

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. E062002029302

RECEIVED
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JAN 11 2006

TO: Department of Enforcement
NASD

RE: Merrill Lynch, Pierce, Fenner & Smith Incorporated, Respondent
[CRD No. 7691]

Pursuant to Rule 9216 of the NASD Code of Procedure, 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 in Part II below. This AWC is submitted on the condition that, if accepted, NASD will not bring any future actions against us alleging violations based on the same factual findings.

We understand that:

1. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by NASD's Department of Enforcement and National Adjudicatory Council ("NAC") Review Subcommittee or Office of Disciplinary Affairs ("ODA"), pursuant to NASD Rule 9216;
2. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against us; and
3. If accepted:
 - a. this AWC will become part of our permanent disciplinary record and may be considered in any future actions brought by NASD or any other regulator against us;
 - b. this AWC will be made available through NASD's public disclosure program in response to public inquiries about our disciplinary record;
 - c. NASD may make a public announcement concerning this agreement and the subject matter thereof in accordance with NASD Rule 8310 and IM-8310-2; and
 - d. We 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 allegation in this AWC or create the impression that the AWC is without factual basis. Nothing in this provision affects our testimonial obligations or right to take legal or factual positions in litigation or other proceedings in which NASD is not a party.

We also understand that our experience in the securities industry and disciplinary history may be factors that will be considered in deciding whether to accept this AWC. That experience and history are as follows:

Merrill Lynch, Pierce, Fenner & Smith Incorporated has been a member of NASD since January 26, 1937. During all periods mentioned herein, Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") was a registered broker-dealer with the United States Securities and Exchange Commission (the "Commission") and a member of NASD, which registration and membership remain currently in effect. Merrill Lynch has the following relevant disciplinary history:

On June 4, 2003, the New York Stock Exchange, Inc. ("NYSE") issued Hearing Panel Decision 03-99 against Merrill Lynch. NYSE found among other deficiencies that Merrill Lynch failed to establish and maintain appropriate procedures and systems necessary to properly review accounts for unapproved discretionary trading. The supervision charge arose from Merrill Lynch's failure to supervise the activities of Tania M. Torruella, a broker who exercised discretion without prior written authorization in the accounts of her customers. Approximately 200 of the customers filed complaints regarding Torruella's trading activity. NYSE imposed a penalty against Merrill Lynch of \$900,000.

I.

WAIVER OF PROCEDURAL RIGHTS

We specifically and voluntarily waive the following rights granted under NASD's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against us;
- B. To be notified of the Formal 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 NAC and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, we specifically and voluntarily waive any right to claim bias or prejudgment of the General Counsel, 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.

We further specifically and voluntarily waive any right to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of 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.

II.

ACCEPTANCE AND CONSENT

- A. We hereby accept and consent, without admitting or denying the allegations or findings, and solely for the purposes of this proceeding and any other proceeding in which NASD 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 NASD:

During the time period, May 27, 1999 through on or about September 18, 2001, Brion G. Randall, a representative registered with Merrill Lynch, Pierce, Fenner & Smith Incorporated exercised discretion in the accounts of seven public customers without having obtained prior written authorization from the customers. Merrill Lynch, Pierce, Fenner & Smith Incorporated, acting through its resident branch office manager, failed to reasonably supervise the activities of Brion G. Randall. The firm failed to reasonably and promptly respond to "red flags" raised by customer complaints, written communications, and telephone conversations regarding possible use of discretion by Randall. Additionally, the firm when presented with the foregoing "red flags" failed to institute heightened supervisory procedures targeting possible use of discretion by Randall.

Such acts, practices, and conduct constitute separate and distinct violations of NASD Conduct Rules 2110 and 3010(a) by Merrill Lynch, Pierce, Fenner & Smith Incorporated.

- B. We also consent to the imposition, at a maximum, of the following sanctions:

A censure and a monetary fine in the amount of \$20,000, which is to be assessed against Merrill Lynch, Pierce, Fenner & Smith Incorporated.

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

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III.

OTHER MATTERS

- A. We understand that we may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. We understand that we 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 NASD, nor does it reflect the views of NASD or its staff.
- B. We agree to pay any monetary sanctions imposed on us upon notice that this AWC has been accepted and that such payments are due and payable as noted above and has attached an Election of Payment form showing the method by which we propose to pay any fine imposed.
- C. We specifically and voluntarily waive any right to claim that we are unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.

We certify that we have read and understand all of the provisions of this AWC and have been given a full opportunity to ask questions about it, and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein, has been made to induce us to submit it.

11/18/05
Date

Merrill Lynch, Pierce, Fenner & Smith
Incorporated

By: David L. Kornblau

David L. Kornblau
First Vice President

Letter of Acceptance, Waiver,
and Consent
Merrill Lynch, Pierce, Fenner & Smith Incorporated
Case No. E062002029302
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Reviewed by:



Counsel for Respondent
Merrill Lynch, Pierce, Fenner
& Smith Incorporated

Accepted by NASD:

1-24-06

Date

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



Laura Leigh Blackston,
Regional Counsel
NASD, Florida District Office
2500 N. Military Trail, Suite 302
Boca Raton, FL 33431-6324
Phone: 561/443-8000
FAX: 561/443-7998

**NASD Senior Vice President
and Regional Director**
Warren A. Butler, Jr.
NASD, District No. 5
1100 Poydras Street, Suite 850
New Orleans, Louisiana 70163-0802

Attachment: Election of Payment forms