

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
20050002612-01

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REGISTRATION & DISCLOSURE

TO: Market Regulation Department
NASD

RE: Merrill, Lynch, Pierce, Fenner & Smith, Inc., Respondent
Broker-Dealer
CRD No. 7691

Pursuant to NASD Rule 9216, Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("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 MLCO alleging violations based on the same factual findings.

MLCO 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 Department of Market Regulation and National Adjudicatory Council ("NAC") Review Subcommittee or Office of Disciplinary Affairs, 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 MLCO; 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 NASD or any other regulator against MLCO;
 - 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-8310-3; and
 - d. MLCO 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 allegation 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 its experience in the securities industry and 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 effective. The firm has the following relevant disciplinary history:

- On April 25, 2006, an AWC became final in which MLCO was censured and fined \$37,500 for violating NASD Rules 2110, 6130(b) and 6620.
- On March 23, 2006, an AWC became final in which MLCO was censured and fined \$45,000 for violating NASD Rules 2110, 3010, 3110, 4632, 6130(d), 6420(a), 6420(a), 6420(c)(3), 6954 and 6955 and SEC Rules 10b-10, 11Ac1-5 (now SEC Rule 605), and 17a-3.
- On November 11, 2005, an AWC became final in which MLCO was censured and fined \$40,000 for violating NASD Rules 2110 and 2320.
- On June 3, 2005, an AWC became final in which MLCO was censured and fined \$7,500 for violating NASD Rules 2110 and 6955.
- On May 19, 2005, an AWC became final in which MLCO was censured and fined \$12,500 for violating NASD Rules 2110 and 6955.
- On August 20, 2004, an AWC became final in which MLCO was censured and fined \$9,000 for violating NASD Rules 3370 and 6130(d).
- On December 23, 2003, an AWC became final in which MLCO was censured and fined \$9,000 for violating NASD Rule 6130(d).
- On April 21, 2003, an AWC became final in which MLCO was censured and fined \$10,000 for violating NASD Rules 2110 and 6955.
- On August 30, 2002, an AWC became final in which MLCO was censured and fined \$7,500 for violating NASD Rule 6130(d).

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 MLCO;
- 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 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.

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 Market Regulation Review MRD200444986/20050000654, the Market Regulation Department staff (the "staff") conducted a review of MLCO's compliance with the duty of best execution during the period of October 1 through December 31, 2003.

In connection with 20050002612, the Market Regulation Department staff (the "staff") conducted a Trading and Market Making Surveillance Examination of MLCO's compliance with applicable trade reporting rules and other regulations. The on-site portion of this examination was conducted from September 27 through September 30, 2004. The staff conducted a review, for trade date July 21, 2004 (unless otherwise stated), of:

- 35 customer sale orders, for compliance with NASD Rules 3110 and 3370;

- Seven proprietary sale transactions, for compliance with NASD Rule 3370 and SEC Rule 10a-1;
- 94 customer and proprietary transactions, for compliance with NASD Rule 6130;
- One short sale in a CQS security, for compliance with SEC Rule 10a-1;
- 50 limit orders executed as principal, for compliance with NASD Rules 2110 (and IM-2110-2), 2320, 6440 and 6541, and SEC Rules 11Ac1-1 and 11Ac1-4;
- 25 "non-displayed" limit orders, for the requirement to price improve market and marketable limit orders received, on the other side of the market, for compliance with NASD Rule 2320;
- 35 limit and market orders and 50 transactions executed in a principal or riskless principal capacity, for compliance with capacity reporting under NASD Trade Reporting and Nasdaq Market Center rules ("NMC");
- 14 orders in Nasdaq securities in soft dollar accounts and 54 related executions, for compliance with transaction reporting rules and the safe harbor limitations of Section 28(e) of the Securities Exchange Act of 1934;
- Six open buy limit orders and stop sell limit orders in securities traded ex-dividend, for compliance with NASD Rule 3220;
- One transaction in a Nasdaq security reported with a .PRP modifier, for compliance with NASD transaction reporting rules;
- 25 orders in securities in which MLCO was a market center, for compliance with SEC Rule 11Ac1-5;
- Data published on the firm's quarterly order routing report from the second quarter of 2004, for compliance with SEC Rule 606;
- Four security/size/order data statistics published on the firm's monthly order execution report of June 2004, for compliance with SEC Rule 605;
- 50 orders in Nasdaq securities submitted to the Order Audit Trail System, for compliance with NASD Rule 6955;
- 10 customer transactions in OTCBB and/or OTC equity securities, for compliance with NASD Rules 3110(b) and 2320;
- 18 persons engaged in the firm's trading and market making activities during July 2004, for compliance with NASD Registration rules;
- 223 order/trade records prepared and maintained for the above samples, for compliance with NASD Rule 3110 and SEC Rules 17a-3 and 17a-4;
- 283 trades reported to NMC, for compliance with NASD Trade Reporting and NMC rules;
- The firm's establishment and implementation of "regular and rigorous" reviews of the execution quality of orders sent to other market centers for execution based on written supervisory procedures in effect during July 2004, for compliance with NASD Rules 2320 and 3010;
- 186 customer trade confirmations, for compliance with SEC Rule 10b-10; and
- The firm's establishment and implementation of a supervisory system and written procedures based on the supervisory system in effect during July 2004, for compliance with NASD Rule 3010.

- A. MLCO hereby accepts and consents, without admitting or denying the allegations or 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:

MRD200444986/20050000654:

1. In 36 transactions for or with a customer, MLCO failed to use reasonable diligence to ascertain the best inter-dealer market and failed to buy or sell in such market so that the resultant price to its customer was as favorable as possible under prevailing market conditions, as reflected on Exhibit A, which is attached hereto and incorporated herein by reference. The conduct described in this paragraph constitutes separate and distinct violations of NASD Rules 2110 and 2320.

MRD200447707/20050002612:

2. MLCO failed to report to ACT the correct symbol indicating whether 12 transactions in eligible securities were a buy, sell, sell short, sell short exempt or cross. The conduct described in this paragraph constitutes separate and distinct violations of NASD Rule 6130(d).
3. During the review period, MLCO transmitted to OATS 31 reports that contained inaccurate, incomplete, or improperly formatted data. Specifically, 27 reports incorrectly included a reporting exception code of "R" to OATS. In three instances, MLCO failed to submit the correct routed order ID to OATS. In one instance, MLCO failed to submit the correct market center code. These inaccurate and/or incomplete reports represented 62 percent of the sample of reports reviewed in the TMMS examination that the firm transmitted during the review period. The conduct described in this paragraph constitutes separate and distinct violations of NASD Rule 6955(a).

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

A censure and a fine of \$40,000 (composed of \$15,000 for the best execution violations, \$15,000 for the violations of the ACT Rules and \$10,000 for the OATS violations). Restitution by Respondent to the investors listed on Exhibit A hereto in the total amount of \$927.90, plus interest at the rate set forth in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), from the date of the violative conduct until the date this Letter of Acceptance, Waiver and Consent is accepted by the National Adjudicatory Council. A registered principal of the firm shall submit satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to

effect restitution, to the COMPLIANCE ASSISTANT, LEGAL SECTION, MARKET REGULATION DEPARTMENT, 9509 KEY WEST AVENUE, ROCKVILLE, MD 20850 no later than 120 days after acceptance of this Letter of Acceptance, Waiver and Consent. If for any reason, Respondent cannot locate any customer after reasonable and documented efforts within such period, or such additional period agreed to by the staff, Respondent shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed-property or abandoned-property fund for the state in which the customer last resided.

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

III.

OTHER MATTERS

- A. MLCO understands that the firm may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. MLCO understands that MLCO 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 MLCO upon notice that this AWC has been accepted and that such payments are due and payable and has attached an Election of Payment form showing the method by which MLCO proposes to pay any fine imposed.
- C. MLCO specifically and voluntarily waives any right to claim that the firm is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.

Merrill, Lynch, Pierce, Fenner & Smith Inc. 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.

June 11, 2007
Date

Merrill, Lynch, Pierce, Fenner & Smith Inc.
Respondent

By: [Signature]
Name: Barry J. Mandel
Title: Senior Vice President

Reviewed by:

[Signature]
Counsel for Respondent

Accepted by NASD:

6/25/07
Date

[Signature]
Thomas R. Gira
Executive Vice President and Deputy
Department of Market Regulation

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

Attachment:

Standard Election of Payment Form
Exhibit A: Best Execution Violations

AWC Incident No.	Date	MPID	B/S	Volume	SECD	Price	Contrs	Report Time	Execution Time	Modifier	Inside Bid or Ask at Execution	Executed Price	Adjusted Price	No. of Shares Requiring Restitution ¹	Restitution
1	10/14/2003	MLCO	B	400	OBAS	7.5		11:08:12	11:08:11		7.55	7.5	7.55	400	20.00
2	10/21/2003	MLCO	B	700	JDAS	21.5		14:24:26	14:24:27		21.58	21.5	21.68	700	56.00
3	10/23/2003	MLCO	S	100	CHKP	16.7		10:19:22	10:19:21		16.55	16.7	16.68	100	4.00
4	10/23/2003	MLCO	S	100	PTEN	20.88		10:19:57	10:19:56		20.61	20.88	20.81	100	7.00
5	10/23/2003	MLCO	B	100	NKTR	12.54		10:02:38	10:02:18		12.82	12.54	12.82	100	8.00
6	10/23/2003	MLCO	B	100	BKHM	2.5		10:02:06	10:02:00		2.83	2.5	2.63	100	13.00
7	10/23/2003	MLCO	S	100	CMVT	10.31		10:20:27	10:20:28		10.15	10.31	10.15	100	18.00
8	10/23/2003	MLCO	B	100	KUC	11.85		9:58:09	9:57:51		12.07	11.85	12.07	100	22.00
9	10/23/2003	MLCO	B	100	THQI	10.99		10:03:03	10:02:54		17.25	10.99	17.25	100	26.00
10	10/23/2003	MLCO	B	750	CSCS	28		10:21:05	10:21:03		28.3	28	28.3	750	219.00
11	10/23/2003	MLCO	B	100	MSTR	48.8		10:02:12	10:02:03		49.1	48.8	49.1	100	30.00
12	10/24/2003	MLCO	B	100	SIRI	2.25		10:26:26	10:26:07		2.33	2.25	2.33	100	4.00
13	10/24/2003	MLCO	S	100	NIPHY	8.7		9:59:34	9:59:33		8.85	8.7	8.85	100	5.00
14	10/24/2003	MLCO	B	100	SIRI	2.28		10:18:25	10:14:55		2.33	2.28	2.33	100	5.00
15	10/24/2003	MLCO	B	100	PWER	9.86		9:55:36	9:55:24		9.92	9.86	9.92	100	6.00
16	10/24/2003	MLCO	B	100	NWAC	13		10:00:17	10:00:16		13.07	13	13.07	100	7.00
17	10/24/2003	MLCO	S	100	TTEK	20.68		10:20:05	10:20:03		20.61	20.68	20.61	100	7.00
18	10/24/2003	MLCO	B	100	SMSC	28.85		9:59:15	9:59:14		28.83	28.85	28.93	100	8.00
19	10/24/2003	MLCO	S	100	CHKP	16.43		10:00:40	9:59:45		16.34	16.43	16.34	100	9.00
20	10/24/2003	MLCO	B	100	VRSN	13.7		10:23:15	10:23:13		13.79	13.7	13.79	100	9.00
21	10/24/2003	MLCO	S	600	JDSU	3.53		10:11:21	10:11:20		3.43	3.53	3.43	600	80.00
22	10/24/2003	MLCO	B	100	ASML	15.39		10:07:24	10:07:22		15.52	15.39	15.52	100	13.00
23	10/24/2003	MLCO	S	200	TARO	63.15		10:03:08	10:03:06		63	63.15	63	200	30.00
24	10/24/2003	MLCO	B	100	ERTS	87		10:26:17	10:26:18		87.15	87	87.15	100	15.00
25	10/24/2003	MLCO	B	100	BRCM	29.7		10:18:36	10:18:35		29.9	29.7	29.9	100	20.00
26	10/24/2003	MLCO	S	100	ZBRA	58.7		10:15:32	10:15:30		58.49	58.7	58.49	100	21.00
27	10/24/2003	MLCO	B	100	UTSI	30.88		10:28:47	10:28:48		31.2	30.88	31.2	100	24.00
28	10/24/2003	MLCO	S	100	CTSH	42.19		9:58:36	9:58:34		41.78	42.19	41.78	100	41.00
29	10/24/2003	MLCO	B	100	EBAY	53.5		10:29:43	10:29:42		53.95	53.5	53.95	100	45.00
30	10/24/2003	MLCO	B	100	AMZN	54		10:15:58	10:15:58		54.63	54	54.63	100	83.00
31	10/28/2003	MLCO	B	500	ERICY	18.68		15:45:24	15:45:23		18.7	18.68	18.7	500	20.00
32	11/12/2003	MLCO	B	1000	VTIV	8.45		13:43:22	13:43:21		8.5	8.45	8.5	1000	50.00
33	11/17/2003	MLCO	S	600	ATML	5.2		15:39:05	15:39:04		5.18	5.2	5.18	500	20.00
34	12/10/2003	MLCO	B	100	INTC	29.731		11:05:19	11:05:02		29.8	29.731	29.8	100	6.00
35	12/31/2003	MLCO	B	100	ILUE	4.05		11:07:54	11:07:54		4.09	4.05	4.09	100	4.00
36	12/31/2003	MLCO	B	100	JCOM	24.89		11:08:09	11:08:09		25.03	24.89	25.03	100	14.00
Total Restitution =															\$927.90