

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2009018601702**

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

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

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("ML" 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 below. This AWC is submitted on the condition that, if accepted, FINRA will not bring any future actions against ML alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. ML hereby accepts and consents, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by FINRA:

BACKGROUND

Merrill Lynch, Pierce, Fenner & Smith Incorporated has been a registered broker-dealer and member of FINRA since January 26, 1937. ML is a Delaware corporation with its principal place of business in New York, NY. ML has over 2,000 active branches and approximately 33,000 registered representatives.

RELEVANT DISCIPLINARY HISTORY

On October 3, 2011, pursuant to Letter of Acceptance, Waiver and Consent No. 2008013990502, FINRA found that ML failed to have a supervisory system to ensure that all employee accounts were monitored for such activities as deposits, withdrawals, and wire transfers. ML also failed to maintain written supervisory procedures to adequately supervise a registered representative who used a business account at ML to implement a Ponzi scheme. ML agreed to a censure and a fine of \$1,000,000.

On July 28, 2009, pursuant to Letter of Acceptance, Waiver and Consent No. 2005002254701, FINRA found that ML failed to establish and maintain systems and procedures reasonably designed to detect and prevent unsuitable short-term sales of closed-end funds purchased at the initial public offering. ML agreed to a censure and a fine of \$150,000.

OVERVIEW

Between October 2006 and February 2009 (the relevant period), ML, through former broker David E. Bredenburg, recommended to at least twelve customers 37 unsuitable short-term transactions in Closed-End Funds ("CEF") and Unit Investment Trusts ("UIT"). Many of the unsuitable short-term CEF transactions involved switching, in which Bredenburg used CEF sales proceeds to purchase other CEFs and UITs, with little or no economic benefit to the customer. For five of the 12 customers, and two others, ML, through Bredenburg, also recommended the unsuitable use of margin to finance the customers' purchases and sales of securities, including the short-term trading of UITs and CEFs, exposing those customers to significant risks, increased costs, and sizable margin balances. Most of the customers were elderly, conservative, and/or unsophisticated investors for whom the aggressive short-term trading and/or use of margin was inappropriate given the customers' financial situations, needs, and investment objectives.

During the relevant period, ML and Bredenburg earned approximately \$47,000 in commissions and margin interest from the unsuitable short-term trading for these customers. At the same time, these customers lost over \$430,000 from the unsuitable short-term trading and from margin interest. Accordingly, ML, through Bredenburg, violated NASD Rules 2310 and 2110 and FINRA Rule 2010.

ML failed to adequately supervise Bredenburg. The Firm was aware of red flags that should have alerted it that Bredenburg was recommending unsuitable short-term transactions in CEFs and UITs and the unsuitable use of margin. Among other things, there was a pattern of CEF and UIT liquidations and sizable margin balances in accounts primarily owned by elderly customers. Nonetheless, ML failed to take adequate and timely steps to prevent further transactions or remedy the unsuitable transactions. As such, the Firm failed to supervise Bredenburg in violation of NASD Rules 3010(a) and 2110, and FINRA Rule 2010.

ML's supervisory failures resulted, in part, from a deficient supervisory system and written procedures that the Firm had in place during the relevant period to supervise short-term UIT trading and switches. The Firm failed to maintain a supervisory system to monitor short-term UIT trading. Before May 2008, ML's written procedures failed to provide adequate guidance regarding the suitability review of UIT transactions. By failing to maintain adequate supervisory systems and procedures, ML violated NASD Rules 3010(a) and (b) and 2110, and FINRA Rule 2010.

FACTS AND VIOLATIVE CONDUCT

1. ML, through Bredenburg, Recommended 37 Unsuitable Short-Term CEF and UIT Transactions

Bredenburg worked in ML's Towson, Maryland office, which was part of the Firm's Baltimore complex.

Bredenburg recommended that at least twelve of his customers engage in a pattern of unsuitable short-term CEF and UIT trading. Bredenburg engaged in 37 unsuitable trades for these customers. Given these customers' age, investment objectives, financial situations, and needs, the CEFs and UITs were suitable as longer-term investment products, particularly given the sales loads associated with purchasing each product. Most of Bredenburg's short-term CEF transactions involved CEFs purchased at initial public offering, with the sales charges to the customer built into the offering price of the CEF. The CEFs at issue typically included a sales load of 4.5%. Likewise, the UITs at issue typically included a maximum sales charge of between 2.95% and 4.95%, and maturity dates ranging from approximately 15 to 24 months. Even though CEFs and UITs generally were intended as longer-term investments, Bredenburg recommended that some of these customers sell their entire positions as soon as two months after purchase.

Many of the short-term CEF transactions involved switching, whereby Bredenburg generated funds to purchase one CEF or UIT by selling another CEF, with the customer gaining little or no economic benefit from the exchange.

SN was one customer who sustained losses as the result of Bredenburg's short-term sales strategy. SN, a widowed investor in her eighties, informed Bredenburg that she was very conservative, did not want to take much risk with the account, and did not want to lose money. On or about March 30, 2007, SN, based upon Bredenburg's recommendation, purchased a CEF at IPO for approximately \$60,000. ML and Bredenburg earned \$1,800 in gross commissions from the transaction. Less than one year later and based upon Bredenburg's recommendation, SN sold the entire position for a loss of approximately \$8,000. While associated with ML, Bredenburg on two other occasions recommended that SN sell her positions in CEFs and UITs less than one year after she purchased them, which generated \$3,000 in gross commissions for ML and Bredenburg and over \$24,000 in losses for SN. These transactions were unsuitable given SN's age, investment objectives, sophistication and needs.

ML, through Bredenburg, made these recommendations to purchase and sell CEFs and UITs on a short-term basis without having reasonable grounds for believing that such recommendations were suitable in view of the frequency and size of the transactions and each customer's investment objectives, financial situation, and needs. The short-term trading did not meet the needs of the customers, each of whom was retired or unemployed, most of whom were elderly, and some of whom were infirm. Moreover, each customer had conservative or moderate

investment profiles that were inconsistent with the short-term trading strategy. As a result of these 37 transactions, these customers incurred unnecessary sales charges and suffered losses of approximately \$360,000, while ML and Bredenburg earned gross commissions of over \$47,000.

By recommending unsuitable short-term CEF and UIT transactions, the Firm violated NASD Rules 2310 and 2110, and FINRA Rule 2010.

2. ML, through Bredenburg, Recommended the Unsuitable Use of Margin to Purchase Securities, Including Short-Term Transactions in CEFs and UITs

Bredenburg also made unsuitable recommendations to seven customers (including five who had suffered losses as a result of his short-term trading strategy in CEFs and UITs) that they open margin accounts and use margin to buy and sell securities, including CEFs and UITs. Bredenburg's recommendations were unsuitable. He lacked a reasonable basis for believing that using margin was suitable given each customer's investment objectives, financial situation, and needs. Bredenburg's recommendations to trade securities on margin, including CEFs and UITs, exposed the customers to significant risk, increased costs, and sizable margin balances. These customers paid in aggregate over \$70,000 in margin interest during the relevant period. The recommendations were inconsistent with the seven customers' investment objectives.

GB was one customer Bredenburg recommended to use margin to trade securities. GB, a widower in his eighties, listed on his account form a moderate risk tolerance and a growth investment objective and told Bredenburg he was averse to debt. Bredenburg began recommending purchases of securities on margin in GB's account in February 2007. By July 2007, the account had a margin balance of more than \$250,000, over one-third of the account's value. GB twice complained to Bredenburg's sales assistant, in September 2007 and February 2008, demanding that the margin balance be eliminated. His account continued to have a sizable margin balance through the first part of 2008 and the balance was not eliminated until April 2008. Between February 2007 and April 2008, GB paid over \$10,000 in margin interest.

By recommending unsuitable transactions on margin, ML, through Bredenburg, violated NASD Rules 2310 and 2110, and FINRA Rule 2010.

3. ML Failed to Supervise Bredenburg

Between October 2006 and February 2009, ML failed to detect that Bredenburg was engaging in a pattern of unsuitable short-term trading of CEFs and UITs and unsuitable transactions on margin. ML approved each of Bredenburg's short-term CEF and UIT transactions. ML failed to identify as unsuitable each of Bredenburg's short-term CEF and UIT transactions. In addition, ML failed to respond adequately to exception reports suggesting that Bredenburg was engaged in a pattern of unsuitable use of margin to trade securities. Most notably, the Firm did not speak with any of these customers about the short-term trading or

margin activity in his or her account until Bredenburg's customers began to complain about Bredenburg in April 2008.

ML failed to respond adequately to exception reports and information that were available to different individuals and/or groups within the Firm that, in the aggregate, would have revealed Bredenburg's activities. In addition, in some cases the Firm relied upon Bredenburg's self-serving explanations for the transactions without conducting further investigation.

By failing to adequately respond to exception reports and other information suggesting that Bredenburg was recommending unsuitable transactions, ML violated NASD Rules 3010(a) and 2110, and FINRA Rule 2010.

4. ML Had Inadequate Systems and Procedures to Supervise UIT Transactions

ML, during the relevant period, lacked adequate supervisory systems and procedures to supervise UIT transactions, including systems and procedures to monitor short-term UIT transactions and switches. While the Firm had a supervisory system for certain short-term CEF liquidations, it did not have a similar system for UIT redemptions. Prior to May 2008, ML's written supervisory procedures for UITs also were deficient, by failing to provide guidance to registered representatives or principals on suitability factors to consider in purchasing, selling, and switching UITs.

By failing to maintain an adequate supervisory system and written procedures to monitor UIT transactions, ML violated NASD Rules 3010(a) and (b) and 2110, and FINRA Rule 2010.

B. The firm consents to the imposition of the following sanctions:

1. Censure.
2. A fine of \$400,000, which includes the disgorgement of commissions received of \$47,190.03.
3. In addition, ML shall comply with the following undertaking within the time period specified (unless otherwise altered by FINRA staff):

On or before the date this AWC is accepted by FINRA, ML shall provide the staff with sufficient evidence that it paid restitution to the affected Bredenburg customers listed in Attachment A hereto in the total amount of \$130,718 (which is the sum of the uncompensated losses incurred from the short-term transactions listed in Attachment B hereto and margin interest in the relevant customers' accounts), 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 the violative

conduct, until the date restitution is paid to each customer. A registered principal on behalf of ML shall submit satisfactory proof of payment of restitution or of reasonable and documented efforts undertaken to effect restitution. Such proof shall be submitted to Robert W. Turk, Senior Counsel, FINRA, Department of Enforcement, 15200 Omega Drive, Third Floor, Rockville, MD. 20850 either by letter that identifies ML and case number 20090186017, or by e-mail from a work-related account of the registered principal of ML to EnforcementNotice@FINRA.org. If for any reason ML cannot locate any customer identified in Attachment A after reasonable and documented efforts within 120 days from the date the AWC is accepted, or such additional period agreed to by a FINRA staff member in writing, ML 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. ML 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.

ML agrees to pay the monetary sanctions upon notice that this AWC has been accepted and that such payments are due and payable. ML has submitted an Election of Payment form showing the method by which it proposes to pay the fine imposed. ML specifically and voluntarily waives any right to claim an inability to pay at any time hereafter the monetary sanctions imposed in this matter.

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.

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

II.

WAIVER OF PROCEDURAL RIGHTS

ML 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, ML 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.

ML 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

ML 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 it; and
- C. If accepted:
 - 1. this AWC will become part of ML's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against it;
 - 2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about ML's disciplinary record;

3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
 4. ML 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. ML 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 ML's right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.
- D. ML may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. ML 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 or its staff.

The undersigned, on behalf of the Firm, certifies that a person duly authorized to act on its 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 the Firm has agreed to its provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce the Firm to submit it.

07/20/2012
Date (mm/dd/yyyy)

Sara A. Martin
Respondent
Merrill Lynch, Pierce, Fenner & Smith
Incorporated

By: Sara A. Martin
Sara A. Martin
Assistant General Counsel

Reviewed by:


Ira L. Oring, Esq.

Counsel for Respondent
Fedder and Garten

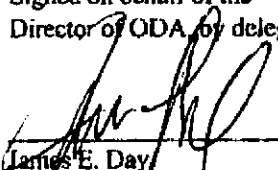
36 South Charles Street, Suite 2300
Baltimore, MD 21201
Telephone: 410-539-2800

Accepted by FINRA:

8/29/12

Date

Signed on behalf of the
Director of ODA by delegated authority


James E. Day

Chief Counsel and Associate V.P.

FINRA Department of Enforcement

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