FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2020067795501

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 28,000 registered representatives in more than 4,000 branch offices, servicing tens of millions of customers.[1]

OVERVIEW

From January 2018 through June 2022, in connection with brokerage transactions involving certain products eligible for advisory fee waivers, Merrill Lynch failed to establish and maintain a supervisory system and written procedures reasonably designed to ensure that its registered representatives had a reasonable basis to believe their recommendations were suitable or in each customer's best interest. As a result of the firm's supervisory failures, customers holding over 2,000 accounts paid almost $1.5 million in avoidable fees.

By virtue of the foregoing, Merrill Lynch violated FINRA Rules 3110 and 2010. In addition, for the period June 30, 2020 to June 30, 2022, Merrill Lynch also violated the Securities

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

Exchange Act of 1934, Rule 15*l*- l(a)(1) by failing to comply with the Compliance Obligation of Regulation Best Interest (Reg BI).

FACTS AND VIOLATIVE CONDUCT

This matter originated from a prior FINRA investigation relating to the retail sale of securities and the firm's supervision of such sales.

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 and NASD 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 and NASD rules.

Prior to June 30, 2020, FINRA Rule 2111 required members and associated persons to have a reasonable basis to believe that a recommendation of a transaction or investment strategy involving a security or securities to any customer is suitable for the customer. Rule 2111.05(a) defines the reasonable-basis obligation to require members and their associated persons to have an understanding of the potential risks and rewards associated with the recommended security or strategy and to have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least some investors. Under Rule 2111, broker-dealers were required to consider costs associated with a recommendation as part of its reasonable diligence. FINRA Rule 2111 is still in effect, but as of June 30, 2020, it no longer applies to recommendations that are subject to Reg BI.

As of June 30, 2020, broker-dealers and their associated persons are required to comply with Reg BI under the Securities Exchange Act of 1934. Rule 15*l*-1(a)(1) of Reg BI requires a broker, dealer, or a natural person associated with a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, to act in the best interest of that retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or associated person ahead of the interest of the retail customer. Reg BI's Care Obligation, set forth at Exchange Act Rule 15*l*-1(a)(2)(ii), requires broker-dealers and their associated persons to exercise reasonable diligence, care, and skill to, among other things, understand the potential risks, rewards, and costs associated with a recommendation. The Care Obligation requires broker-dealers and their associated persons to have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail investors.

Additionally, Reg BI's Compliance Obligation, set forth in Exchange Act Rule 15*l*-1(a)(2)(iv), requires broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to achieve compliance with Reg BI, including the Care Obligation. The Adopting Release provides that broker-dealers should consider the nature of their firm's operations and how to design such policies and procedures to prevent violations from occurring, detect violations that have occurred, and to correct promptly any violations that have occurred.

A violation of FINRA Rule 3110 or Reg BI is also a violation of FINRA Rule 2010, which requires associated persons to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of their business.

Merrill Lynch offers customers a 12-month waiver of otherwise-applicable advisory fees on certain new-issue products, if, and only if, the products are purchased initially in an advisory account.[2] Notwithstanding this benefit, from January 2018 to June 2022, in certain instances firm registered representatives recommended that customers purchase such products in a brokerage account and then promptly recommended the transfer of those same products to an advisory account. These brokerage recommendations caused customers to incur unnecessary expenses – in particular, in the form of advisory fees that would have been avoided if the assets were purchased initially in advisory accounts. These types of brokerage recommendations caused the customers to pay fees they could have avoided while obtaining the same benefits. In particular, registered representatives recommended the brokerage purchase of these products, and their prompt transfer to an advisory account, to over 1,300 customers. As a direct result, customers incurred almost $1.5 million in avoidable fees.

During this period, the firm failed to monitor for, detect, or prevent these types of potentially unsuitable recommendations or recommendations that were not in the customers' best interest. The firm had policies, procedures, and automated surveillance tools intended to detect, prevent, and correct, potentially unsuitable recommendations relating to many securities where the products were purchased in brokerage accounts, then shortly thereafter transferred to advisory accounts, or vice versa. The firm's supervisory system, policies, and procedures failed, however, to address the unique characteristics of the securities products at issue here. Merrill Lynch did not have a supervisory system, written policies, or procedures, to detect the purchase in brokerage accounts of products eligible for advisory fee waivers, followed by the transfer of those same securities to advisory accounts. As such, the firm failed to reasonably ensure that its representatives had a reasonable belief that the brokerage recommendations to purchase and then transfer these particular products, were suitable or in each customer's best interest.[3]

Therefore, Respondent violated FINRA Rules 3110 and 2010. In addition, for the period June 30, 2020, to June 30, 2022, Merrill Lynch also violated Exchange Act Rule 15*l*-1(a)(1) by failing to comply with the Compliance Obligation of Reg BI.

CREDIT FOR EXTRAORDINARY COOPERATION

In resolving this matter, FINRA has recognized Merrill Lynch's extraordinary cooperation for having: (1) conducted an internal review to identify affected customers and calculate total remediation; (2) implemented remedial measures in its systems and WSPs to voluntarily enhance its supervisory system and WSPs to address deficiencies identified during the review; (3) agreed to pay restitution to affected customers; (4) established a plan

[2] From January 2018 to July 2022, the firm's Investment Advisory Brochure disclosed that a customer would be charged a Program Fee immediately upon transferring new issue offerings into a Program Account.

[3] In June 2022, the firm enhanced its supervisory system and written supervisory procedures (WSPs).

to efficiently identify, notify and repay customers eligible for restitution; and (5) provided substantial assistance to FINRA in its investigation.

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

- Censure; and
- Restitution of $1,486,380 plus interest as described below.

Restitution is ordered to be paid to the 1,361 unique customers identified by the firm and communicated to FINRA (Eligible Customers), in the total amount of $1,486,380, plus interest at the rate set forth in Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), from the date each Eligible Customer's affected purchase incurred a fee, until the date this AWC is accepted by the National Adjudicatory Council (NAC).

A registered principal on behalf of Respondent shall submit satisfactory proof of payment of restitution and interest (separately specifying the date and amount of each paid to each Eligible Customer) or of reasonable and documented efforts undertaken to effect restitution. Such proof shall be submitted by email to EnforcementNotice@FINRA.org from a work-related account of the registered principal of Respondent. The email must identify Respondent and the case number and include a copy of the check, money order, or other method of payment. This proof shall be provided by email to EnforcementNotice@FINRA.org no later than 120 days after the date of the notice of acceptance of the AWC.

The restitution amount plus interest to be paid to each Eligible Customer shall be treated by the Respondent as the Eligible Customer's property for purposes of state escheatment, unclaimed property, abandoned property, and similar laws. If after reasonable and documented efforts undertaken to effect restitution Respondent is unable to pay all Eligible Customers within 120 days after the date of the notice of acceptance of the AWC, Respondent shall submit to FINRA in the manner described above a list of the unpaid Eligible Customers and a description of Respondent's plan, not unacceptable to FINRA,[4] to comply with the applicable escheatment, unclaimed property, abandoned property, or similar laws for each such Eligible Customer.

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 imposition of a restitution order or any other monetary sanction in this AWC, and the timing of such ordered payments, does not preclude customers from pursuing their own actions to obtain restitution or other remedies.

[4] In order to be "not unacceptable," the plan must at least: (i) state that the firm will follow the relevant escheatment laws, applicable timing, etc. and (ii) state that the firm will include a Rule 15c3-3 reserve formula credit for unpaid restitution or otherwise set the funds aside for the exclusive benefit of the Eligible Customers.

[redacted]

Restitution payments to customers shall be preceded or accompanied by a letter, not unacceptable to FINRA, describing the reason for the payment and the fact that the payment is being made pursuant to a settlement with FINRA and as a term of this AWC.

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.

June 25, 2024

Date

Jill Del Monico

Merrill Lynch
Respondent

Print Name: Jill Del Monico

Title: Associate General Counsel and Director

Reviewed by:

William Goydan

William E. Goydan
Counsel for Respondent
McGuire Woods LLP
1251 Avenue of the Americas, 20th Floor
New York, NY 10020-1104

Accepted by FINRA:

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

July 1, 2024

Date

Thomas Kuczajda

Tom Kuczajda, Director
FINRA
Department of Enforcement
9509 Key West Avenue
Rockville, MD 20850