

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2019062900001**

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 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 Lynch has been a FINRA member since 1937 and is headquartered in New York, New York. It is a full-service brokerage firm, providing sales and trading, research, and underwriting services to institutional and retail customers. It employs approximately 29,000 registered representatives located in more than 3,800 branch offices.

On December 22, 2014, Merrill Lynch and the New Hampshire Bureau of Securities Regulation entered into a consent order through which the firm agreed to cease and desist from violations of telemarketing rules and agreed to pay an administrative fine in the amount of \$350,000, plus the Bureau's investigative costs of \$50,000. The Bureau found that Merrill Lynch representatives made telemarketing calls to New Hampshire residents who were registered on a do-not-call list and were not firm clients, and that Merrill Lynch did not reasonably supervise the telemarketing activities of its agents located in New Hampshire.¹

OVERVIEW

Between January 2018 and January 2020 (the "Relevant Period"), Merrill Lynch's registered representatives who were enrolled in its Financial Advisor Development

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

Program (FADP) as trainees placed thousands of telemarketing calls to phone numbers that appeared on the national do-not-call registry as well as the firm's do-not-call list, in violation of FINRA Rules 3230 and 2010. During the Relevant Period, Merrill Lynch failed to establish and maintain a supervisory system reasonably designed to ensure that trainees did not place unsolicited telemarketing calls to individuals on the national do-not-call registry and the firm's do-not-call list, in violation of FINRA Rules 3110 and 2010.

FACTS AND VIOLATIVE CONDUCT

This matter originated from a tip made to FINRA.

FINRA Rule 3230(a) states that no member or person associated with a member shall initiate any outbound telephone call to any person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member, or any person who has registered his or her telephone number on the Federal Trade Commission's national do-not-call registry, unless certain exceptions apply. For example, FINRA Rule 3230(b) provides that a firm making an outbound call will not be liable for a call to a telephone number on the national do-not-call registry if the firm has an established business relationship with the recipient of the call or prior express written consent from the recipient of the call, or if the associated person initiating the call has a personal relationship with the recipient of the call.

FINRA Rule 3230(d) further requires that, prior to engaging in telemarketing, a member firm institute procedures to comply with paragraph (a), including recording requests received from a person not to receive calls from the member on the firm's do-not-call list and honoring such requests.

FINRA Rule 3110(a) requires a member firm to establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.

FINRA Rule 3110(b) requires a member firm to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and the activities of its associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules.

FINRA Rule 2010 requires that a member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

During the Relevant Period, Merrill Lynch operated a Financial Advisor Development Program for early-career registered representatives who participated as trainees. Approximately 3,000 trainees participated in the 36-month program at any given time. The program included a business development element in which participants engaged in marketing to prospective new clients, including by making unsolicited telemarketing calls to individuals.

At all relevant times, the firm's written policies prohibited representatives from placing unsolicited telemarketing calls to any telephone number on the national do-not-call registry. In addition, the firm's written policies prohibited representatives from placing unsolicited telemarketing calls to any telephone number on the firm's internal do-not-call list, which documented phone numbers for individuals who requested not to receive telemarketing calls from the firm. The firm's written procedures required representatives to verify that telephone numbers they intended to call for telemarketing were not on the national do-not-call registry or the firm's do-not-call list using either one of two electronic systems that the firm maintained: (1) a contact management system in which trainees could designate lists of telephone numbers as belonging to "prospective clients" and screen them against the do-not-call lists ("Contact Management System"); and (2) a search tool that trainees could use to identify if an individual phone number appeared on a do-not-call list ("Search Tool"). Both electronic systems notified trainees if those phone numbers appeared on the national do-not-call registry or the firm's do-not-call list. Trainees were directed not to make telemarketing calls to phone numbers appearing on the national do-not-call registry or the firm's do-not-call list unless they received and documented affirmative consent for the phone call from the individual receiving the call.

During the Relevant Period, the firm conducted a monthly review of 200 randomly-selected trainees for compliance with telemarketing rules. However, this review was not reasonable because the firm only considered the subset of calls made by those trainees that had been placed to numbers the trainees had designated as belonging to prospective clients in the Contact Management System. If a trainee failed to enter a phone number into the firm's Contact Management System as a prospective client, the firm did not identify calls to that number as part of this monthly review, or otherwise review the call for compliance with telemarketing rules, even if the trainee entered the number into the Search Tool, and even if the number was included on the national do-not-call registry or the firm's do-not-call list.

As a result, during the Relevant Period, the firm's monitoring program did not detect thousands of outbound calls its trainees placed to telephone numbers that were listed on the national do-not-call registry or the firm's do-not-call list. The firm did not review these calls for compliance with telemarketing rules and did not determine whether the calls were made subject to an exception from Rule 3230.

In July 2019, the firm was alerted to this issue by a former employee and initiated an internal review of trainee calling activity and its associated processes. The firm subsequently self-reported the conclusions of its review to FINRA under Rule 4530(b).

Beginning in January 2020, the firm implemented enhanced call screening and supervisory review technology, adopted enhanced supervisory procedures, conducted enhanced training, and began monitoring all outgoing trainee calls for compliance with Rule 3230.

Therefore, Respondent violated FINRA Rules 3230, 3110, and 2010.

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

- a censure and
- a \$700,000 fine.

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 right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party. Nothing in this provision affects Respondent's testimonial obligations in any litigation or other legal proceedings.
- 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.

April 26, 2023
Date

Alexander B. White
Merrill Lynch, Pierce, Fenner & Smith Incorporated
Respondent

Print Name: Alexander B. White

Title: Associate General Counsel; Senior Vice President

Reviewed by:

[Signature]
Thomas J. Hennessey
Counsel for Respondent
Morgan, Lewis & Bockius LLP
One Federal Street, Boston, MA 02110

Accepted by FINRA:

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

May 1, 2023
Date

[Signature]
Katherine Wyman
Principal Counsel
FINRA
Department of Enforcement
Brookfield Place, 200 Liberty Street – 11th Floor
New York, NY 10281