FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2020066667001

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 Lynch has been a FINRA member since 1937. It is a global investment banking and multi-service brokerage firm that provides, among other things, retail brokerage and wealth management services. Since January 2009, Merrill Lynch has been an indirect, wholly owned subsidiary of Bank of America Corporation with its principal place of business in New York, New York. It has more than 29,000 registered representatives in more than 3,900 branch offices, servicing tens of millions of customers.

On December 21, 2017, pursuant to AWC No. 2012035224301 and Exchange Act Release No. 34-82382, FINRA and the Securities and Exchange Commission, respectively, censured and fined Merrill Lynch $26 million ($13 million each) for failing to have systems and procedures reasonably designed to detect and cause the reporting of suspicious activity due to numerous deficiencies in its anti-money laundering (AML) compliance program related to retail brokerage accounts. Specifically, from September 2011 through January 2012, Merrill Lynch did not investigate suspicious activities detected only by one of its automated monitoring systems and did not review hundreds of alerts generated by the system. As a result, the firm failed to investigate 1,015 instances of suspicious activity. In addition, the firm's scoring of certain events in its automated surveillance system minimized the detection of suspicious activity or prevented such activity from being reviewed and reported. Finally, before May 2015, Merrill Lynch excluded millions of accounts from its automated monitoring system and therefore failed reasonably to monitor the accounts for suspicious activity. FINRA found Merrill Lynch in violation of FINRA Rules 3310(a) and 2010.

On October 27, 2014, pursuant to AWC No. 2010022971201, FINRA censured and fined Merrill Lynch $2.5 million for, among other things, failing to implement and establish procedures and internal controls reasonably designed to detect and cause the reporting of suspicious transactions in violation of NASD Rules 3011(a) and 2110 and FINRA Rule 2010. Specifically, from July 2008 through December 2008, Merrill Lynch's programs for suspicious activity surveillance failed to capture certain trading data necessary to monitor for suspicious activity.

On July 26, 2011, pursuant to AWC No. 2009020383001, FINRA censured and fined Merrill Lynch $400,000 for violating NASD Rules 3011(a), 3011(b), and 2110 by failing to enforce its written procedures by accepting third-party checks for deposit into a customer's account that, contrary to the procedures, did not identify the customer by name. As a result, one of its customers, a registered representative at another member firm, was able to move over $9 million of misappropriated funds through his Merrill Lynch cash management brokerage account.[1]

OVERVIEW

From January 2009 to November 2019, Merrill Lynch incorrectly applied the $25,000 monetary threshold applicable to banks rather than the $5,000 threshold applicable to broker-dealers to determine when to file a category of Suspicious Activity Reports (SARs). By applying the incorrect threshold, Merrill Lynch failed to file approximately 1,500 SARs from January 2009 to November 2019. Merrill Lynch failed to establish and implement policies and procedures reasonably designed to detect and cause the reporting of suspicious transactions in violation of NASD Rule 3011(a), and FINRA Rules 3310(a) and 2010.[2]

FACTS AND VIOLATIVE CONDUCT

This matter originated from a disclosure to FINRA by Merrill Lynch pursuant to FINRA Rule 4530(b).

FINRA Rule 3310 and its predecessor, NASD Rule 3011, require broker-dealers to "develop and implement a written anti-money laundering program reasonably designed to achieve and monitor the member's compliance with the requirements of the Bank Secrecy Act (31 U.S.C. 5311, *et seq.*) and the implementing regulations promulgated thereunder by the Department of the Treasury." FINRA Rule 3310(a) and NASD Rule 3011(a) require that the AML program include "policies and procedures that can be reasonably expected to detect and cause the reporting of transactions required under 31 U.S.C. § 5318(g) and the implementing regulations thereunder." A violation of FINRA Rule 3310 or NASD Rule 3011 is also a violation of FINRA Rule 2010, which requires

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

[2] FINRA Rule 3310 superseded NASD Rule 3011 on January 1, 2010.

member firms to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business.

Section (a)(2) of 31 CFR § 1023.320, a regulation implementing 31 U.S.C. § 5318(g), requires a broker-dealer to file a SAR in connection with a suspicious transaction or pattern of transactions that "involves or aggregates funds or other assets of at least $5,000."

Merrill Lynch Applied the Incorrect SAR Filing Threshold for More than a Decade.

Broker-dealers and national banks are both required to file SARs in connection with, among other suspicious activity, suspected criminal activity that meets or exceeds certain dollar thresholds.[3] A broker-dealer, such as Merrill Lynch, is required to report suspected criminal activity that meets the $5,000 threshold described above. By contrast, a national bank is required to report suspected criminal activity in the following circumstances: (i) insider abuse involving any amount; (ii) violations aggregating $5,000 or more where a suspect can be identified; and (iii) violations aggregating $25,000 or more regardless of potential suspects.12 C.F.R. § 21.11(c). Therefore, for suspected criminal activity that does not involve insider abuse and for which there is no substantial basis to identify a suspect responsible for the suspicious activity, national banks are subject to a $25,000 threshold while broker-dealers are subject to a $5,000 threshold.

From January 2009 until November 2019, Merrill Lynch incorrectly applied the $25,000 threshold applicable to national banks rather than the $5,000 threshold applicable to broker-dealers when determining whether to file a SAR on potential fraud activity where there was no identifiable suspect (and the case did not involve insider abuse, potential money laundering, or BSA violations). It therefore, for over 10 years, failed to file a SAR for potential fraud activity above $5,000 but below $25,000.

Merrill Lynch and Bank of America, N.A. merged in January 2009, at which time Bank of America assumed responsibility for investigating suspicious activity at Merrill Lynch and filing any SARs. For suspected criminal activity not involving insider abuse and where a suspect could not be identified, the firm incorrectly applied the $25,000 threshold applicable to national banks when determining whether to file a SAR for *both* bank and brokerage account activity. The procedures relating to SAR filings only referenced the $25,000 threshold applicable to national banks and did not identify the $5,000 threshold applicable to broker-dealers. The suspicious activity that went unreported included unauthorized debit card withdrawals, forged or altered checks, account intrusions, identity theft, and phone or internet scams.

[3] Broker-dealers and national banks are also required to file SARs on transactions or attempted transactions that they know, suspect, or have reason to suspect involve money laundering or violations of the Bank Secrecy Act or have no business or apparent lawful purpose. Merrill Lynch's failure to file SARs at issue here does not involve such activity.

For example, the firm failed to timely file SARs in connection with the following activities:

- In January 2014, an individual identifying himself as a Merrill Lynch customer contacted the firm to transfer $24,000 from the customer's brokerage account to the customer's account at another financial institution. Shortly after the funds were transferred, the other financial institution informed Merrill Lynch that the customer's account there had been compromised and the customer confirmed he did not authorize the transfer.

- In August 2014, Merrill Lynch identified suspicious checking activity in a customer's account. The customer confirmed that three checks were forged, totaling $17,585, which had been written on her firm brokerage account for deposit at outside accounts unknown to her.

- In July 2017, a Merrill Lynch customer confirmed that she did not authorize an online payment of $15,000 from her brokerage account to a store credit card. While the firm could not identify a suspect, it did identify three IP addresses associated with the unauthorized online activity.

In about September 2019, the firm discovered that it incorrectly had been applying the $25,000 threshold to brokerage account activity since the 2009 merger. Between October 2019 and May 2020, the firm amended its written procedures and an automated surveillance system to reflect the correct monetary threshold, trained its personnel responsible for investigating suspicious activity and filing SARs, began applying the correct threshold, and self-reported its violations to FINRA, the SEC, and the Financial Crimes Enforcement Network (FinCEN). Merrill Lynch also conducted a look-back to 2014 (the earliest date for which the firm retained records) and filed 865 SARs on no-suspect criminal activity that met the proper $5,000 threshold.

By applying the incorrect threshold, Merrill Lynch failed to file approximately 1,500 SARs between January 2009 and November 2019.

From January 2009 to November 2019, Merrill Lynch failed to establish and implement policies and procedures reasonably designed to detect and cause the reporting of suspicious activity as required under 31 CFR § 1023.320(a)(2). Accordingly, the firm violated NASD Rule 3011(a), and FINRA Rules 3310(a) and 2010.

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

- a censure and

- a $6 million fine.

Contemporaneously with the issuance of this AWC, Merrill Lynch is settling an action with the Securities and Exchange Commission pursuant to an Order Instituting Administrative Proceedings addressing the same misconduct and imposing a civil penalty of $6 million.

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.

SANCTIONS CONSIDERATIONS

In determining sanctions, FINRA considered the additional sanctions imposed by the SEC for the same misconduct, the firm's prompt remedial measures and self-reporting to regulators after discovery, and its sharing the findings of its internal investigation with regulators.

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.

June 2, 2023
Date

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Respondent

Print Name: MARK L. KEENT

Title: ASSOCIATE GENERAL COUNSEL

Reviewed by:

Michael J. Leotta, Esq.
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WilmerHale
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Accepted by FINRA:

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

07/11/2023
Date

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