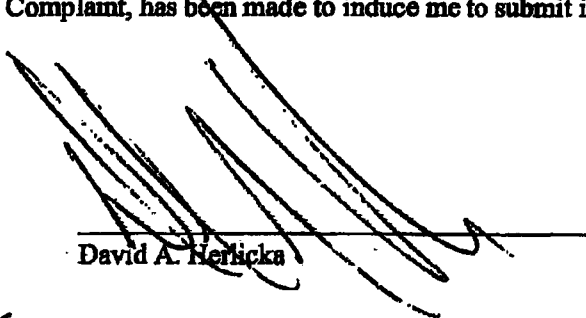
the subject matter thereof in accordance with FINRA Rule 8313; and

4. I may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. I may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects my: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.

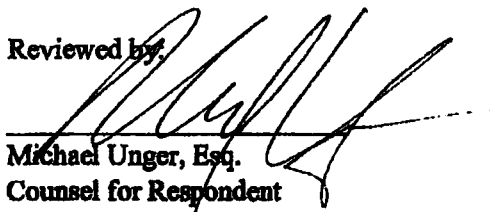
- D. I may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. I understand that I may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by FINRA, nor does it reflect the views of FINRA or its staff.

I certify that I have read and understand all of the provisions of this AWC and have been given a full opportunity to ask questions about it; that I have agreed to its provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce me to submit it.

05/22/2014
Date:


David A. Herlicka

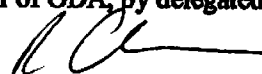
Reviewed by:


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Accepted by FINRA:

Date 5/23/14

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



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