

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 20090189070**

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, Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch" 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 the Firm alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. Merrill Lynch 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 (B/D No. 7691) is a wholly-owned subsidiary of Merrill Lynch & Co., Inc., which in turn is wholly owned by the Bank of America Corporation. Merrill Lynch, a FINRA-regulated broker-dealer, is a global investment banking and full service brokerage firm with principal offices located in New York, NY.

RELEVANT DISCIPLINARY HISTORY

The Firm has no prior relevant disciplinary history.

OVERVIEW

From June 2002 through February 2007, Merrill Lynch sold over \$3 billion in 529 college savings plans ("529 plans"). During this period, Merrill Lynch failed to establish and maintain adequate procedures, including written supervisory procedures, that were reasonably designed to achieve compliance with suitability obligations as they relate to the sale of Internal Revenue Code Section 529 college savings plans ("529 plans"). As such, Merrill Lynch violated Municipal Securities Rulemaking Board ("MSRB") Rule G-27.

FACTS AND VIOLATIVE CONDUCT

a. 529 Plans and Merrill Lynch's 529 Plan Sales

529 plans are tax-advantaged investment programs designed to help finance qualified higher education costs. The name is derived from the section of the Internal Revenue Code governing the plans. Each of the 50 states, and the District of Columbia, currently has at least one type of 529 plan. All 529 plans offer the same federal tax advantages, including tax deferral on earnings. Approximately half of the states offer state income tax deductions and/or other benefits based on investments by residents in their state's 529 plan, and five states offer state income tax deductions and/or other benefits regardless of which 529 plan the resident invests in. Some states offer 529 plans directly, others offer the 529 plans through designated broker-dealers, and some states offer their plans both directly and through designated broker-dealers. In addition, each plan has different costs, expenses, investment options and other plan features.

From June 2002 through February 2007, Merrill Lynch sold over \$3 billion of 529 plans.¹

b. Merrill Lynch Failed to Establish and Maintain Adequate Procedures Related to the Sale of 529 Plans

From June 2002 through February 2007, Merrill Lynch required registered representatives to consider potential state tax benefits offered by a state in which a client resided as one of a variety of factors before recommending an out of state 529 plan. However, during the period June 2002 through February 2007, Merrill

¹ During this period, Merrill Lynch offered and sold the NextGen College Investing Plan[®] (the "NextGen Plan"), administered by the Finance Authority of Maine. NextGen was the only 529 plan that Merrill Lynch offered and sold on a nationwide basis during this period. However, Merrill Lynch offered and sold 529 plans sponsored by the following states to customers who resided in those states: South Carolina (beginning in 2003); Colorado and Virginia (beginning in 2004); Ohio and New York (beginning in 2005); New Mexico, West Virginia, and Rhode Island (beginning in 2006); and Illinois (beginning in 2007). Merrill Lynch also offered an Arkansas 529 plan from 2003–2005 and a Wyoming 529 plan from 2003–2006 to residents of those states. Today, Merrill Lynch offers 12 529 plans in addition to the NextGen Plan.

Lynch failed to establish and maintain specific procedures reasonably designed to achieve compliance with industry suitability standards related to the sale of 529 plans. The Firm's written supervisory procedures did not adequately ensure that the Firm's registered representatives were considering customer state income tax benefits during their 529 plan suitability analyses. The Firm failed to establish and maintain written supervisory procedures requiring supervisors to perform and document reviews to determine if registered representatives were complying with suitability requirements before recommending a 529 plan purchase. Moreover, Merrill Lynch did not have effective procedures relating to documenting its suitability determinations in connection with the sale of 529 plans.

From March 2007 to the present, the Firm has maintained written supervisory procedures requiring supervisors to perform and document their suitability review of 529 plan sales.

c. Violations

From June 2002 through February 2007, Merrill Lynch failed to establish and maintain supervisory systems and procedures, including written supervisory procedures, reasonably designed to achieve compliance with industry suitability standards related to the sale of 529 plans.

529 plans are municipal securities. As a result, when offering and selling 529 plans, regulated firms must comply with the applicable rules of the MSRB. MSRB Rule G-27 requires that regulated firms supervise the conduct of the municipal securities activities of the firm and its associated persons to ensure compliance with MSRB rules and the federal securities laws, and that firms adopt, maintain and enforce written supervisory procedures reasonably designed to ensure that municipal securities activities are in compliance. Merrill Lynch's conduct, as described above, was in violation of MSRB Rule G-27.

B. Merrill Lynch also consents to the imposition of the following sanctions:

1. A censure;
2. A Fine of \$500,000; and
3. An Undertaking that requires that Merrill Lynch:
 - a. within 60 days of execution of this AWC, distribute a stand-alone letter acceptable to Enforcement (the "529 Letter") to each current customer who resided in a state that offered 529-related state tax benefits at the time the customer opened an advisor sold NextGen Plan account at Merrill Lynch at any time during the period June 2002

through February 2007; the 529 Letter to customers will instruct the customers to call a designated phone number at Merrill Lynch ("designated number") with any inquiries, concerns, or complaints regarding their 529 investment. The designated number will be made available to customers for a period of 120 days from the mailing of the 529 Letter. After 120 days, the designated number will contain a recorded message instructing clients to contact the firm's College Plan Services area;

- b. if requested within 180 days of the mailing of the 529 Letter, will assist in transferring or rolling-over any customer's investment in the NextGen Plan into a 529 plan of the customer's choice within the customer's home state, regardless of whether Merrill Lynch currently offers such 529 plan, with Merrill Lynch waiving: (i) any and all client fees or costs due to Merrill Lynch, if any, in connection with the sale, transfer, or roll-over of the NextGen Plan; and/or (ii) any and all client fees or costs due to Merrill Lynch, if any, in connection with the initial purchase of a 529 plan within the customer's home state using the proceeds of the NextGen Plan; and
- c. provide to Enforcement staff semi-annually, or upon Enforcement's request, until December 31, 2011, a report in a form acceptable to Enforcement describing each oral and written inquiry, concern, or complaint received through the designated number, or any written complaint otherwise received by the Firm concerning the NextGen Plan from the recipients of the 529 Letter, along with a description of how the Firm addressed or resolved the inquiries, concerns, or complaints of each such customer.

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

Merrill Lynch specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanctions imposed in this matter.

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

II.

WAIVER OF PROCEDURAL RIGHTS

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

- A. To have a Complaint issued specifying the allegations against the Firm;
- 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, Merrill Lynch 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.

Merrill Lynch 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

Merrill Lynch understands that:

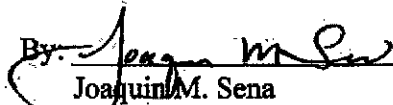
- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;

- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against the Firm; and
- C. If accepted:
 - 1. this AWC will become part of the Firm's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against Merrill Lynch;
 - 2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about the Firm's disciplinary record;
 - 3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 83131 and
 - 4. Merrill Lynch 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. Merrill Lynch 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 Merrill Lynch's right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.
- D. Merrill Lynch may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Merrill Lynch 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.

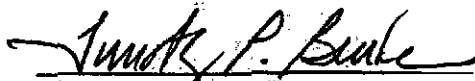
The undersigned, on behalf of the Firm, certifies that a person duly authorized to act on its behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that the Firm has agreed to its provisions voluntarily; and that no offer, threat, 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.

10/10/2010
Date (mm/dd/yyyy)

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Respondent

By: 
Joaquin M. Sena
Associate General Counsel

Reviewed by:

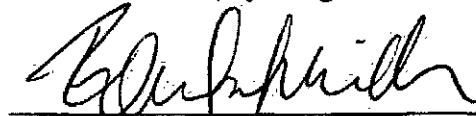

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Counsel for Merrill Lynch, Pierce, Fenner & Smith Incorporated

Accepted by FINRA:

11/23/10
Date

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


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