

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2011028644501**

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

RE: Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch" or the "Firm"),
Respondent
CRD No. 7691

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, 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. The Firm 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 is a Delaware corporation with its principal place of business in New York, New York.¹ The Firm is a global investment banking and multi-service brokerage firm that, among other things, provides retail brokerage, corporate and investment banking services, wealth management and commercial lending. It is registered with the Securities and Exchange Commission ("SEC") as a broker-dealer and investment adviser and has been a FINRA regulated firm since January 26, 1937. Merrill Lynch has more than 15,000 financial advisors and approximately \$2.2 trillion in customer assets.

RELEVANT DISCIPLINARY HISTORY

Between October 2001 and March 31, 2010, the Firm failed to send margin risk disclosure statements to 6,957 customers who opened certain accounts at the firm. Between August 2004 and June 2010, the Firm also failed to send business

¹ Merrill Lynch is a wholly-owned subsidiary of Bank of America Corporation ("Bank of America"). On or about September 14, 2008, the boards of directors of Bank of America and Merrill Lynch & Co., Inc. unanimously approved the merger of the two entities. On December 5, 2008, Bank of America's shareholders voted to approve the merger and the merger closed on January 1, 2009.

continuity plans to 16,711 customers who opened certain accounts. In addition, from April 2003 to December 2011, Merrill Lynch failed to have an adequate supervisory system to ensure that customers in certain advisory programs were billed in accordance with contract and disclosure documents, which resulted in more than \$32 million in overcharges to customers. As a result, the Firm violated Section 10 of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-10(a) thereunder, Exchange Act Rules 17a-3 and 17a-4, NASD Rules 2230, 2341, 2260(a), 3010, 3510(e) and 2110 and FINRA Rules 2251(a), 2264, 4370 and 2010, and agreed to a \$2.8 million fine.²

OVERVIEW

From January 10, 2010 to February 16, 2011, the Firm failed to send required regulatory disclosures and notices in connection with the opening of approximately 12,989 Firm accounts. These included business continuity plan disclosures, privacy pledges, payment for order flow disclosures, and affiliate marketing notices. In addition, from December 5, 2011 through November 18, 2012, the Firm failed to collect employer addresses for 345,789 accounts as required.

By failing to send required disclosures and notices to customers, the Firm violated Rule 607 of Regulation NMS, Rule 4 of Regulation S-P, Rule 121 of Regulation S-AM, and FINRA Rules 4370 and 2010. In addition, by failing to obtain required employer address information from customers, the Firm violated FINRA Rules 4512 and 2010.

FACTS AND VIOLATIVE CONDUCT

Failure to Send Required Disclosures and Notices to Customers

FINRA and SEC Required Regulatory Notices Upon Account Opening

Under Rule 607 of Regulation NMS, a broker-dealer that acts as agent for a customer is required to disclose, in writing, upon opening a new account and on an annual basis thereafter, the firm's policies regarding receipt of payment for order flow and the firm's policies for determining where to route customer orders that are the subject of payment for order flow.³ Exchange Act Rule 10b-10(d)(8) states that "payment for order flow" includes any payment or benefit that results in compensation to the broker/dealer for routing orders to a particular venue.

Pursuant to Rule 4 of Regulation S-P when a customer relationship is initially established with a customer, firms must provide a "clear and conspicuous notice" regarding their privacy policies and practices.⁴

² *Merrill Lynch, Pierce, Fenner & Smith Inc.*, AWC No. 20080141877 (Jun. 2012).

³ See Regulation NMS, 17 CFR 242.607(a).

⁴ See Regulation S-P, 17 CFR 248.4(a)(1).

Rule 121 of Regulation S-AM prohibits broker dealers from using eligibility information about a consumer from an affiliate to make a marketing solicitation to a customer unless, among other things:

- (i) It is clearly and conspicuously disclosed to the consumer in writing or, if the consumer agrees, electronically, in a concise notice that [the firm] may use eligibility information about that consumer received from an affiliate to make marketing solicitations to the consumer;
- (ii) The consumer is provided a reasonable opportunity and a reasonable and simple method to "opt out," or the consumer prohibits [the firm] from using eligibility information to make marketing solicitations to the consumer; and
- (iii) The consumer has not opted out.⁵

This affiliate marketing notice must be provided before a firm affiliate can use eligibility information to make a marketing solicitation.

FINRA Rule 4370(e) provides, in pertinent part, "[e]ach member must disclose to its customers how its business continuity plan addresses the possibility of a future significant business disruption and how the member plans to respond to events of varying scope. At a minimum, such disclosure must be made in writing to customers at account opening."

The Firm Failed to Provide Required Disclosures and Notices to Customers

From January 10, 2010 to February 16, 2011, when a customer opened a securities account, the Firm typically distributed a "Welcome Letter" package that included required regulatory disclosures. According to the Firm's policies and procedures, the Welcome Letter package was supposed to include a letter from the Firm, business continuity plan disclosure, affiliate marketing notice, privacy pledge, and payment for order flow disclosure.

On January 10, 2010, the Firm implemented a new software system to facilitate the opening of customer accounts. The account opening platform ("Platform") was programmed to automatically send Welcome Letter packages to customers when accounts were opened.

The Platform was used to help open new college savings ("529 Accounts"), education savings, and individual investor accounts. However, in December 2010, the Firm discovered that the Platform failed to send Welcome Letter packages to customers as required. The failure occurred because the Firm did not activate a

⁵ See Regulation S-AM, 17 CFR 248.121(a)(1).

mechanism on the Platform to deliver the Welcome Letter packages to the accounts. Although the Firm tested the Platform before it was implemented and conducted subsequent systems testing, it did not discover that the Welcome Letter packages were not being sent to customers.

As a result, for approximately 13 months, from January 10, 2010 to February 16, 2011, the Firm did not send Welcome Letter packages with required privacy policy disclosures, policies on payment for order flow, affiliate marketing notices and business continuity plans to 12,989 accounts enrolled in 529 Accounts (4,850 accounts), education savings accounts (590 accounts) and individual investor accounts (7,549 accounts).⁶

Accordingly, the Firm violated Rule 607 of Regulation NMS, Rule 4 of Regulation S-P, Rule 121 of Regulation S-AM, and FINRA Rules 4370 and 2010.

The Firm Failed to Obtain Employer Address Information for Certain Customer Accounts

FINRA Rule 4512 requires firms to maintain certain information relating to customer accounts. Specifically, FINRA Rule 4512(a)(2)(B) requires member firms to maintain for each account, among other things, the address of each customer's employer.

From December 5, 2011, the effective date of FINRA Rule 4512, through November 18, 2012, the Firm failed to collect employer addresses for 345,789 accounts.

Accordingly, the Firm violated FINRA Rules 4512 and 2010.

B. The Firm also consents to the imposition of the following sanctions:

- Censure; and
- \$100,000 fine.

The Firm agrees to pay the monetary sanction upon notice that this AWC has been accepted and that such payment is due and payable. The Firm has submitted an Election of Payment form showing the method by which the Firm proposes to pay the fine imposed.

The Firm specifically and voluntarily waives any right to claim that the Firm is unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter.

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

⁶ The violations of Rule 121 of Regulation S-AM occurred for a period of approximately seven months since compliance with Rule 121 of Regulation S-AM was not required until June 1, 2010.

II.

WAIVER OF PROCEDURAL RIGHTS

The Firm 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, the Firm specifically and voluntarily waives any right to claim bias or prejudgment of the Chief Legal Officer, 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.

The Firm 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

The Firm 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 the Firm;
2. this AWC will be made available through FINRA's public disclosure program in accordance with FINRA Rule 8313;
3. FINRA may make a public announcement concerning this agreement and the subject matter thereof in accordance with FINRA Rule 8313; and
4. 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. 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. The Firm 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 the Firm 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.

Date: 12/12/2014

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Respondent

By: Mark L. Keene
Mark L. Keene, Associate General Counsel

Reviewed By:

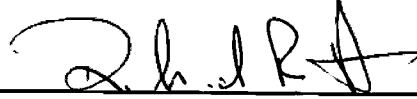
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Accepted by FINRA:

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2.5.15
Date

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



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