

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2011026254401**

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

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

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Merrill Lynch, Pierce, Fenner & Smith Inc. ("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 Merrill Lynch 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, a wholly-owned subsidiary of Bank of America Corporation, is a Delaware corporation with its principal place of business in New York, New York. It is a global investment banking and multi-service brokerage firm that provides, among other things, retail brokerage, corporate and investment banking services, wealth management, and commercial lending services. Merrill Lynch is registered with the Securities and Exchange Commission as a broker-dealer and investment adviser and has been a FINRA-regulated firm since January 26, 1937. It has more than 15,000 registered representatives and holds approximately \$2.2 trillion in customer assets.

RELEVANT DISCIPLINARY HISTORY

Pursuant to Letter of Acceptance, Waiver and Consent No. 2008014187701 (June 2012), FINRA censured and fined Merrill Lynch \$2.8 million for violating various provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), certain rules thereunder, FINRA rules, and NASD rules, including Section 10 of the Exchange Act, Rule 10b-10(a), and NASD Rules 2230, 3010,

and 2110 for (i) failing to send approximately 10,647,187 trade confirmations for 232,356 customer accounts; and (ii) failing to accurately state whether the Firm acted as an agent or principal on trade confirmations and account statements relating to certain mutual fund transactions sent to at least 526,405 customer accounts for 7,538,005 transactions.

Pursuant to Letter of Acceptance, Waiver and Consent No. 2007009456801 (Feb. 2008), FINRA censured and fined \$175,000 for violating Rule 10b-10(a) under the Exchange Act and NASD Rules 3010(a), 3010(b), 2230, and 2260 for failing to timely and consistently update its records relating to certain investment advisory and fee-based accounts during the period from January 2001 through January 2006. This resulted in the Firm's failure to deliver proxy statements and trade confirmations to at least 42,626 customer accounts.

OVERVIEW

From March 2010 through March 2011 (the "Relevant Period"), as a result of a system configuration error, Merrill Lynch sent 39,256 trade confirmations to 22 institutional clients that failed to inform the investors that Merrill Lynch was executing the trades on an agency basis. The confirmations were sent for 13,231 block non-dollar equity trades. As a result of the foregoing, Merrill Lynch violated Section 10 of the Exchange Act, Rule 10b-10(a)(2) thereunder, NASD Rule 2230, and FINRA Rule 2010.

FACTS AND VIOLATIVE CONDUCT

Under Rule 10b-10(a)(2), a broker-dealer is required to notify a customer at or before the completion of the transaction whether the broker-dealer is acting as agent for the customer, agent for some other person, agent for the broker and some other person, or as principal for its own account. The broker-dealer also must include in its trade confirmation language identifying whether the firm acted as an agent or principal in a securities transaction. NASD Rule 2230, effective during the Relevant Period, required a member to provide written notification to a customer that conformed with the requirements of Rule 10b-10. During the Relevant Period, Merrill Lynch failed to inform 22 institutional clients trading in non-U.S. equities that it was acting in an agency capacity in executing the trades.

In or around March 2010, Merrill Lynch began migrating institutional clients from the OMGEO OASYS Global trading platform to the OMGEO CTM platform. During the migration, the Firm inadvertently failed to configure the CTM platform to pass capacity language downstream to client confirmations. The CTM platform included additional fields of information not required by the OASYS platform, and the execution capacity field was moved to a different location within the data stream. The Firm did not realize that the field containing execution capacity had been moved, which resulted in the execution capacity not being filled in.

Although the firm tested its new platform prior to the migration from OASYS to CTM, the testing did not detect that the new platform would not identify trading capacity for certain transactions. As a result, capacity language was omitted from 39,256 confirmations, representing 13,231 block non-dollar equity trades, all executed on an agency basis.

The Firm's conduct described herein violated Section 10 of the Exchange Act, Rule 10b-10(a)(2) thereunder, NASD Rule 2230, and FINRA Rule 2010.

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

- censure;
- a \$65,000 fine.

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

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

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 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, 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 understand 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 the Firm'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 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 8313; 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. The Firm 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 the Firm's: (i) testimonial obligations; or (ii) 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. The Firm 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 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.

Respondent

Merrill Lynch, Pierce, Fenner & Smith Inc.

3/21/13
Date

By: Joseph Nenichka
Joseph Nenichka, Director

Accepted by FINRA:

4/8/13
Date

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

James E. Day
James E. Day
Vice President and Chief Counsel
FINRA Department of Enforcement
15200 Omega Drive, Suite 300
Rockville, MD 20850
T: (301) 258-8520
F: (301) 208-8090
james.e.day@finra.org