

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2018058319801**

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 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 Respondent alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. Respondent 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 full-service broker-dealer with more than 30,000 registered individuals and more than 3,700 branches. The Firm has been a FINRA member since 1937. Merrill Lynch was acquired by Bank of America Corporation in January 2009, and it remains a fully-owned, indirect subsidiary today. The Firm is one of Bank of America's two principal United States broker-dealer subsidiaries.

RELEVANT DISCIPLINARY HISTORY

Respondent does not have any relevant disciplinary history with the Securities and Exchange Commission, any state securities regulators, FINRA, or any other self-regulatory organization.

OVERVIEW

From April 2016 through the present (the "Relevant Period"), Merrill Lynch allowed an executive with its non-FINRA member affiliate to function as a principal in the Firm's prime brokerage business without being registered with FINRA. The individual was

actively engaged in the management of Merrill Lynch's prime brokerage business in the United States, and exercised overall managerial decision-making authority, including (1) hiring prime brokerage employees registered with FINRA, (2) directly supervising some of those employees, (3) writing performance reviews for registered employees, (4) determining and approving compensation for registered employees, (5) acting as a voting member of committees making business decisions for the Firm's securities business, (6) presiding over weekly U.S. prime brokerage sales meetings, (7) soliciting business from current and prospective clients, and (8) personally approving the on-boarding of at least one customer. Merrill allowed the individual to act as a principal of the Firm, but did not ensure the individual was registered with FINRA as a principal. Based on the foregoing, Merrill Lynch violated NASD Rule 1021 and FINRA Rule 1220, as well as FINRA Rule 2010.

FACTS AND VIOLATIVE CONDUCT

NASD Rule 1021(a) (for conduct before October 1, 2018) and FINRA Rule 1210(a) (for conduct on and after that date) each provide that every person engaged in the securities business of a member must be registered in the registration category appropriate to his or her function. NASD Rule 1021(a) and FINRA Rule 1220(a)(2)(A) each provide that every person who is to function as a principal is required to register as such with FINRA.

NASD Rule 1021(b) and FINRA Rule 1220(a)(1) each define "principal" as any person associated with a member who is "actively engaged in the management of the member's investment banking or securities business," including engaging in supervision, solicitation, conduct of business, or training of associated persons. FINRA Rule 1220(a)(1) further states that the phrase "actively engaged in the management of the member's investment banking or securities business" includes "the management of, and the implementation of corporate policies related to, such business" and "managerial decision-making authority with respect to the member's investment banking or securities business and management-level responsibilities for supervising any aspect of such business, such as serving as a voting member of the member's executive, management or operations committees."

During the Relevant Period, Merrill Lynch permitted an executive with its non-FINRA member affiliate to be actively engaged in the management and supervision of FINRA-registered employees in the Firm's prime brokerage department. The individual directly supervised more than twenty-five U.S.-based prime brokerage employees, all but one of whom were registered with FINRA. The individual wrote annual performance reviews for registered employees and, relatedly, made decisions on registered persons' compensation. The individual's written comments in these performance reviews demonstrate a deep familiarity with each employee's work, at times referencing specific transactions and customers. Additionally, the individual interviewed candidates to fill open prime brokerage positions and made the final employment decision as to the hiring of certain candidates. The individual also promoted and demoted, and changed the job functions of, prime brokerage employees.

The individual was also a voting member of pricing and commitment committees that made specific business decisions directly impacting the Firm's securities business. Additionally, the individual solicited business from Firm customers and prospective clients and approved the on-boarding of at least one customer. The individual ran weekly sales meetings of the prime brokerage sales group and played a leading role in covering several of the prime brokerage department's more important clients.

Accordingly, Merrill Lynch allowed the individual to act as a principal of the Firm, but did not register the individual with FINRA as a principal. By virtue of the foregoing, Merrill Lynch violated NASD Rule 1021 (for conduct before October 1, 2018), FINRA Rule 1220 (for conduct on and after that date) and FINRA Rule 2010.

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

- Censure;
- A fine of \$150,000; and
- The following undertaking:
 - i. Within no later than 30 days from the issuance of the Notice of Acceptance of this AWC, a registered principal and executive officer of the Firm, on behalf of Merrill Lynch, shall submit a certification that: (a) the individual referred to in this AWC is not actively engaged in the management of the Firm's securities business, or (b) if the individual is, the individual has obtained the requisite registrations. The certification shall be addressed to Kevin E. Pogue, Senior Counsel, FINRA, Department of Enforcement, Brookfield Place, 200 Liberty Street, New York, N.Y. 10281-1003 [kevin.pogue@finra.org]. Upon written request showing good cause, FINRA staff may extend the procedural due date set forth above.

Respondent agrees to pay the monetary sanctions 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 hereafter, the monetary sanction imposed in this matter.

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 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 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 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 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 Respondent 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 it 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 herein and the prospect of avoiding the issuance of a Complaint, has been made to induce it to submit it.

Merrill Lynch, Pierce Fenner & Smith Incorporated
Respondent

4/29/2020
Date

By: Joaquin M. Sena

Print Name: JOAQUIN M. SENA

Title: Deputy General Counsel

Reviewed by:

Robert A. Buhlman *(DAF)*

Robert A. Buhlman
Counsel for Respondent
Sidley Austin LLP
60 State Street, 36th Floor
Boston, Massachusetts 02109

Accepted by FINRA:

May 13, 2020
Date

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

Kevin E. Pogue

Kevin E. Pogue
Senior Counsel
FINRA
Department of Enforcement
Brookfield Place, 200 Liberty Street, 11th Floor
New York, N.Y. 10281-1003