

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2014041490801**

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

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

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Respondent 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 is a global investment banking and brokerage firm that provides financial services to clients, including retail brokerage and wealth management to individuals. Since 2009, Merrill Lynch has been a wholly-owned subsidiary of Bank of America Corporation. The Firm has been a FINRA member since January 26, 1937, has a principal place of business in New York, New York, and has more than 34,000 registered individuals in more than 3,300 branch offices.

RELEVANT DISCIPLINARY HISTORY

On January 14, 2015, pursuant to Letter of Acceptance, Waiver and Consent No. 2013037137602, FINRA found that the Firm failed to timely amend a representative's Form U5 to report two written complaints alleging misappropriation of customer funds. The Firm was found to have violated FINRA Rules 4530(a) and 2010 and Article V, Section 3 of FINRA's By-Laws. It was censured and fined \$175,000.

On September 21, 2012, pursuant to Letter of Acceptance, Waiver and Consent No. 2009020356301, FINRA found that the Firm failed to make or timely make approximately 1,200 required filings or acknowledgments of customer complaints, arbitrations and civil litigations and related Forms U-4 and U-5. The Firm was found to have violated, *inter alia*, NASD Rules 3070(f) and 2110, FINRA Rule 2010 and Article V, Section 3 of NASD's and FINRA's By-Laws. It was censured and fined \$500,000.

OVERVIEW

Between approximately February 2010 and June 2010, Merrill Lynch failed to reasonably supervise EW, who, together with a third party, MS, engaged in a scheme to defraud a customer of the firm ("Customer A"). The scheme began when EW was associated with Merrill Lynch, but the actual theft of funds occurred after EW left the firm and ended when EW and MS were arrested by the criminal authorities.¹ As set forth in more detail below, the Firm failed to respond reasonably to red flags that EW was engaged in conduct that appeared to violate the Firm's policies and procedures. In particular, the Firm failed to reasonably investigate certain of EW's email communications that it had flagged for review. It also failed to reasonably follow-up on a \$1.7 million default judgment entered against EW based on a civil complaint that alleged that EW had cheated a couple who had lent MS money, alleging that EW had written two post-dated checks, only to later close the account on which the checks were written. Had the Firm more vigorously responded to these red flags, it likely could have discovered EW's association with MS and been in a better position to address the risk EW posed to Customer A and the Firm.² The Firm also failed to disclose certain reportable events that occurred in 2010 and 2012 to FINRA. By virtue of the foregoing, Merrill Lynch violated NASD Rule 3010(a)³, FINRA Rules 1122 and 2010, and Article V, Section 2(c) and 3(b) of FINRA's By-Laws.

FACTS AND VIOLATIVE CONDUCT

EW, MS and Customer A

EW was registered with three FINRA member firms between 1988 and 2004. In July 2004, she left the securities industry and began working for MS's real estate development company. MS had a criminal history and by March 2009, he had been the subject of several news articles in the Miami press that had detailed his alleged involvement in bribing public officials in connection with certain of his real estate projects as well as other fraudulent schemes. MS's company went bankrupt in March 2009. Shortly before then, in February 2009, EW applied to work as an investment associate for Merrill Lynch. Although she later disclosed her employment with MS's company on her initial Form U4, she omitted any reference to her five-year employment with MS's company in her Merrill Lynch employment application indicating instead that her last employer was

¹ EW and MS ultimately pled guilty to various crimes and received prison terms.

² The Firm, along with others, settled Customer A's multi-million dollar claims in 2017.

³ NASD Rule 3010(a), replaced by FINRA Rule 3110(a) effective December 1, 2014, applies to the Firm's conduct prior to December 1, 2014.

another FINRA member firm in 2004.

EW worked in the Firm's Miami office on a team focused on providing financial services to affluent professional athletes. In or about February 2010, EW was introduced to Customer A, a professional athlete. Shortly thereafter she began devoting a significant portion of her time providing him with a variety of financial-related services, including advising him on investments he held away from the Firm and paying his bills on-line from his Firm brokerage account. That same month, EW also introduced MS to Customer A using a fictitious name, falsely representing that MS was a wealthy and successful businessman who could help Customer A with his various, existing business and other financial needs. In fact, MS was a con man who together with EW gained Customer A's confidence and then access to his financial accounts, ultimately misappropriating millions of dollars after EW left the Firm in July 2010.

Merrill Lynch Failed to Reasonably Investigate Red Flags Concerning EW

Merrill Lynch's email surveillance system flagged several of EW's emails for review by supervision. The emails were flagged for review randomly or based on key words in the content. Pursuant to Merrill Lynch's written policies and procedures, the persons responsible for reviewing flagged emails were required to escalate to branch supervisors any emails showing a potential violation of Firm policies. In the three instances below, however, emails to or from EW showing potential violations of Merrill Lynch's policies and procedures were not appropriately escalated, despite having been flagged and reviewed. Thus:

On February 17, 2010, EW forwarded to MS an email she received from Customer A regarding a potential investment. It was against Firm policy to share customer information outside of the Firm without customer authorization. In addition, the investment discussed in the email was not being offered by Merrill Lynch and was a potential private securities transaction. EW also incorrectly identified herself as a "Senior Financial Advisor" even though she was prohibited from holding that title because she was not appropriately licensed. The email was not elevated for further supervisory review.

On March 17, 2010, EW sent an email using a personal email address to a client associate working on her team at Merrill Lynch. The email contained a non-disclosure agreement regarding a feature film investment, raising the question of whether EW was involved with a private securities transaction or outside business activity. In addition, the email showed that EW was using a personal email address to correspond about business in violation of the firm's procedures. This email was also not elevated for further supervisory review.

On March 29, 2010, EW received an email from a real estate attorney regarding Customer A. The email string contained in the flagged email showed EW attempting to terminate the attorney's engagement with Customer A and assume control over advising Customer A on a real estate investment he was seeking to unwind. Such services were

beyond the scope of what EW was permitted to provide to Merrill Lynch customers. Again, this email was not elevated for further supervisory review.

Elevation of these emails to EW's supervisors and further investigation would have revealed EW's close association with MS, that she was providing services beyond what the Firm permitted, and that she was potentially involved with private securities transactions. Had the Firm also then broadened its examination to review EW's other Firm emails, it could have found other indicia of potential misconduct. For example, EW's emails showed that she was involved in arranging bail for MS in February 2010; that MS (under his assumed name) had directed that funds be wired from Customer A's brokerage accounts; and, that an access ID and temporary passcode for Customer A's bank account had been provided to EW.⁴

Another significant red flag occurred on or about March 25, 2010 when the Firm received a garnishment order in connection with a lawsuit filed against EW. The papers received by the Firm showed that the court had entered a default judgment against EW in the amount of \$1,694,233.10. Although the default judgment and garnishment order were soon vacated, Merrill Lynch did not review the underlying complaint. That complaint alleged that EW had taken improper steps to help MS avoid one of his debts, specifically by writing post-dated checks from a bank account she later closed. The Firm failed, however, to obtain a copy of the complaint or otherwise reasonably investigate the circumstances leading to the award of such a large judgment against one of its customer-facing registered representatives. Appropriate follow-up, in addition to revealing serious allegations of misconduct against EW, would also again have shown EW's continued association with MS. At that time, nothing in the Firm's policies or procedures required that the Firm investigate garnishment orders, either for Form U4 reporting or other supervisory purposes. In October 2012, the Firm changed its policies to require its payroll department to report garnishment orders to its registration and licensing group, which in turn was required to determine whether the garnishment related to an outstanding judgment or lien that required reporting on the employee's Form U4.

Reporting Failures

Beginning in 2010, the Firm also failed to report to FINRA several events related to EW. The March 2010 default judgment underlying EW's garnishment order was not disclosed on EW's Form U4.⁵ Nor did the Firm disclose (or consider disclosing) the complaint that led to the default judgment, despite the fact that it was, at least arguably, an investment-related civil action.⁶ Finally, the Firm also failed to disclose on an amended Form U5 the felony charges against EW in 2012, despite learning of them in real time.⁷ FINRA's investigation began in 2014, after the Firm disclosed through an amended Form U5 and

⁴ The Firm's policies prohibited registered representatives from having online access to a customer account for the purpose of entering bill payments or initiating account activity.

⁵ Question 14M on the Form U4 requires that outstanding liens and judgments be reported.

⁶ Question 14H(2) on the Form U4 requires certain investment-related civil actions to be reported.

⁷ Question 7C(2) on the Form U5 requires felony charges in connection with events that occurred where the individual was employed by or associated with a firm, among other items to be reported.

Rule 4530 filing that Customer A had complained.

Violations

NASD Rule 3010(a) required that each member establish and maintain a system to supervise the activities of its associated persons reasonably designed to achieve compliance with applicable securities laws and regulations and NASD/FINRA Rules. The duty to supervise includes the responsibility to investigate red flags that suggest that misconduct may be occurring and to act upon the results of such investigation.

Article V, Section 2(c) of the FINRA By-Laws of The Corporation provides that “[e]very application for registration filed with the Corporation shall be kept current at all times by supplementary amendments...not later than 30 days after learning of the facts or circumstances giving rise to the amendment.” Section 3(b) of Article V requires members to notify FINRA by means of an amendment of Forms U4 or U5 in the event that the member learns of facts or circumstances causing any information to become inaccurate or incomplete. Further, effective August 17, 2009, FINRA Rule 1122 prohibited the filing of information which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing.

By virtue of the conduct described above, Merrill Lynch violated NASD Rule 3010(a); Article V, Section 2(c) and 3(b) of FINRA’s By-Laws; and FINRA Rules 1122 and 2010.

B. Respondent also consents to the imposition of the following sanctions:

- A censure; and
- A fine in the amount of \$300,000.

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

Respondent specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanction(s) imposed in this matter.

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

II.

WAIVER OF PROCEDURAL RIGHTS

Respondent specifically and voluntarily waives the following rights granted under FINRA’s Code of Procedure:

- A. To have a Complaint issued specifying the allegations against Respondent;
- 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, Respondent 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.

Respondent 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

Respondent 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 me; and
- C. If accepted:
 - 1. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against Respondent;

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. Respondent 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. Respondent 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 Respondent'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. Respondent may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that Respondent 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 Respondent 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.

10/30/2018
Date (mm/dd/yyyy)

Mark L. Keene
Merrill Lynch, Pierce, Fenner & Smith Inc.

By: MARK L. KEENE
ASSOCIATE GENERAL COUNSEL
(name/title)

Reviewed by:

Howard E. Heiss / BPQ
Howard Heiss
Counsel for Respondent

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1-212-326-2116

Accepted by FINRA:

12/13/2018
Date

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



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