

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 20050000655-01

TO: Market Regulation Department
NASD

RE: **Merrill Lynch, Pierce, Fenner & Smith Incorporated**, Respondent
CRD No. 7691

Pursuant to Rule 9216 of the NASD Code of Procedure, Merrill Lynch, Pierce, Fenner & Smith Incorporated, ("MLCO" or the "firm"), submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described in Part II below. This AWC is submitted on the condition that, if accepted, NASD will not bring any future actions against the firm alleging violations based on the same factual findings.

The firm understands that:

1. *Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by NASD's Market Regulation Department and National Adjudicatory Council ("NAC") Review Subcommittee or Office of Disciplinary Affairs ("ODA"), pursuant to NASD Rule 9216;*
2. *If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against the firm; and*
3. *If accepted:*
 - a. *this AWC will become part of the firm's permanent disciplinary record and may be considered in any future actions brought by the NASD or any other regulator against the firm;*
 - b. *this AWC will be made available through NASD's public disclosure program in response to public inquiries about the firm's disciplinary record;*
 - c. *NASD may make a public announcement concerning this agreement and the subject matter thereof in accordance with NASD Rule 8310 and IM-8310-2; and*
 - d. *the firm 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. Nothing in this provision affects the firm's testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which NASD is not a party.

MLCO also understands that the firm's experience in the securities industry and the firm's disciplinary history may be factors that will be considered in deciding whether to accept this AWC. That experience and history are as follows:

MLCO has been a member of NASD since January 26, 1937 and its registration remains in effect.

- On September 20, 2004, an AWC became final in which MLCO was censured and fined \$27,000 for violating NASD Conduct Rule 2110 and NASD Marketplace Rules 6420(a) and 6620(a);
- On December 23, 2003, an AWC became final in which MLCO was censured and fined \$9,000 for violating NASD Marketplace Rule 6130(d);
- On August 27, 2003, an AWC became final in which MLCO was censured and fined \$8,000 for violating NASD Conduct Rule 2110 and NASD Marketplace Rule 6620(a);
- On December 3, 2002, an AWC became final in which MLCO was censured and fined \$7,500 for violating NASD Conduct Rule 2110 and NASD Marketplace Rule 6620(a);
- On August 30, 2002, an AWC became final in which MLCO was censured and fined \$7,500 for violating NASD Marketplace Rule 6130(d); and
- On October 27, 2000, an AWC became final in which MLCO was censured and fined \$97,000 for violating NASD Conduct Rules 2110, 2320, 3010 and 3370, NASD Marketplace Rules 4613(e), 4632, 4642, 6130, 6420, 6620 and SEC Rule 11Ac1-4.

I.

WAIVER OF PROCEDURAL RIGHTS

MLCO specifically and voluntarily waives the following rights granted under NASD's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against the firm;

- B. To be notified of the Formal 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 NAC and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, MLCO specifically and voluntarily waives any right to claim bias or prejudice 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.

MLCO further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of 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.

II.

ACCEPTANCE AND CONSENT

In connection with 20050000655, the Market Regulation Department staff (the "staff") conducted a review of MLCO's compliance with the rules applicable to transaction reporting during the period of May 1 through August 31, 2004.

In connection with 20050000847, the staff conducted a review of MLCO's compliance with the rules applicable to the Nasdaq Market Center during the period of July 1 through September 30, 2004.

In connection with 20050000942, the staff conducted a review of MLCO's compliance with the rules applicable to transaction reporting during the period of January 1 through April 30, 2004.

- A. MLCO 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 NASD, or to which NASD 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 NASD:

In connection with 20050000655:

1. During the review period, MLCO failed, within 90 seconds after execution, to transmit through Nasdaq Market Center, 14,861 last sale reports of transactions in Nasdaq securities. These transactions constitute more than five percent of all eligible transactions in Nasdaq securities that MLCO was required to report to Nasdaq Market Center during the review period.
2. The conduct described in paragraph one above constitutes a pattern or practice of late transaction reporting without exceptional circumstances in violation of NASD Conduct Rule 2110.

In connection with 20050000847:

3. During the review period, MLCO failed to accept or decline in Nasdaq Market Center 1,527 transactions in eligible securities within twenty minutes after execution. These transactions constitute more than two percent of all transactions that MLCO had an obligation to accept or decline in Nasdaq Market Center during the review period.
4. The conduct described in paragraph three above constitutes separate and distinct violations of NASD Marketplace Rule 6130(b), and a violation of NASD Conduct Rule 2110.

In connection with 20050000942:

5. During the review period, MLCO failed, within 90 seconds after execution, to transmit through Nasdaq Market Center, 2,113 last sale reports of transactions in OTC Equity Securities. These transactions constitute more than two % of all eligible transactions in OTC Equity Securities that MLCO was required to report to Nasdaq Market Center during the review period.
6. The conduct described in paragraph five above constitutes a pattern or practice of late transaction reporting without exceptional circumstances in violation of NASD Conduct Rule 2110.
7. During the review period, MLCO failed, within 90 seconds after execution, to transmit through Nasdaq Market Center, 555 last sale reports of transactions in OTC Equity Securities and failed to designate each such transaction as late to Nasdaq Market Center.
8. The conduct described in paragraph seven above constitutes separate and distinct violations of NASD Marketplace Rule 6620.

B. MLCO also consents to the imposition, at a maximum, of the following sanctions:

A censure and a \$37,500 fine (composed of a \$12,500 fine each for the violations identified in 20050000655, 20050000847 and 20050000942).

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

III.

OTHER MATTERS

- A. MLCO understands that it may attach a Corrective Action Statement to this AWC which is a statement of demonstrable corrective steps taken to prevent future misconduct. MLCO 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 NASD nor does it reflect the views of NASD or its staff.
- B. MLCO agrees to pay any monetary sanctions imposed on it upon notice that this AWC has been accepted and that such payments are due and payable, and has attached the Election of Payment form showing the method by which the firm proposes to pay any fine imposed.
- C. MLCO specifically and voluntarily waives any right to claim that MLCO is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.

Merrill Lynch, Pierce, Fenner & Smith Incorporated, certifies that the firm has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it, and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein, has been made to induce MLCO to submit it.

Date: 2/23/2006

**Merrill Lynch, Pierce, Fenner &
Smith Incorporated**

Respondent

By: Lauri Scoran

Name: Lauri Scoran
Title: First Vice President

Reviewed by:

David Marcus

Counsel for Respondent

Accepted by NASD

4/21/06
Date

Thomas R. Gira
Thomas R. Gira
Executive Vice President and Deputy
Market Regulation Department

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

Attachment:
Standard Election of Payment Form