

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

Department of Enforcement,

Complainant,

v.

Berthel, Fisher & Co. Financial Services,
Inc. (CRD No. 13609),

Respondent.

Disciplinary Proceeding
No. 2014039169601

Hearing Officer Dixon

**ORDER ACCEPTING OFFER OF
SETTLEMENT**

Date: February 5, 2018

INTRODUCTION

Disciplinary Proceeding No. 2014039169601 was filed on March 20, 2017, by the Department of Enforcement of the Financial Industry Regulatory Authority (FINRA) (Complainant). Respondent Berthel, Fisher & Co. Financial Services, Inc. (Berthel Fisher) submitted an Offer of Settlement (Offer) to Complainant dated January 30, 2018. 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, Berthel Fisher has consented, without admitting or denying the allegations of the Complaint, as amended by the Offer of Settlement, 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, as amended by the Offer of Settlement, and to the imposition of the sanctions set

forth below, and fully understands that this Order will become part of Berthel Fisher's permanent disciplinary record and may be considered in any future actions brought by FINRA.

BACKGROUND

Berthel Fisher has been a FINRA-registered broker-dealer since 1983, and its headquarters and home office are in Cedar Rapids, Iowa. Berthel Fisher is an introducing broker-dealer with approximately 350 registered individuals operating in approximately 230 branch offices. By virtue of its current registration, Berthel Fisher is subject to FINRA's jurisdiction pursuant to Article IV of FINRA's By-Laws.

On February 24, 2014, FINRA accepted a Letter of Acceptance, Waiver and Consent from Berthel Fisher in a disciplinary matter (#2012032541401) involving, among other things, inadequate supervisory systems and written procedures, including those concerning its suitability review of transactions in non-traded REITs, non-traditional ETFs and other alternative investments. Berthel Fisher accepted and consented to the imposition of a censure, fine of \$675,000, and payment of restitution to customers in the total amount of \$13,292.53.

FINDINGS AND CONCLUSIONS

It has been determined that the Offer be accepted and that findings be made as follows:¹

SUMMARY

1. Over a two-year period, Jeffrey Dragon, a registered representative of Berthel, Fisher & Co. Financial Services, Inc., generated approximately \$417,000 in concessions for himself and his firm, at the expense of his customers, by recommending and effecting a pattern of

¹ The findings herein are pursuant to Berthel Fisher's Offer of Settlement and are not binding on any other person or entity named as a respondent in this or any other proceeding. On January 8, 2018, an Order Accepting Offer of Settlement was issued resolving all causes of action in this proceeding against Jeffrey Paul Dragon. As part of that Order, Dragon was suspended from associating with a FINRA member in any capacity for 21 months and fined \$50,000.

unsuitable short-term trading of unit investment trusts (“UITs”). Specifically, between January 1, 2013 and December 31, 2014 (the “UIT Period”) Dragon recommended to 12 customers – many of whom were seniors, unsophisticated investors, or both – that they liquidate UIT positions that they had held for only a few months, and which they had purchased on Dragon’s recommendations, and then use the proceeds to purchase other UITs. Because each UIT purchased carried a new sales load, and because UITs are designed not to be actively traded, Dragon’s recommendations were excessive and unsuitable.

2. Dragon’s recommendations to these customers were further unsuitable, in that he designed his recommendations to prevent his customers’ UIT purchases from qualifying for sales-charge discounts. Despite regularly recommending that customers purchase UITs in amounts that exceeded volume-discount “breakpoints” of \$50,000 and \$100,000, Dragon routinely structured their investments – by spreading the amounts over smaller purchases and multiple days – in order to avoid reaching those thresholds. By doing so, Dragon sought to increase his concessions at his customers’ expense.

3. Berthel Fisher allowed this activity to occur – and, in fact, profited from it – as a direct result of its inadequate system for supervising UIT trading. Throughout the UIT Period, Berthel Fisher’s only regular supervisory review of UIT recommendations and customer activity consisted of manual reviews of daily trade blotters that did not indicate either how long UIT positions had been held before liquidation or the source of funds used to purchase new UITs. Thus, Berthel Fisher’s supervisory system was not reasonably designed to prevent short-term and potentially excessive UIT trading.

4. Berthel Fisher’s supervisory system was also inadequate because it was not reasonably designed to prevent short-term and potentially excessive trading in mutual funds. As

with UITs, the firm's supervisory system lacked any methods, reports, or other tools to identify mutual-fund switching or trading patterns indicative of other misconduct between January 1, 2013 and December 31, 2015 (the "Mutual Fund Period").

5. Likewise, Berthel Fisher's supervisory system was not reasonably designed to ensure that the firm's UIT and mutual-fund customers received all sales-charge discounts to which they were entitled during the UIT Period and Mutual Fund Period, respectively. Instead, Berthel Fisher relied on its registered representatives and its clearing firm to determine whether UIT and mutual-fund purchases should receive sales-charge discounts, and conducted no review or supervision to determine if those discounts were applied correctly.

6. This not only allowed Dragon's breakpoint-manipulation scheme to go unchecked, it also resulted in further injury to Berthel Fisher's customers: from 2010 through 2014, Berthel Fisher failed to detect that more than 2,700 of its customers' UIT purchases did not receive applicable sales-charge discounts. As a result, Berthel Fisher customers paid excessive sales charges of approximately \$667,000, nearly all of which was paid to Berthel Fisher and its registered representatives as dealer concessions. In consultation with FINRA, Berthel Fisher acknowledged that it had missed the discounts identified above and paid restitution to the affected customers in 2015.

RESPONDENTS AND JURISDICTION

A. BERTHEL, FISHER & CO. FINANCIAL SERVICES, INC.

7. Berthel Fisher has been a FINRA-registered broker-dealer since 1983. Its headquarters and home office are in Cedar Rapids, Iowa.

8. Berthel Fisher is an introducing broker-dealer with approximately 350 registered individuals operating in approximately 230 branch offices.

9. More than half of Berthel Fisher's branch locations are single representative offices.

10. By virtue of its current registration, Berthel Fisher is subject to FINRA's jurisdiction pursuant to Article IV of FINRA's By-Laws.

B. JEFFREY DRAGON

11. Jeffrey Dragon first entered the securities industry in 1988.

12. Dragon was associated with six different broker-dealers from 1988 to 2007.

13. Dragon registered as a General Securities Representative with Berthel Fisher in March 2007, and Dragon was employed by Berthel Fisher from March 2007 until Berthel Fisher terminated his registration in September 2016.

FACTS COMMON TO ALL CAUSES OF ACTION

A. UNIT INVESTMENT TRUSTS

14. A UIT is one of three basic types of investment companies registered with the Securities and Exchange Commission under the Investment Company Act of 1940, along with mutual funds and closed-end funds.

15. A UIT offers shares, called "units," in a fixed portfolio of securities that has been assembled by a sponsor and offered publicly to investors through broker-dealers.

16. Units are offered to the public during an initial offering period and at the offering price stated in the offering materials.

17. UITs terminate on a specified date, generally between 12 and 24 months after the start of the initial offering period.

18. Investors who hold their units until the UIT's termination receive a distribution following the liquidation of the trust's remaining assets, less deductions for final trust expenses.

19. Investors may also liquidate units before the UIT terminates, either through a

secondary market, if available, or by tendering units to the product's sponsor. The liquidation price for units is equal to the net asset value per unit, less any uncollected sales charges.

20. Broker-dealers selling UITs to the public earn compensation for doing so, through a portion of the sales charges assessed on UIT purchases.

21. UIT purchases are subject to sales charges, which typically consist of:

- an initial sales charge,
- a deferred sales charge, and
- a creation-and-development fee.

22. These sales charges are based on a percentage of the public-offering price of each UIT, and the majority of a UIT's total sales charge is paid as a "dealer concession" to the broker-dealer selling the units to the public.

23. Nearly all of the UITs at issue here carried sales charges totaling 3.95% before available discounts ("undiscounted sales charges"). The full range of undiscounted sales charges for the UITs at issue was between 2.95% and 4.95%.

24. UIT sponsors, however, offer various discounts that can reduce the total sales charges paid in connection with a UIT investment.

25. For example, most UITs provide a 1.0% sales-charge discount for UIT "rollovers" or exchanges – i.e., UIT purchases made with the proceeds of a termination or liquidation of another UIT within the previous 30 days.

26. In addition, volume discounts – sometimes called "breakpoints" – are available for single-day UIT purchases, by the same customer and from the same sponsor, that exceed specific threshold amounts, usually beginning at \$50,000. Customers investing at or above an available breakpoint qualify for sales-charge discounts of 0.25% or more, depending on the breakpoint amount.

27. Sales-charge discounts, whether breakpoints, rollover discounts, or otherwise, reduce the costs that customers pay for their UIT investments and thereby reduce the dealer concession received by the selling broker-dealer and its registered representatives.

28. Rollover and breakpoint discounts were available for all of the UITs at issue here.

B. DRAGON RECOMMENDED AND EFFECTED A PATTERN OF UNSUITABLE SHORT-TERM UIT TRADING.

29. During the UIT Period, Jeffrey Dragon, acting as an agent of Berthel Fisher and within the scope of his duties, recommended and engaged in short-term UIT trading in 19 accounts belonging to 12 of his customers (“Customers”).

30. Over that two-year period, Dragon’s UIT trading in the Customers’ accounts involved approximately 640 UIT purchases in 81 distinct UITs, of which 70 were offered by Guggenheim Funds Distributors, LLC.²

31. During that time, Berthel Fisher authorized Dragon and its other representatives to recommend and place trades in UITs offered by Guggenheim and two other sponsors: First Trust Portfolios L.P., and Advisors Asset Management, Inc.

32. Dragon’s UIT recommendations to the Customers followed a consistent pattern:

- purchase UITs during their initial offering periods,
- liquidate those UITs before the end of their term – usually after holding them for six months or less, and
- use the proceeds from these liquidations to purchase other UITs, thereby incurring new sales charges.

33. For example:

a) Dragon recommended that AP, an 81-year-old customer, make 177 separate UIT purchases during the two-year UIT Period. Of those 177 purchases:

- four positions were held for 30 days or fewer,

² This figure excludes two instances in which a Customer chose to reinvest monthly UIT dividends, which resulted in small additional purchases between the opening and closing of the position.

- 76 additional positions were liquidated 60 or fewer days after purchase,
- another 89 positions were liquidated between 61 and 90 days after purchase,
- only four positions were held for longer than 120 days, and
- zero were held for longer than 294 days or to termination.

b) Similarly, 84-year-old AW, also acting on Dragon's recommendations, made a total of 81 UIT purchases in her trust and retirement accounts during the UIT Period. Of the discrete positions resulting from those purchases:

- two were sold after less than 30 days, including one that was held for only 12 days,
- 12 others were liquidated within 31-60 days after purchase,
- another 60 UIT positions were liquidated after being open 61-90 days,³
- Only two positions were held for longer than 120 days, and
- zero were held longer than 12 months or until termination.

c) Customer PC was 62 years old when she acted on Dragon's recommendations to purchase 90 UIT positions during the UIT period. Of those:

- nine were liquidated within 60 days of purchase,
- 56 others were liquidated within 61-90 days after purchase,
- 14 others were liquidated within 91-120 days months, and
- Only one was held longer than 12 months or to termination.

34. Nine of the other Customers, also acting on Dragon's recommendations, made a total of 289 UIT purchases during the two-year UIT period. Only 20 of the UIT positions that resulted from these purchases were held for longer than one year or to termination. By comparison, more than 220 positions were liquidated after being held for less than 120 days.

35. The short-term trading that Dragon recommended meant that the affected customers cycled the same funds through multiple rounds of UIT purchases – and the concomitant

³ For one of these liquidations, a portion of the original position was liquidated 67 days after purchase, while the remainder was held 126 days before liquidation.

sales charges – in 2013 and 2014. For example:

- a) Customer LL invested \$33,801 in a UIT in January 2013 and, after liquidating the position four months later, used the same funds in six more rounds of UIT purchases and liquidations between May 2013 and July 2014. As a result, LL's initial investment was subject to seven separate sales charges in the course of 18 months.
- b) Likewise, a \$106,000 UIT purchase by customer AP in February 2013 was liquidated in May 2013, and the proceeds were used to buy and sell seven other UIT positions by July 2014. Thus, in less than 18 months, AP incurred eight discrete UIT sales charges on her initial \$106,000 investment.

36. The total principal amount of the short-term UIT trades that Dragon recommended to the Customers during the UIT Period totaled approximately \$19,000,000. And all of those purchases were subject to undiscounted sales charges of between 2.95% and 4.95%. A complete listing of the short-term UIT trading that Dragon recommended to the Customers and conducted in their accounts during the UIT Period is provided in Exhibit A to the Complaint, as amended herein.

37. This resulted in the Customers paying approximately \$417,000 in dealer concessions in connection with Dragon's short-term UIT trade recommendations, as reflected in Exhibit B to the Complaint, as amended herein.

38. The approximately \$417,000 was initially paid to Berthel Fisher, which in turn paid to Dragon 90% of all dealer concessions received for UIT transactions placed by Dragon during the UIT Period.

C. DRAGON STRUCTURED UIT PURCHASE RECOMMENDATIONS IN ORDER TO DEPRIVE THE CUSTOMERS OF BREAKPOINT DISCOUNTS.

39. In addition to recommending that the Customers engage in short-term trading of

UITs, Dragon also structured the Customers' transactions in order to prevent them from qualifying for breakpoint discounts.

40. During 2013 and 2014, Dragon was aware that the UITs he recommended to his Customers offered breakpoint discounts for purchases of \$50,000 or more.

41. Dragon was further aware that these discounts were available not only for individual transactions at or above breakpoint amounts, but also for multiple UIT purchases made by the same customer from the same product sponsor on a single day, if the aggregate principal amount of those purchases exceeded a breakpoint threshold.

42. Despite this knowledge, Dragon recommended transactions to the Customers in a manner that was intended to deprive them of available breakpoint discounts and to increase the dealer concessions paid to Berthel Fisher and Dragon for those transactions.

43. Of the approximately 640 UIT purchases that Dragon recommended to the Customers during 2013 and 2014, only three exceeded the \$50,000 breakpoint.

44. By contrast, Dragon recommended 143 UIT purchases in amounts just below this threshold, between \$44,999 and \$49,999 during the same time period, as reflected in Exhibit C to the Complaint.

45. Even when soliciting UIT investments that exceeded \$50,000 or \$100,000, Dragon consistently recommended that customers split the amounts invested into multiple, smaller purchases and place the trades on different days, which meant that none of the purchases qualified for breakpoint discounts.

46. For example:

- a) Dragon recommended that 62-year-old customer PC purchase more than \$116,000 worth of four Guggenheim UITs in late March 2013.

- Dragon structured the investments to occur over the course of a four-business-day period, so that none of the purchases qualified for any breakpoint discount.
- Had PC made the four purchases on the same day, all four trades would have qualified for a 0.50% (or \$5,800) sales-charge discount.

b) Dragon recommended that 81-year-old customer AP liquidate three UIT positions on November 14, 2013, and reinvest the proceeds – approximately \$181,000 – in other UITs.

- Dragon structured the purchases to occur on four separate days over a six-day period, so that none of the purchases qualified for any breakpoint discount.
- Had AP reinvested all the liquidation proceeds on a single day, the entire amount would have qualified for a sales-charge discount of 0.50% (or \$9,050).

47. This type of structuring was the norm for Dragon; approximately 40 times in 2013 and 2014, Dragon recommended that Customers purchase more than \$100,000 worth of UITs from a single sponsor, but spread those recommendations over multiple days, which made those purchases ineligible for a 0.50% breakpoint discount.

48. In more than 50 other instances during 2013 and 2014, Dragon recommended that his Customers purchase more than \$50,000 worth of UITs by a single sponsor, but structured those transactions so that none of the single-day purchases exceeded \$50,000.

49. Dragon engaged in this structuring in order to prevent Customers from qualifying for breakpoint discounts.

50. While these structured UIT transactions were occurring, Berthel Fisher did not have any system to detect or deter Dragon's misconduct, nor did anyone in a supervisory or compliance capacity at Berthel Fisher investigate, question, or otherwise supervise Dragon's structured UIT transactions.

D. BERTHEL FISHER'S SUPERVISION OF UIT ACTIVITY, INCLUDING BOTH THE FREQUENCY OF THAT ACTIVITY AND THE APPLICATION OF SALES-CHARGE DISCOUNTS, WAS INADEQUATE.

Berthel Fisher's supervisory system was not reasonably designed to detect or prevent patterns of short-term or otherwise excessive UIT trading.

51. Berthel Fisher's written supervisory procedures ("WSPs") in effect during the UIT Period devoted only one page to UITs.

52. That single page was the WSPs' only guidance for Berthel Fisher representatives regarding UITs, and it required them to: 1) make a suitability determination before recommending a UIT to a customer; 2) evaluate the costs of that UIT transaction when compared to alternative investments with lower costs; and 3) consider "breakpoints" and other potential discounts before recommending the purchase of a UIT.

53. Berthel Fisher's WSPs did not provide any meaningful guidance, instructions, or tools designed to help anyone at Bethel Fisher supervise the suitability of UIT transactions.

54. The firm's WSPs failed to designate any firm principal, supervisor, or department as responsible for reviewing the suitability of UIT recommendations.

55. In practice, Berthel Fisher's director of the trading department was solely responsible for conducting a suitability review for all UIT transactions executed by Berthel Fisher's representatives during the UIT Period.

56. Between January 1, 2013 and December 16, 2014, CM was director of Berthel Fisher's trading department.

57. For the remainder of the UIT period, KS performed the UIT review that had previously been CM's responsibility.

58. Berthel Fisher's WSPs did not provide CM, KS, or anyone else with any direction, guidance, or instruction for how to review UIT transactions for suitability, and neither the WSPs

nor the firm provided CM or KS with exception reports, aggregated trade runs, or other tools that would have allowed them to detect short-term, excessive, or otherwise unsuitable UIT trading.

59. Berthel Fisher did not provide CM any training or instruction in how to review the suitability of UIT transactions.

60. When Berthel Fisher gave KS the responsibility of reviewing the suitability of UIT transactions, it provided him no training in how to do it.

61. The only method by which CM and KS supervised UIT transactions for suitability was by conducting a manual review of a daily trade blotter, which contained limited information about the previous day's trading by the firm's registered representatives. Depending on the day's trading volume, the daily trade blotter could contain information regarding several hundred trades.

62. Berthel Fisher's daily trade blotter did not contain any information that would have allowed CM or KS to:

- identify trading patterns;
- determine how long a liquidated UIT had been held by a customer;
- learn whether a UIT purchase followed a prior UIT sale;
- discover whether a UIT purchase was funded with proceeds from a prior UIT sale;
- identify patterns of short-term, excessive, or otherwise unsuitable UIT trading by any specific Berthel Fisher representative; or
- identify patterns of short-term, excessive, or otherwise unsuitable UIT trading in the account of any specific customer.

63. Other than the daily trade blotter, CM and KS did not review, and were not provided by Berthel Fisher, any reports or tools as part of their review of UIT transactions. Thus, their ability to adequately supervise UIT trading at the Firm was severely limited. Unless CM or KS remembered specific transactions from previous days' trade blotters, their reviews of the daily trade blotter would only reveal problematic short-term trading if both sides of the switch – i.e., the sale of one UIT and the subsequent purchase of another – happened on the same trading day.

64. In reviewing the daily trade blotter, CM did not look for or was unable to identify short-term, excessive, or otherwise unsuitable UIT activity. Similarly, CM did not attempt to identify any patterns of trading in UITs that would have indicated short-term, excessive or unsuitable trading.

65. Other than the daily trade blotter, Berthel Fisher did not use, review, create, receive, or request from its clearing firm any system, tool, report, or other information in supervising for the suitability of UIT transactions during the UIT Period.

Berthel Fisher's supervisory system was not designed to review for and ensure the proper application of sales-charge discounts to UIT purchases.

66. Also during the UIT Period, Berthel Fisher's WSPs failed to provide any meaningful guidance, direction, instructions or tools designed to supervise UIT transactions to ensure that Berthel Fisher customers were receiving sales-charge discounts to which they were entitled.

67. The WSPs did not designate any firm principal, supervisor, or department as responsible for ensuring that customers received sales-charge discounts to which they were entitled, and that they were not subjected to improper sales charges.

68. Even if Berthel Fisher had designated *someone* to supervise UIT sales charges and sales-charge discounts, the firm and its WSPs did not have or provide any guidance, direction, tools, reports, or processes that were reasonably designed to:

- determine whether UIT purchases were eligible for sales-charge discounts;
- ensure that sales-charge discounts were applied to eligible UIT purchases;
- or
- detect UIT purchases structured in ways that deprived customers of breakpoint discounts.

69. Berthel Fisher's WSPs were silent on rollover discounts for UITs, and there was no process or mechanism at Berthel Fisher to even identify when rollovers occurred, much less to

ensure that available rollover discounts were actually applied to those transactions.

70. In practice, Berthel Fisher relied exclusively on its registered representatives to identify which UIT transactions were eligible for rollover discounts and relied on its registered representatives and/or trading desk to communicate that eligibility to Berthel Fisher's clearing firm or the UIT sponsor.

71. Similarly, Berthel Fisher's supervisory system lacked any process or mechanism for determining whether UIT purchases qualified for breakpoint discounts, ensuring that such discounts were applied, or detecting and preventing the structuring of UIT transactions to avoid breakpoints.

72. Despite this reliance on its registered representatives and trading desk to identify and apply the sales-charge discounts available to Berthel Fisher's UIT customers, Berthel Fisher did not provide training for its representatives and trading desk personnel on the correct application of rollover and breakpoint discounts.

73. Given the absence of applicable training and WSPs, trading-desk personnel were not even aware that a customer who sold a UIT position – as opposed to holding it to termination – and used the proceeds to purchase another UIT would qualify for a rollover discount.

E. BERTHEL FISHER'S INADEQUATE UIT SUPERVISION LED TO EXTENSIVE CUSTOMER HARM.

74. Berthel Fisher's failure to establish and maintain an adequate system for supervising UIT trading led to extensive customer harm, both through the unsuitable trading that Dragon recommended and through the firm's separate failure to ensure that its UIT customers received sales-charge discounts to which they were entitled.

Berthel Fisher's inadequate supervision allowed Dragon's unsuitable UIT recommendations to go unchecked throughout the two-year UIT Period.

75. By failing to establish and maintain an adequate supervisory system for UIT

trading, Berthel Fisher enabled Dragon to recommend and effect a pattern of unsuitable short-term UIT trading in the Customers' accounts during the UIT Period.

76. Berthel Fisher's supervisory system failed to detect any of the short-term UIT trading in the Customers' accounts during that time.

77. Berthel Fisher's trading desk never questioned Dragon during the UIT Period about how long the Customers had held their UIT positions, whether a new UIT purchase was replacing a UIT that had been liquidated, or the putative rationale behind the short-term trading of UITs by Dragon in numerous customer accounts, including those of senior investors.

78. At no point during the UIT Period did Berthel Fisher detect that Dragon was structuring his Customers' UIT purchases to prevent them from qualifying from breakpoint discounts, and nothing in the firm's supervisory system or procedures was designed to prevent such manipulation.

79. Dragon's unsuitable recommendations resulted in significant harm to the 12 affected customers, whose sales charges for Dragon's unsuitable UIT recommendations resulted in the payment of approximately \$417,000 in improper dealer concessions to Dragon and Berthel.

Berthel Fisher's inadequate UIT supervision cost customers more than \$666,000 in improper UIT sales charges.

80. Separate from Dragon's structuring of UIT purchases to avoid qualifying for breakpoint discounts, Berthel Fisher failed to ensure that its customers received more than \$666,000 worth of sales-charge discounts for which their UIT purchases did qualify.

81. Berthel Fisher's failure to apply sales charge discounts was discovered by FINRA during a 2014 exam, and FINRA subsequently analyzed five years' worth of Berthel Fisher customers' UIT transactions to determine the scope of the firm's failure.

82. This review showed that, between January 1, 2010 and December 31, 2014, Berthel

Fisher representatives placed 3,856 UIT transactions that were eligible for at least one sales-charge discount.

83. Of those discount-eligible transactions, Berthel Fisher failed to identify and apply the appropriate discounts on 2,776 occasions, for an error rate of 72%. As a result, Berthel Fisher customers paid a total of \$666,869.97 in excessive, improper UIT sales charges during that period.

84. A substantial portion of the excessive sales charges improperly collected from Berthel Fisher customers due to the failure to apply the appropriate discounts were ultimately paid to Berthel Fisher and its representatives as dealer concessions.

85. In consultation with FINRA, Berthel Fisher acknowledged that it had missed the discounts identified above and paid restitution to the affected customers in 2015.

F. BERTHEL FISHER'S SUPERVISION OF MUTUAL-FUND TRANSACTIONS WAS ALSO INADEQUATE.

86. Bethel Fisher's failure to have an adequate supervisory system designed to detect and deter short-term, excessive, or otherwise unsuitable trading, and to ensure that customers received sales-charge discounts to which they were entitled, was not limited to UIT products. The same supervisory deficiencies noted above also existed in the firm's supervision of mutual fund trading.

Berthel Fisher failed to establish and maintain a supervisory system that was reasonably designed to review for and ensure the suitability of mutual-fund transactions.

87. During the Mutual Fund Period, Berthel Fisher's supervisory system was not reasonably designed to review mutual-fund transactions for suitability.

88. Berthel Fisher's WSPs during that period stated that mutual-fund transactions would be reviewed daily "for transactions where the client sells one mutual fund to buy another mutual fund" – i.e., switching.

89. The WSPs further stated that any registered representative who recommended a mutual-fund switch “must have a reasonable basis for believing the switch is suitable for the client.”

90. The WSPs required that, when a switch was identified, steps had to be taken to “ensure the client signs the Mutual Fund Switch Authorization” form (“switch letter”).

91. The WSPs assigned the Trading Department and the Designated OSJ Branch Manager responsibility for ensuring that these forms were completed and submitted, but did not identify any individual as responsible for supervising this area or receiving the forms.

92. Although the WSPs addressed the requirement of obtaining a signed switch letter, they did not include any provisions for supervisory review of the suitability of mutual-fund transactions, including switches, such as how or by whom the review would be performed.

93. In practice, as with the firm’s supervision of UIT transactions, CM and KS were solely responsible for reviewing all mutual-fund transactions effected by all Berthel Fisher representatives and placed through Berthel Fisher’s clearing firm during the Mutual Fund Period.

94. As with UIT transactions, the method by which CM supervised mutual-fund transactions for suitability was by conducting a manual review of a daily trade blotter, which contained partial information about trades submitted the previous business day by the firm’s registered representatives.

95. Other than the daily trade blotter, CM did not review – and was not provided by Berthel Fisher – any reports or tools as part of his review of mutual fund transactions for suitability.

96. In reviewing the daily trade blotter, CM did not look for short-term or otherwise unsuitable mutual fund activity, nor did he attempt to identify any patterns of trading in mutual funds that would have indicated such unsuitability.

97. In fact, the blotter CM used to review mutual fund activity did not contain any information that would have allowed CM to:

- identify any potentially problematic trading patterns occurring over multiple days or longer periods of time;
- determine how long a sold mutual fund had been held by a customer;
- learn whether a mutual fund purchase followed a prior mutual fund sale;
- discover whether a mutual fund purchase was funded with proceeds from a prior mutual fund sale;
- identify patterns of short-term, or excessive mutual fund trading or switching by any specific Berthel Fisher representative; or
- identify any other types of unsuitable mutual fund in the account of any specific customer.

98. Thus, CM's ability to adequately supervise mutual-fund trading at the Firm was severely limited. Unless CM remembered specific transactions from previous days' trade blotters, his review of mutual-fund trading would only potentially detect mutual-fund switch transactions if both sides of the switch – i.e., the sale of one fund and the subsequent purchase of another – occurred on the same trading day.

99. The inability to detect other mutual-fund switches prevented CM from assessing the suitability of these transactions.

100. After assuming responsibility for reviewing mutual-fund transactions in December 2014, KS continued CM's practice of reviewing mutual-fund transactions for suitability by reviewing the daily trade blotter. KS was therefore also unable to identify switches where the sale and purchase occurred on different days – and, thus, unable to evaluate the suitability of those switches.

101. Later in 2015, KS developed and began using a "Weekly Principal Trade Report," which he generated each Monday and which contained various exception reports triggered by the previous week's trades, including possible mutual-fund switches. As of December 2015, however, KS's review of mutual-fund activity would only identify switches where the sale and subsequent

purchase occurred during the same Monday-Friday period.

102. Thus, during the entire Mutual Fund Period, Berthel Fisher's supervision of mutual-fund transactions did not include any surveillance system, report, tool, process, or other method reasonably designed to detect mutual-fund switches.

103. Berthel Fisher's clearing firm created tools and reports designed to assist introducing broker-dealers like Berthel Fisher in supervising the suitability of mutual fund transactions, and those reports were available to Berthel Fisher upon the firm's request.

104. Berthel, however, did not use, review, create, receive, or request from its clearing firm any system, tool, report, or other information to help anyone supervise for the suitability of mutual fund transactions during the Mutual Fund Period.

Berthel Fisher's supervisory system was not reasonably designed to review for or ensure the proper application of sales-charge discounts to mutual-fund purchases.

105. With respect to mutual-fund sales charges, Berthel Fisher's WSPs during the Mutual Fund Period stated that mutual-fund order records would be reviewed:

- to ensure that sales-charge discounts were considered;
- "for improper breakpoint sales (near but below common breakpoint levels);" and
- "for purchases of multiple funds with similar investment objectives."

106. The WSPs assigned responsibility for these actions to the Trading Department, Compliance Department, and OSJ Branch Managers, but did not specify which entity would perform each action.

107. In practice, the trading-department director – i.e., CM and, later, KS – was solely responsible for reviewing sales charges on mutual-fund transactions effected by all Berthel Fisher representatives and placed through Berthel Fisher's clearing firm.

108. In conducting that review, the trading-department director did not use any system,

report, tool, process, or other method designed to detect improper breakpoint sales or other mutual-fund transactions that prevented customers from qualifying for sales-charge discounts.

109. In fact, the trading-department director did not attempt to determine whether breakpoint discounts for mutual-fund purchases or other discounts were applied properly.

First Cause Of Action

Violation of FINRA Rules 2111 and 2010 (Unsuitable UIT Recommendations)

110. The Department realleges and incorporates by reference all previous paragraphs.

111. FINRA Rule 2111 provides that a member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile.

112. FINRA Rule 2010 requires associated persons to observe high standards of commercial honor and just and equitable principles of trade.

113. During the UIT Period, Dragon recommended and engaged in short-term UIT trading in the accounts of 12 Berthel Fisher customers. These short-term trading patterns were inconsistent with the design of the securities at issue and required the customers to pay substantial sales charges – most of which came back to Berthel Fisher and Dragon in the form of dealer concessions.

114. Dragon made the recommendations to the Customer that they buy and sell UITs without having a reasonable grounds for believing that the consistent pattern of short-term UIT trading he recommended was suitable for any of the Customers, given their age, personal and financial situations and needs; the nature of the recommended UIT transactions, including the sales

charges and other costs associated with them; and the availability of less costly alternatives. As a result, the pattern of short-term trading and switching of the UITs was unsuitable for all 12 Customers.

115. Furthermore, Dragon also routinely structured the UIT purchases he recommended to the Customers during the UIT Period in order to prevent the Customers from qualifying for sales-charge discounts, which would have reduced the dealer concessions paid to him and Berthel Fisher.

116. Dragon made the structured recommendations to the Customers without having a reasonable basis to believe that those recommendations, which prevented the Customers from receiving available discounts to which they were entitled, were suitable for those Customers, or for any customer.

117. Berthel Fisher is liable for Dragon's unsuitable investment recommendations under the doctrine of *respondeat superior* because Dragon was an agent of Berthel Fisher acting within the scope of his duties when he engaged in this misconduct.

Second Cause Of Action

Violation of NASD Conduct Rule 3010 and FINRA Rules 3110 and 2010 (Failure to Establish and Maintain a Supervisory System Reasonably Designed to Ensure Compliance with Securities Laws, Regulations, and FINRA Rules Regarding Transactions in UITs and Mutual Funds)

118. The Department realleges and incorporates by reference all previous paragraphs.

119. NASD Rule 3010(a) and FINRA Rule 3110(a) require each member firm to "establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with" federal securities laws and FINRA and NASD rules.

120. As part of that required supervisory system, NASD Rule 3010(b) and FINRA Rule

3110(b) require each member firm to “establish maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve compliance with” federal securities laws and FINRA and NASD rules.

121. At all times relevant to the Complaint, Berthel Fisher was responsible for supervising the activities of each of its registered representatives, including taking reasonable measures to ensure that each recommendation made by the firm and its representatives was preceded by a reasonable determination that the transaction was suitable for the customer to whom it was recommended.

122. Berthel Fisher also had an obligation, at all times relevant to the Complaint, to establish, maintain, and enforce a supervisory system that was reasonably designed to ensure that customers received sales-charge discounts on all eligible UIT and mutual-fund purchases.

123. During the UIT Period, however, Berthel Fisher failed to establish and maintain a supervisory system that was reasonably designed to ensure compliance with its and its representatives’ suitability obligations under the federal securities laws and FINRA and NASD rules in connection with sales of UITs, and to ensure that customers received sales-charge discounts to which they were entitled on UIT purchases.

124. For example, during the UIT period, Berthel Fisher:

a. lacked procedures and policies designed to prevent unsuitable short-term UIT trading and to ensure that customers were not subjected to excessive sales charges on UIT purchases;

b. failed to offer or provide training regarding UITs to its registered representatives or the individuals responsible for reviewing the suitability of UIT transactions;

c. failed to provide training or instruction on applicable or potentially applicable UIT sales-charge discounts;

d. failed to implement any procedures or systems to determine whether sales-charge discounts were correctly applied; and

e. did not obtain, create, or use any surveillance system, reports, tools, processes, or other methods that would indicate, or that could reasonably be expected to lead to the discovery of, unsuitable short-term UIT trading or missed sales-charge discounts.

125. In addition, during the Mutual Fund Period, Berthel Fisher failed to establish and maintain a supervisory system that was reasonably designed to ensure compliance with its and its representatives' suitability obligations under the federal securities laws and FINRA and NASD rules in connection with the trading of mutual funds, and to ensure that customers received sales-charge discounts to which they were entitled on mutual-fund purchases.

126. For example, during the Mutual Fund period, Berthel Fisher:

a. lacked supervisory procedures and policies designed to detect and prevent potentially unsuitable short-term trading and switching and to ensure that customers were not subjected to excessive sales charges on mutual-fund transactions;

b. failed to offer or provide training on mutual funds to its registered representatives or the individuals responsible for reviewing the suitability of mutual-fund transactions;

c. failed to provide training or instruction on applicable or potentially applicable mutual fund sales-charge discounts;

d. failed to implement any procedures or systems to determine whether sales-charge discounts were being applied where appropriate; and

e. did not obtain, create, or use any surveillance system, reports, tools, processes, or

other methods that would indicate, or that could reasonably be expected to lead to the discovery of, unsuitable mutual fund trading, including unsuitable mutual-fund switches, improper breakpoint sales, or mutual-fund transactions that otherwise prevented customers from qualifying for sales-charge discounts.

Based on the foregoing, Berthel Fisher violated FINRA Rules 2111 and 2010 (unsuitable UIT trading); and NASD Rule 3010 (for conduct occurring before December 1, 2014), FINRA Rule 3110 (for conduct occurring on or after December 1, 2014), and 2010 (failure to maintain supervisory systems reasonably-designed to ensure compliance with securities laws, regulations and rules with respect to transactions involving UITs and mutual funds).

Based on these considerations, the sanctions hereby imposed by the acceptance of the Offer are in the public interest, are sufficiently remedial to deter Berthel Fisher 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 Berthel Fisher be censured, fined \$225,000, ordered to pay restitution in the total amount of \$117,315.41, plus interest, ordered to pay disgorgement in the total amount of \$299,471.73, and ordered to retain an Independent Consultant.

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

Restitution is ordered to be paid to the customers listed on Attachment A hereto in the total amount of \$117,315.41, plus interest at the rate set forth in Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), from the date of each customer's first UIT purchase in 2013,

until the date this Offer is accepted by the NAC. A registered principal on behalf of Berthel Fisher shall submit satisfactory proof of payment of restitution or of reasonable and documented efforts undertaken to effect restitution. Such proof shall be submitted to Adam B. Walker, Senior Regional Counsel, FINRA Department of Enforcement, 120 W. 12th Street, 8th Floor, Kansas City, Missouri 64131, either by letter that identifies Berthel Fisher and Disciplinary Proceeding No. 2014039169601, or by e-mail from a work-related account of the registered principal of Berthel Fisher to EnforcementNotice@FINRA.org. This proof shall be provided to the FINRA staff member listed above no later than 120 days after acceptance of the Offer. If for any reason Berthel Fisher cannot locate any customer identified in Attachment A after reasonable and documented efforts within 120 days from the date the Offer is accepted, or such additional period agreed to by a FINRA staff member in writing, Berthel Fisher shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed property or abandoned property fund for the state in which the customer is last known to have resided. Berthel Fisher shall provide satisfactory proof of such action to the FINRA staff member identified above and in the manner described above, within 14 days of forwarding the undistributed restitution and interest to the appropriate state authority.

The imposition of a restitution order or any other monetary sanction herein, and the timing of such ordered payments, does not preclude customers from pursuing their own actions to obtain restitution or other remedies.

Disgorgement of concessions received from the unsuitable UIT trades in this matter not otherwise part of restitution is ordered to be paid to FINRA in the total amount of \$299,471.73.

Berthel Fisher shall:

a) Retain, within 60 days of the date of the Order Accepting Offer of Settlement, an Independent Consultant, not unacceptable to FINRA staff, to conduct a comprehensive review of the adequacy of the Firm's policies, systems and procedures (written and otherwise) and training relating to all products that Berthel Fisher offers to customers, including but not limited to UITs and mutual funds;

b) Exclusively bear all costs, including compensation and expenses, associated with the retention of the Independent Consultant;

c) Cooperate with the Independent Consultant in all respects, including by providing staff support. Berthel Fisher shall place no restrictions on the Independent Consultant's communications with FINRA staff and, upon request, shall make available to FINRA staff any and all communications between the Independent Consultant and Berthel Fisher and documents reviewed by the Independent Consultant in connection with his or her engagement. Once retained, Berthel Fisher shall not terminate the relationship with the Independent Consultant without FINRA staff's written approval; Berthel Fisher shall not be in and shall not have an attorney-client relationship with the Independent Consultant and shall not seek to invoke the attorney-client privilege or other doctrine or privilege to prevent the Independent Consultant from transmitting any information, reports or documents to FINRA;

d) At the conclusion of the review, which shall be no more than 160 days after the date of the Order Accepting Offer of Settlement, require the Independent Consultant to submit to the Firm and FINRA staff a Written Report. The Written Report shall address, at a minimum, (i) the adequacy of the Firm's policies, systems, procedures, and training relating to all products that Berthel Fisher offers to customers, including but not limited to UITs and mutual funds; (ii) a

description of the review performed and the conclusions reached; and (iii) the Independent Consultant's recommendations for modifications and additions to the Firm's policies, systems, procedures and training; and

e) Require the Independent Consultant to enter into a written agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any other employment, consultant, attorney-client, auditing or other professional relationship with Berthel Fisher, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. Any firm with which the Independent Consultant is affiliated in performing his or her duties pursuant to the Order Accepting Offer of Settlement shall not, without prior written consent of FINRA staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Berthel Fisher or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

Within 90 days after delivery of the Written Report, Berthel Fisher shall adopt and implement the recommendations of the Independent Consultant or, if it determines that a recommendation is unduly burdensome or impractical, propose an alternative procedure to the Independent Consultant designed to achieve the same objective. The Firm shall submit such proposed alternatives in writing simultaneously to the Independent Consultant and FINRA staff. Within 30 days of receipt of any proposed alternative procedure, the Independent Consultant shall: (i) reasonably evaluate the alternative procedure and determine whether it will achieve the same objective as the Independent Consultant's original recommendation; and (ii) provide the Firm with a written decision reflecting his or her determination. The Firm will abide by the Independent

Consultant's ultimate determination with respect to any proposed alternative procedure and must adopt and implement all recommendations deemed appropriate by the Independent Consultant.

Within 30 days after the issuance of the later of the Independent Consultant's Written Report or written determination regarding alternative procedures (if any), Berthel Fisher shall provide FINRA staff with a written implementation report, certified by an officer of Berthel Fisher, attesting to, containing documentation of, and setting forth the details of the Firm's implementation of the Independent Consultant's recommendations.

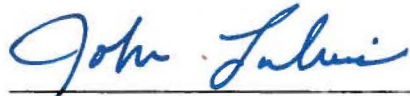
Upon written request showing good cause, FINRA staff may extend any of the procedural dates set forth above.

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



John Luburic
Senior Litigation Counsel
FINRA Department of Enforcement
55 West Monroe Street, Suite 2700
Chicago, IL 60603-5052
312-899-4369 (ph); 202-721-8377 (fax)

ATTACHMENT A

ACCOUNT NUMBER (LAST 4)	CUSTOMER	RESTITUTION	INTEREST
-2580	PC	\$4,935.31	\$875.84
-0033	PC	\$17,014.82	\$3,124.87
-3912	MD	\$430.79	\$71.53
-3246	MD	\$1,911.01	\$346.72
-9323	LL	\$4,723.04	\$860.10
-9430	LL	\$1,085.77	\$200.88
-6165	GN	\$15,310.95	\$2,798.61
-2091	AP	\$7,008.90	\$1,276.38
-8907	AP	\$44,805.83	\$8,107.48
-2490	MS	\$383.73	\$69.66
-2482	MS	\$1,103.96	\$194.53
-6430	AW	\$7,773.79	\$1,407.40
-9566	AW	\$10,827.51	\$1,965.49
TOTAL		\$117,315.41	\$21,299.49