

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
No. 2013038772501**

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

**FROM: Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Respondent
Member Firm
CRD No. 7691**

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill," "Respondent," 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 alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. Merrill 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 has been a FINRA member since 1937 and is headquartered in New York, New York. The Firm is a full-service brokerage firm with more than 46,500 associated persons. Among other things, it provides sales and trading services, research, and underwriting services.

RELEVANT DISCIPLINARY HISTORY

On June 29, 2000, a New York Stock Exchange ("NYSE") Hearing Panel issued decision 00-109 imposing a \$250,000 fine and finding, among other things, that Merrill had associated with three persons subject to a statutory disqualification for three, six, and eight months, respectively.

On November 15, 2002, an NYSE Hearing Panel issued decision 02-228 imposing a \$300,000 fine on Merrill for associating with 23 persons who were subject to a statutory disqualification and failing to report the associations pursuant to NYSE Rule 351. The Panel also required Merrill to hire an independent consultant to review its hiring procedures.

OVERVIEW

Federal securities laws require that FINRA member firms fingerprint most associated persons prior to or upon association with the firm. The firms review the fingerprint results as part of their background check to determine, among other things, whether a prospective associated person has previously engaged in misconduct that subjects her or him to a "statutory disqualification." As set forth in Section 3(a)(39) of the Securities Exchange Act of 1934 ("Exchange Act"), certain criminal and regulatory events will subject a person to a "statutory disqualification." The fingerprint results provide information about a prospective associated person's criminal background. FINRA members must also obtain other background information to determine if a prospective associated person is subject to certain serious, but non-criminal, findings or sanctions imposed by financial regulators that could also subject her or him to a statutory disqualification.

From January 1, 2009 through October 28, 2013 (the "relevant period"), Merrill failed to conduct adequate background checks on approximately 4,500 of its 20,000 non-registered associated persons. Of these 4,500 individuals, 1,115 were not fingerprinted at all and another 240 were not fingerprinted until after they began to work for Merrill. Merrill timely fingerprinted the remaining 3,145 associated persons and screened them under Section 19 of the Federal Insurance Deposit Act ("Section 19"), but failed to screen them for some types of felony convictions or regulatory actions, as required under the Securities Exchange Act of 1934 ("Exchange Act"). As a result, Merrill allowed at least one person who was subject to a disqualification to associate with it and was not able to determine whether another 115 associated persons were subject to a disqualification because they terminated their association before Merrill screened them.

The Firm's failure to fingerprint or properly screen 4,500 of its associated persons during the relevant period arose in part as a result of Merrill's January 1, 2009 acquisition by Bank of America Corporation ("BAC"). After BAC acquired Merrill on January 1, 2009, Merrill did not maintain a supervisory system or procedures to identify and properly screen all individuals who became associated with the Firm in a non-registered capacity. As a result of the foregoing, Merrill violated Section 17(f) of the Exchange Act and Rule 17f-2 thereunder, the FINRA By-Laws, Article III, Section 3(b), NASD Rule 3010 and FINRA Rule 2010.

Merrill also failed to maintain certain required records in violation of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, NASD Rule 3110, and FINRA Rules 4511 and 2010.¹

FACTS AND VIOLATIVE CONDUCT

A. Merrill Failed to Fingerprint or Timely Fingerprint Associated Persons

Merrill and other FINRA members are required by the federal securities laws to fingerprint most associated persons and are required by FINRA rules to screen all associated persons to ensure they are not subject to a disqualification from associating with a broker dealer. FINRA members use fingerprint results as part of the necessary screening process.

¹ On December 5, 2011, FINRA Rule 4511 replaced NASD Rule 3110.

On January 1, 2009, at the beginning of the relevant period, BAC acquired Merrill. After the acquisition, certain job functions were consolidated or eliminated and employees were transferred, assumed new job responsibilities, and/or were dismissed and later rehired. As a result of this reorganization process, a number of BAC employees who had never been fingerprinted became associated with Merrill.

Merrill did not create a system to identify the non-registered associated persons who required fingerprinting and screening because they had become associated with it due to the reorganization. Thus, many of these associated persons, whose new job functions or responsibilities required them to be fingerprinted, were not fingerprinted. The Firm also failed to identify other persons who were subsequently hired or retained who were required to be fingerprinted. Finally, the Firm did not fingerprint around 240 individuals before they started to work for Merrill in capacities that required fingerprinting. As a result, Merrill failed to fingerprint 1,115 non-registered associated persons at all, and failed to fingerprint another 240 non-registered associated persons before they began to work for Merrill.

By virtue of the foregoing, Merrill violated Section 17(f) of the Exchange Act and Rule 17f-2 thereunder, and FINRA Rule 2010.

B. Merrill Failed to Adequately Screen for Statutory Disqualification

Section 19 requires banks to obtain approval to hire or retain anyone who has been convicted of, or entered into a pretrial diversion or similar program related to, any criminal offense involving dishonesty or a breach of trust or money laundering. Requirements under Section 3(a)(39) of the Exchange Act and FINRA By-Laws, are broader. They call for broker dealers to obtain approval prior to associating with anyone convicted, within the past ten years, of criminal offenses (including misdemeanors) similar to those specified in Section 19, as well as anyone convicted of any domestic felony or subject to specified findings or actions by certain financial regulators.

During the relevant period, Merrill failed to fully screen 4,500 non-registered associated persons to ensure they were not subject to a statutory disqualification before they associated with Merrill. The Firm reviewed most of these associated persons under the provisions of Section 19 but not under the more expansive provisions contained in the Exchange Act and FINRA By-Laws.

As a result, the Firm allowed one person, RM, who was subject to disqualification because he had been convicted of a drug-related felony, to associate with it. RM became associated with Merrill in or before August 2013 but was not fingerprinted or screened at that time. Merrill first learned that he was subject to a disqualification after it submitted fingerprints through the Central Registration Depository on December 16, 2013 and reviewed related criminal records. The Firm ultimately terminated RM's association on January 30, 2014. Merrill could not determine whether another 115 non-registered associated persons were subject to statutory disqualification because their associations with Merrill terminated before Merrill was able to screen them for statutory disqualification.

By virtue of the foregoing, Merrill violated Article III, Section 3(b) of the FINRA By-Laws and FINRA Rule 2010.

C. Merrill Failed to Create Required Documents

Merrill failed to create for RM a "questionnaire or application ... approved in writing by an authorized representative of the member that contained," among other things, a record of RM's 2006 arrest and felony conviction, as required by Section 17(a) of the Exchange Act and Rule 17a-3(a)(12)(i)(G) thereunder. In addition, Merrill did not create fingerprint records for all of its eligible associated persons, as required by Section 17(a) of the Exchange Act and Rule 17a-3(a)(13) thereunder. As a result, Merrill violated Section 17(a) of the Exchange Act and Rules 17a-3(a)(12)(i)(G) and 17a-3(a)(13) thereunder, NASD Rule 3110, and FINRA Rules 4511 and 2010.

D. Merrill Failed to Establish and Maintain an Adequate Supervisory System and Failed to Establish, Maintain and Enforce Written Supervisory Procedures

Merrill's written supervisory policies and procedures for fingerprinting focused on individuals who were or intended to become registered rather than on individuals who were non-registered associated persons. Some policies noted that non-registered associated persons should be fingerprinted under Rule 17f-2, but stated that another BAC entity would manage the fingerprinting process. The policies did not indicate how the other entity was to be notified of the need to fingerprint any such non-registered associated person, did not reference any procedures for monitoring or coordinating the fingerprinting process with the Firm, and did not specify that the fingerprinting should occur before the non-registered associated person began to work for the Firm.

Merrill's supervisory policies also stated that those associated persons "not employed by a broker dealer that support activities within a broker dealer may be required to be fingerprinted. These associates will be notified as needed." There was no explanation of how these associated persons were to be identified, who was responsible for identifying them, who would notify them of the need for fingerprinting, who would monitor the fingerprinting process, and how the monitoring would occur. The procedures also failed to note that the fingerprinting should occur before the associated person began to work for the Firm.

Merrill's written supervisory procedures on screening were similarly deficient. They did not provide for any sort of review to ensure that Merrill's non-registered associated persons were screened for statutory disqualification under the Exchange Act (and not simply for compliance with Section 19).

By virtue of the foregoing, Merrill failed to establish and maintain a supervisory system to identify all of its associated persons, to screen them for statutory disqualification as required by FINRA By-Laws, and to fingerprint eligible associated persons as required by Section 17(f) of the Exchange Act and Rule 17f-2 thereunder. Merrill also failed to establish, maintain and enforce written procedures that were designed to achieve compliance with applicable securities laws and regulations, including: (i) the recordkeeping provisions (Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, NASD Rule 3110 and FINRA Rule 4511); (ii) the fingerprinting provisions (Section 17(f) of the Exchange Act and Rule 17f-2 thereunder); and (iii) FINRA

eligibility rules (FINRA By-Laws, Article III, Section 3(b)). Therefore, Merrill violated NASD Rules 3010(a) and (b).

B. The Firm also consents to the imposition of the following sanctions:

- a censure;
- a fine in the amount of \$1,250,000; and
- an undertaking to review its systems and procedures regarding the identification, fingerprinting, and screening of non-registered associated persons to ensure that current systems and procedures are reasonably designed to achieve compliance with all securities laws and regulations, including Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, Section 17(f) of the Exchange Act and Rule 17f-2 thereunder, FINRA By-Laws Article III, Section 3(b), and FINRA Rule 4511. Within 30 days of Notice of Acceptance of this AWC, a managing director of the Firm shall describe in a written statement the methodology used by the Firm to conduct the referenced review and certify in writing to FINRA's Department of Enforcement that the Firm has adopted and implemented policies and procedures, including written procedures, reasonably designed to ensure compliance with the provisions of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, Section 17(f) of the Exchange Act and Rule 17f-2 thereunder, FINRA By-Laws Article III, Section 3(b), and FINRA Rule 4511. For good cause shown and upon receipt of a timely application, FINRA staff may extend the review and certification deadline set forth above.

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

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

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

II.

WAIVER OF PROCEDURAL RIGHTS

Merrill 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, Merrill 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.

Merrill 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

Merrill 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 Merrill; and**
- C. If accepted:**
 - I. this AWC will become part of the Firm's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against it;**

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. **Merrill 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. Merrill 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 Merrill'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. **Merrill may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Merrill 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 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 the Firm 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.

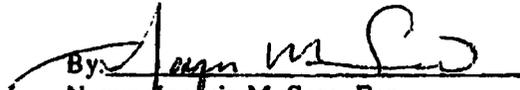
Date: 12/10/2015

Merrill Lynch, Pierce, Fenner & Smith,
Incorporated

Reviewed by:



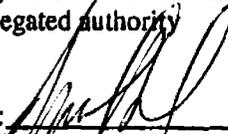
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By: 
Name: Joaquin M. Sena, Esq.
Title: Associate General Counsel

Accepted by FINRA:

Date: 12/10/15

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

By: 
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