

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2018058015702**

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

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

Pursuant to FINRA Rule 9216, Respondent Merrill Lynch, Pierce, Fenner & Smith Incorporated 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 Respondent alleging violations based on the same factual findings described in this AWC.

I.

ACCEPTANCE AND CONSENT

- A. Respondent accepts and consents to the following findings by FINRA without admitting or denying them:

BACKGROUND

Merrill became a FINRA member on January 26, 1937. The firm provides financial services to customers, including retail brokerage and wealth management to individuals. Merrill has a principal place of business in New York, New York and approximately 29,000 registered individuals in more than 3,900 branch offices.

In March 2006, the SEC censured and fined Merrill \$2.5 million for, among other things, failing to promptly furnish emails responsive to the staff's requests in connection with various SEC investigations and inquiries. In its order, the SEC noted the importance of broker-dealers complying with the requests of regulatory authorities during investigations.

In September 2019, the CFTC fined Merrill \$300,000 for failing to promptly produce reliable audit trail data requested by the CFTC Division of Enforcement, which, according to the order, "substantially delayed a Division investigation and [was] due in large part to [Merrill's] failure to develop and diligently administer adequate procedures for responding to routine regulatory requests."¹

¹ For more information about the firm, including prior regulatory events, visit BrokerCheck® at www.finra.org/brokercheck.

OVERVIEW

During 2018 through 2020, Merrill failed to comply with its FINRA Rule 8210 obligations in two separate FINRA Enforcement investigations. In both investigations, the firm failed to timely produce responsive documents for up to two years or more and, in one instance, failed to produce certain telephone records, which were destroyed by a vendor despite a pending Rule 8210 request calling for their production. These failures interfered with and delayed FINRA's investigations. By reason of the foregoing, Merrill violated FINRA Rules 8210 and 2010.

FACTS AND VIOLATIVE CONDUCT

This matter originated after FINRA received (i) notice in 2018 of a customer arbitration involving a Merrill representative ("Broker A") and (ii) a Form U5 filed in 2017 by the firm disclosing a customer complaint involving another Merrill representative ("Broker B").

FINRA Rule 8210(a)(1) requires member firms "to provide information orally, in writing, or electronically . . . with respect to any matter involved in the investigation, complaint, examination, or proceeding." Rule 8210(a)(2) requires member firms to permit the inspection and copying of the member's books and records with respect to any matter involved in the investigation, complaint, examination, or proceeding. Rule 8210(c) provides that "[n]o member or person shall fail to provide information . . . or to permit an inspection and copying of books, records, or accounts pursuant to this Rule." Failing to respond to a Rule 8210 request in a timely manner, or providing a partial but incomplete response, is a violation of Rule 8210.

Rule 8210 is essential to FINRA's ability to investigate possible misconduct by its members and associated persons. A firm's obligation under Rule 8210 remains the same, irrespective of whether the responses are handled by firm employees, outside counsel, or third-party vendors.² Scierer is not a required element of a Rule 8210 violation. A violation of FINRA Rule 8210 is also a violation of FINRA Rule 2010, which requires members to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business.

1. The Firm Failed to Make Timely and Complete Productions in FINRA's Investigation of Broker A

Three customers alleged in separate arbitrations that Broker A had engaged in unauthorized and excessive trading, unsuitable recommendations, and other sales practice violations.³ As part of its investigation, in May 2018, FINRA issued a Rule 8210 request to the firm, seeking, among other things, telephone records, notes of meetings with

² In Regulatory Notice 21-29, FINRA reminded firms that "outsourcing an activity or function to a Vendor does not relieve members of their ultimate responsibility for compliance with all applicable . . . FINRA . . . rules." (internal quotation marks, punctuation, and citation omitted).

³ The firm settled with the customers. In January 2021, FINRA barred Broker A from the securities industry.

customers, and account opening documents for the three customers. After an agreed-upon extension of time and a rolling production, the firm told the staff in December 2018 that it had completed its production. However, the firm failed to comply with Rule 8210 in four respects:

First, the firm did not produce responsive telephone records with two of the customers from 2015 and 2016, because the firm's vendor destroyed those documents in 2018 and early 2019 as part of the vendor's policy to periodically delete records older than three years. The firm mistakenly failed to request all available telephone records from the vendor until February 2019. By that time, more than nine months of records that would have been available at the time of the 2018 Rule 8210 request had already been deleted. The firm explained the circumstances pertaining to the loss of the records in July 2020 after inquiries by FINRA.

Second, the firm failed to timely produce all meeting notes between Broker A and one of the customers. The firm produced additional responsive notes to FINRA in January 2020—twenty months after the May 2018 request. The firm explained that its production was delayed, in part, because when the firm located the documents in 2019, the firm's counsel did not immediately identify the documents as responsive to FINRA's May 2018 request. FINRA then requested that the firm review for additional missing documents and the firm represented to the staff in March 2020 that it had identified no additional documents for production.

Third, the firm failed to produce all of its responsive telephone records regarding the third customer until August 2020, more than two years after FINRA's request and after its representation in March described above. The firm explained that the delay occurred because, when it identified the telephone records mistake discussed above, it failed to remember that there had been a separate pull of telephone records relating specifically to the customer in question.

Finally, in September 2020, after the staff asked the firm to search its records for additional responsive documents, the firm made a final production that overlapped in part with past productions, but also included new, responsive documents, including account opening documents.

Each of the categories of documents described above was material to FINRA's investigation of the alleged misconduct by Broker A.

2. The Firm Failed to Make Timely Productions in FINRA's Investigation of Broker B

A customer alleged that Broker B participated in a series of failed investments away from the firm.⁴ As part of its investigation, in June 2018, FINRA issued a Rule 8210 request to the firm, seeking, among other documents, emails related to Broker B's potential selling

⁴ The firm settled with the customer. In 2020, FINRA fined and suspended Broker B for engaging in private securities transactions.

away. In March 2019 and then in July 2019, FINRA issued additional Rule 8210 requests to the firm, seeking records concerning the firm's supervisory review of Broker B's emails. The firm failed to timely comply with the foregoing Rule 8210 requests in two respects:

First, the firm failed to timely produce documents in response to the June 2018 request.⁵ In April and May 2020—nearly two years after the date of the initial request—the firm produced responsive emails—in addition to those that had already been produced—showing that Broker B was facilitating customers' outside investments in products not approved by the firm. The firm explained that its production of emails was delayed because, among other things, of the improper application of an email "threading" tool by its vendor that excluded certain materials from review. These emails were relevant to FINRA's investigation of potential misconduct by Broker B.

Second, the firm failed to timely produce documents in response to the March and July 2019 Rule 8210 requests. Those responses were initially due in March and August 2019, respectively, with FINRA agreeing to a rolling production. On October 11, 2019, FINRA advised the firm that its failure to timely produce documents was delaying the completion of the investigation and imposed a new deadline, pursuant to Rule 8210, of October 31, 2019 for the firm to complete its production. The firm made the balance of its production by the revised due date.

However, after FINRA raised concerns in November 2019 about apparent omissions in the firm's production, the firm produced additional records in December 2019. After FINRA asked more questions in January 2020, the firm investigated the production and produced additional records between March and May 2020, including emails sent or received by Broker B and flagged by the firm's supervisory system. The new materials showed that the firm had flagged certain of Broker B's emails, which contained red flags of potential misconduct, for supervisory review and thus were relevant to FINRA's investigation. The firm explained that its untimely production was caused by several reasons, including the firm's vendor's use of defective search terms.

In September 2021, Merrill implemented additional processes for tracking (i) requests for extensions of time to respond to FINRA Rule 8210 requests and the reasons for those extensions; and (ii) Rule 8210-related concerns raised by FINRA staff.

By reason of the untimely and incomplete productions described above, the firm violated FINRA Rules 8210 and 2010.

SANCTIONS CONSIDERATIONS

In determining the appropriate sanctions in this matter, FINRA considered, among other factors: (1) the firm's disciplinary history; (2) the importance of the information requested as viewed from FINRA's perspective; (3) the number of requests made and the

⁵ The production was initially due in June 2018. After FINRA agreed that the firm could make a rolling production, the firm made its productions throughout the balance of 2018, with the last production made in February 2019.

degree of regulatory pressure required to obtain a response; (4) the length of time to respond; (5) the firm's explanations for the delayed productions and other deficiencies; (6) that the violations occurred in two separate and concurrent FINRA investigations; and, (7) the remedial steps the firm has taken subsequent to the misconduct.

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

- a censure;
- a \$1.2 million fine; and
- an undertaking that within no later than 90 days of the date of issuance of this AWC, a senior officer of Merrill shall certify in writing that, as of the date of the certification, the firm has established and implemented policies, procedures, processes, and internal controls reasonably designed to address and remediate the issues identified in this AWC. The certification shall be submitted to Perry Hubbard, Senior Director, FINRA Department of Enforcement, 15200 Omega Drive, Third Floor, Rockville, MD 20850, perry.hubbard@finra.org. Upon written request showing good cause, FINRA staff may extend the procedural date set forth above.

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 an inability to pay, now or at any time after the execution of this AWC, the monetary sanction imposed in this matter.

The sanctions imposed in this AWC shall be effective on a date set by FINRA.

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 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, 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 its acceptance or rejection.

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 Respondent; and
- C. If accepted:
 - 1. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future action 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 its subject matter 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 testimonial obligations or 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 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.

The undersigned, on behalf of Respondent, certifies that a person duly authorized to act on Respondent's 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 the AWC's provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth in this AWC and the prospect of avoiding the issuance of a complaint, has been made to induce Respondent to submit this AWC.

December 15, 2021
Date

MARK L. KEENE
Merrill Lynch, Pierce, Fenner & Smith Incorporated
Respondent

Print Name: MARK L. KEENE

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Reviewed by:

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Accepted by FINRA:

12/20/2021

Date

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

Jessica Zetwick-Skryzhynskyy

Jessica Zetwick-Skryzhynskyy

Director

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