

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
No. 2018057425202**

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

RE: Berthel, Fisher & Co. Financial Services, Inc. (Respondent)
Member Firm
CRD No. 13609

Pursuant to FINRA Rule 9216, Respondent Berthel, Fisher & Co. Financial Services, Inc. (Berthel Fisher) 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 in this AWC.

I.

ACCEPTANCE AND CONSENT

- A. Respondent accepts and consents to the following findings by FINRA without admitting or denying them:

BACKGROUND

Berthel Fisher is a full-service retail firm that has been a FINRA member firm since 1983. Berthel Fisher has 253 registered representatives and 168 branches.¹

OVERVIEW

In August 2015, when reviewing a customer's request for approval to trade options in his brokerage account, Berthel Fisher failed to exercise due diligence to ascertain the customer's investment experience and knowledge, in violation of FINRA Rules 2360(b)(16)(B) and 2010.

Between August 2015 and February 2018, Berthel Fisher, through Broker A, recommended options transactions to the same customer without having reasonable grounds for believing that the transactions were suitable for that customer. Through this conduct, Berthel Fisher violated FINRA Rules 2360(b)(19), 2111, and 2010.

During the same period, Berthel Fisher failed to establish and maintain a supervisory system, including written procedures, reasonably designed to achieve compliance with

¹ For more information about the respondent, including prior regulatory events, visit BrokerCheck® at www.finra.org/brokercheck.

FINRA's rules pertaining to the suitability of options trading in customer accounts. Berthel Fisher also failed to enforce multiple provisions of its written supervisory procedures pertaining to options trading. Through this conduct, Berthel Fisher violated FINRA Rules 2360(b)(20)(A), 3110(a), 3110(b), and 2010.

FACTS AND VIOLATIVE CONDUCT

This matter originated from a customer complaint made to FINRA.

FINRA Rule 2111 provides that FINRA member firms and their associated persons "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. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation."

FINRA Rule 3110(a) requires members to establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA Rules. FINRA Rule 3110(b) requires each of its members 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 applicable securities laws and regulations, and with applicable FINRA rules."

In addition to the general supervisory requirements of FINRA Rule 3110, FINRA Rule 2360(b)(20)(A) requires "[e]ach member that conducts a public customer options business [to] ensure that its written supervisory policies and procedures . . . adequately address the member's public customer options business."

FINRA Rule 2360(b)(19)(A) states:

No member or person associated with a member shall recommend to any customer any transaction for the purchase or sale (writing) of an option contract unless such member or person associated therewith has reasonable grounds to believe upon the basis of information furnished by such customer after reasonable inquiry by the member or person associated therewith concerning the customer's investment objectives, financial situation and needs, and any other information known by such member or associated person, that the recommended transaction is not unsuitable for such customer.

FINRA Rule 2360(B)(16)(B) requires a member, when approving a customer's account for option trading, to "exercise due diligence to ascertain the essential facts relative to the

customer, his financial situation and investment objectives.” The rule specifically identifies certain minimum information that members should seek to obtain, including investment objectives, estimated annual income, estimated net worth, estimated liquid net worth, age, and “investment experience and knowledge (e.g., number of years, size, frequency and type of transactions) for options, stocks and bonds, commodities, and other financial instruments.”

Any violation of FINRA Rules 2111, 3110, or 2360 also constitutes a violation of FINRA Rule 2010, which requires FINRA members and their associated persons to “observe high standards of commercial honor and just and equitable principles of trade” in the conduct of their business.

Berthel Fisher approved Customer A for options trading at levels for which he was not eligible under the firm’s own guidelines.

Broker A joined Berthel Fisher in 2012.² Later that year, Customer A became a Berthel Fisher customer by transferring his IRA from another broker-dealer where he had previously been Broker A’s customer. At the time, Customer A was 71 years old and retired. His IRA was worth approximately \$205,000. Since retiring in 2009, Customer A had taken \$1,500 in monthly withdrawals from his IRA for current expenses and had occasionally withdrawn larger amounts to pay for other expenses. Social Security benefits were Customer A’s only other source of income.

Between 2013 and 2015, Customer A’s account holdings did not produce enough income or gains to offset his withdrawals. By August 2015, the account’s value had declined to approximately \$120,000 after taking withdrawals of approximately \$73,000. Broker A recommended that Customer A begin trading options³ as a strategy to generate income.

Broker A submitted an Options Approval Request form for Customer A’s account to Berthel Fisher in August 2015 requesting approval to trade options at the Firm’s “Level 2” option-trading level. The form indicated that Customer A had “good” knowledge of options and “moderate” experience trading several types of options. In fact, Customer A had little or no knowledge of, and zero experience with, options investing. The new-account form that Customer A had completed in 2012 stated that he did not have any experience trading options. Berthel Fisher approved the Options Approval Request.

Moreover, although Berthel Fisher’s written supervisory procedures established income and net-worth guidelines for customers seeking approval to participate in various types of

² In 2020, Broker A agreed to an AWC imposing a three-month suspension for making unsuitable recommendations to Customer A.

³ An option contract gives its owner (the “holder”) the right either to buy (“call”) or sell (“put”) a specified amount of a security at a fixed “strike” price before a specified expiration date. In exchange for the option, the holder pays a premium to the option “writer” - i.e., the party selling the option. If the option holder exercises the option, then the option writer must either sell or buy the security in the amount and at the price specified in the option contract. The writer keeps the premium regardless of whether the holder exercises the option.

options trading, the firm failed to apply those guidelines to Customer A. In August 2015, Berthel Fisher's income and net-worth guidelines should have limited Customer A to the Firm's "Level 1" options trading, which included only covered-call writing.⁴

Nonetheless, Berthel Fisher approved Customer A not only for the covered-call writing allowed at Level 1, but also for riskier types of options trading included in Level 2: covered writing of equity puts, purchase of equity and index calls and puts, and purchase of equity and index straddles and combinations. Although the firm's written procedures required a written explanation for any deviation from the income/net-worth guidelines for options-trading levels, Berthel Fisher approved Customer A's Options Approval Request without providing any such explanation.

Therefore, Berthel Fisher violated FINRA Rules 2360(b)(16)(B) and 2010.

Berthel Fisher, through Broker A, recommended unsuitable options transactions to Customer A.

Between August 2015 and February 2018, Broker A recommended and executed 28 unsuitable options transactions in Customer A's account.

These unsuitable recommendations included the purchase of 22 call or put options, which carried the risk that Customer A would lose the entire premium he paid for them if those options expired out of the money. This type of transaction was unsuitable for Customer A, considering his age, financial situation, investment experience, and the proportion of his total account value at risk in each of these trades.

For example, Broker A recommended 17 purchases of put and call options on an index fund, QQQ, between August 2015 and December 2016. Broker A's strategy when purchasing options in Customer A's account was to resell them for a profit (as opposed to exercising the option). While Broker A was sometimes successful with this strategy, he also sometimes resold the options at a loss. On four occasions, however, options in Customer A's account expired worthless, resulting in losses totaling nearly \$20,000. In one instance, Broker A recommended that Customer A purchase 30 QQQ call options for \$11,538, which caused Customer A to risk – and ultimately lose – more than 15% of his entire account value at the time in a single transaction. Over the period in which Broker A recommended these 17 QQQ option transactions, Customer A's account declined in value from \$120,000 to approximately \$37,000. This decline included withdrawals of \$22,700.

The 28 unsuitable options transactions also included six different instances of Broker A recommending that Customer A write put options when he did not hold a short position in the underlying security. This put Customer A at risk of having to purchase the

⁴ In a covered call, the option writer sells the right to purchase a security that the writer already owns. Because the option holder will likely only exercise the option if the price of the underlying security rises above the strike price, the option writer's risk is limited to the possibility of losing upside appreciation above the strike price.

underlying security for more than its market value. Given his age, financial situation, and investment experience, this type of transaction was also unsuitable for Customer A.

Four of the six put options that Customer A wrote were exercised, thereby requiring him to purchase the underlying security. Customer A later sold these four stock positions at losses totaling \$14,459.⁵ A large proportion of that amount resulted from one put option, which, when exercised, required Customer A to purchase 400 shares of the underlying stock for substantially more than the stock was worth. The stock price subsequently continued to fall, and Customer A realized a loss of more than \$11,150 when he sold the position eight months later.

In total, the 28 unsuitable options transactions resulted in net losses of more than \$31,000 in Customer A's account between August 2015 and February 2018.⁶ The combined effect of investment losses and withdrawals resulted in Customer A's account declining 50% in the first six months after Berthel Fisher approved it for options trading. By January 2018, Customer A's account balance had declined to \$17,008, which was more than \$100,000 below its balance when Berthel Fisher approved Customer A's Options Approval Request and after receiving withdrawals of \$42,200.⁷

Therefore, Berthel Fisher violated FINRA Rules 2111, 2360(b)(19), and 2010.

Berthel Fisher failed to reasonably supervise options trading.

Between August 2015 and February 2018, Berthel Fisher failed to enforce portions of its written supervisory procedures regarding options trading and failed to establish, maintain, and enforce a reasonable supervisory system for options trading.

During that period, the firm's written procedures required its Registered Options Principals (ROPs) to review options transactions each day and to consider several factors in their review, including (1) whether the trade was compatible with the customer's objectives and approved trading level, (2) the size and frequency of transactions, and (3) profit or loss in the account. The firm's written procedures instructed a ROP who identified a potentially unsuitable options transaction to take corrective action, such as confirming the trade with the representative, requalifying an option account, canceling the order, or educating the representative.

With respect to the options activity in Customer A's account, however, Berthel Fisher failed to enforce these procedures. The firm approved each options trade recommended to Customer A while failing to respond to red-flag warnings that many of those transactions were potentially unsuitable. For example, the firm failed to consider the account's steep decline when reviewing Customer A's options activity, did not consider the size,

⁵ These loss calculations include premiums Customer A received for selling the put options.

⁶ This figure includes all premiums paid and received for the 28 option contracts, losses on securities purchased when put options Customer A wrote were exercised, and all associated transaction costs.

⁷ In December 2018, Berthel Fisher agreed to a settlement with Customer A regarding the activity described here.

frequency, and concentration of Customer A's options transactions, and never contacted either Broker A or Customer A about any of those transactions.

In addition, as described above, although its written supervisory procedures established income and net-worth guidelines for customers seeking approval to participate in various types of options trading, Berthel Fisher failed to apply those guidelines to Customer A.

Berthel Fisher did not provide or require options-specific training for its ROPs and did not oversee their activities for adherence to the firm's written procedures. In their daily review of options transactions, the firm's ROPs used a report that did not include certain information relevant to a suitability review, such as each account's level of options-trading approval, the account's profit or loss over time, commission activity over time, or the frequency of option transactions. Although Berthel Fisher had access to a separate report intended to identify option trades outside an account's approved trading level, its ROPs did not review that report between October 2016 and February 2018.

As a result of these supervisory failures, Berthel Fisher failed to identify the unsuitable transactions in Customer A's account or to take any corrective action to restrict or reverse them.

Therefore, Berthel Fisher violated FINRA Rules 3110, 2360(b)(20)(A), and 2010.

B. Respondent also consents to the imposition of the following sanctions:

- a censure;
- a \$100,000 fine; and
- a requirement that, not later than 90 days from the date this AWC is accepted, a senior officer and principal of Berthel Fisher shall certify in writing to FINRA that the firm has implemented supervisory systems and written supervisory procedures reasonably designed to address the deficiencies identified in this AWC. This certification shall be submitted to Adam Walker, Senior Counsel, FINRA, 120 W. 12th Street, 8th floor, Kansas City, Missouri 64105.

Respondent agrees to pay the monetary sanction upon notice that this AWC has been accepted and that such payment is due and payable. Respondent has submitted an Election of Payment form showing the method by which it proposes to pay the fine imposed.

Respondent specifically and voluntarily waives any right to claim an inability to pay, now or at any time after the execution of this AWC, the monetary sanction imposed in this matter.

The sanctions imposed in this AWC shall be effective on a date set by FINRA.

II.

WAIVER OF PROCEDURAL RIGHTS

Respondent specifically and voluntarily waives the following rights granted under FINRA's Code of Procedure:

- A. To have a complaint issued specifying the allegations against it;
- 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, Respondent specifically and voluntarily waives any right to claim bias or prejudgment of the Chief Legal Officer, 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 its acceptance or rejection.

Respondent further specifically and voluntarily waives 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

Respondent understands 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 Respondent; and
- C. If accepted:

1. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future action brought by FINRA or any other regulator against Respondent;
 2. this AWC will be made available through FINRA's public disclosure program in accordance with FINRA Rule 8313;
 3. FINRA may make a public announcement concerning this agreement and its subject matter in accordance with FINRA Rule 8313; and
 4. Respondent 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. Respondent 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 Respondent's right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party. Nothing in this provision affects Respondent's testimonial obligations in any litigation or other legal proceedings.
- D. Respondent may attach a corrective action statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that it 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.

The undersigned, on behalf of Respondent, certifies that a person duly authorized to act on Respondent's behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that Respondent has agreed to the AWC's provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth in this AWC and the prospect of avoiding the issuance of a complaint, has been made to induce Respondent to submit this AWC.

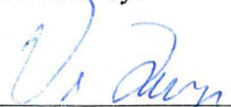
Date 4-1-22


Berthel, Fisher & Co. Financial Services, Inc.
Respondent

Print Name: Andrew Christofferson

Title: COO

Reviewed by:

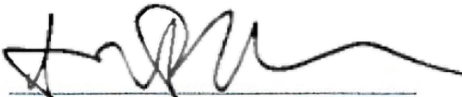


Vincent D. Louwagie
Counsel for Respondent
Anthony Ostlund Louwagie Dressen & Boylan P.A.
90 South 7th Street, Suite 3600
Minneapolis, Minnesota 55402

Accepted by FINRA:

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

Date 4/26/2022



Adam Walker
Senior Counsel
FINRA
Department of Enforcement
120 W. 12th Street, 8th floor
Kansas City, Missouri 64105