FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2009020188101

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 of FINRA's Code of Procedure, Respondent 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 herein.

I.

ACCEPTANCE AND CONSENT

A. Respondent 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 Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch" or the "Firm") has been a FINRA member firm since 1937. It is a full-service broker-dealer with its principal offices located in New York, New York. It employs over 31,000 registered individuals and maintains over 1,200 branch offices. In January 2009, Merrill Lynch was acquired by Bank of America Corporation.

RELEVANT DISCIPLINARY HISTORY

In July 2004, Merrill Lynch was censured and fined $250,000 pursuant to a Letter of Acceptance, Waiver & Consent for failing to comply with its discovery obligations in FINRA arbitration proceedings. The AWC found that Merrill Lynch violated IM-10100 of the Code of Arbitration Procedure and NASD Rule 2110 by failing to produce documents sought

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by claimants in seven arbitration proceedings after orders had been issued by the arbitration panels requiring the firm to produce the documents.

OVERVIEW

FACTS AND VIOLATIVE CONDUCT

1. The ATP Program

In January 2009, Merrill Lynch was acquired by Bank of America Corporation. To retain high-producing registered representatives during this time period, Merrill Lynch created a program known as the Advisor Transition Program (ATP). Under the ATP, Merrill Lynch would pay certain registered representatives a lump sum retention payment structured as a loan and accompanied by a promissory note. Pursuant to a separate agreement, for each month thereafter that the registered representative remained employed by the Firm, Merrill Lynch would make a service payment (less taxes) of a portion of the loan amount on the representative's behalf, so that the full amount of the loan would be repaid in an agreed time period, typically seven years. If a registered representative, among other things, filed for bankruptcy, became insolvent, failed to make a payment, or their employment was terminated by Merrill Lynch for any reason before the total loan amount was repaid, all outstanding principal and interest would become immediately due and payable.

In January 2009, Merrill Lynch implemented the ATP by making payments of approximately $2.8 billion to approximately 5,000 registered representatives. Decisions as to which registered representatives received ATP payments, and the amount of those payments, were based upon Merrill Lynch's analysis of the production of each registered representative. Participation by registered representatives in the ATP was voluntary.

2. Merrill Lynch Structured the ATP Program to Avoid Arbitration When it Sought Collection of the ATP Loans

Merrill Lynch structured the ATP program so it could avoid arbitration proceedings when seeking to collect amounts due under the ATP loans. The ATP payments were documented so that the promissory notes stated that the loans were being made to the registered representatives by a non-registered affiliate of Merrill Lynch, Merrill Lynch International Finance, Inc. (MLIFI). However, the funding for the ATP loans was actually provided to Merrill Lynch by its parent company, and not by MLIFI. The funds were provided by the parent company to an account at Merrill Lynch in the name of MLIFI, which in turn made a payable entry on its books for the amount of the ATP funding. The loans were serviced

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by Merrill Lynch.

Each of the registered representatives who received an ATP loan was required to sign a promissory note. In the promissory note, the registered representative agreed to repay the balance due on the loan to MLIFI when the registered representative's employment with Merrill Lynch terminated. The promissory notes were drafted by Merrill Lynch and stated that "[t]he undersigned agrees that any actions regarding the [n]ote, including actions to recover amounts due under this [n]ote, shall be brought solely in the Supreme Court of the State of New York in New York County." The notes also required registered representatives to consent to the jurisdiction of the New York state courts for any action or proceeding relating to the note. Other than the promissory note, Merrill Lynch registered representatives had no relationship with MLIFI.

The language described above was included in the promissory notes so Merrill Lynch could pursue collections of amounts due under the loans through MLIFI in expedited proceedings in New York state court. New York law specifically provides for such proceedings for non-payment of money amounts due and greatly limits defendants' ability to assert counterclaims in such actions. See NY CPLR Rule 3213.

3. Merrill Lynch Pursues Collection of Amounts Due Under the ATP Loans Through MLIFI in New York State Court

In 2009, a number of registered representatives who had received ATP loans left Merrill Lynch, or were terminated by the Firm, and failed to repay amounts due under the ATP. To pursue collection of outstanding ATP loan balances from those registered representatives, Merrill Lynch filed summary collection proceedings in New York state court in the name of MLIFI. Between January 2009 and November 2009, the Firm filed over 90 such actions in New York state court.

4. Violations

A. Merrill Lynch Violated FINRA Rule 2010 by Structuring the ATP Program to Circumvent the Requirement to Arbitrate Disputes

Rule 13200(a) of FINRA's Code of Arbitration Procedure requires that disputes between member firms and associated persons be arbitrated if they arise out of the business activities of the member or associated person. IM 13000 under the Code of Arbitration Procedure provides that failure to submit a dispute for arbitration as required by the Code "may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010."

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As described above, Merrill Lynch designed the ATP program to avoid instituting arbitration proceedings to collect amounts due from registered representatives who had left the Firm. The Firm structured the program so it appeared that the funds for the ATP loans came from MLIFI, a non-registered affiliate, and not from the Firm itself. The Firm also placed language in the promissory notes used in the ATP program that stated that actions to recover amounts due under the notes could be brought only in New York state court. In these ways, Merrill Lynch designed the ATP program to allow it to pursue recovery of amounts due from the ATP loans through MLIFI in expedited proceedings in New York court, and thus to circumvent Merrill Lynch's requirement to arbitrate disputes with its associated persons.

By structuring the ATP program to allow the Firm to avoid complying with its obligation to arbitrate disputes with its associated persons, Merrill Lynch violated FINRA Rule 2010.

B. Merrill Lynch Violated Rule 13200(a) of the Code of Arbitration Procedure and FINRA Rule 2010 By Pursuing Collection of Amounts Due from Registered Representatives in Court Actions Rather Than in Arbitration Proceedings

As described above, between January 2009 and November 2009, Merrill Lynch filed over 90 actions in New York state court, in the name of MLIFI, against former Merrill Lynch registered representatives to recover amounts due under ATP loans. These proceedings involved disputes between Merrill Lynch and the registered representatives relating to the business activities of both Merrill Lynch and the representatives. As such, Rule 13200(a) of FINRA's Code of Arbitration Procedure required that the proceedings be brought as arbitration proceedings, and not as expedited proceedings in New York state court. As noted above, defendants' ability to assert counterclaims in those proceedings is greatly limited.

By bringing these proceedings, Merrill Lynch repeatedly circumvented the requirement to arbitrate disputes with its associated persons. The Firm thereby repeatedly violated Rule 13200(a). As set forth in IM 13000, in doing so, Merrill Lynch also repeatedly violated FINRA Rule 2010.

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

Censure and a fine of $1,000,000.

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

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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 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

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 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.

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.

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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 actions brought by FINRA or any other regulator against Respondent;

2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about Respondent's disciplinary record;

3. FINRA may make a public announcement concerning this agreement and the subject matter thereof 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.

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 or its staff.

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The undersigned, on behalf of Respondent 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 Respondent has 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 Respondent to submit it.

Merrill Lynch, Pierce, Fenner & Smith Incorporated

January 13, 2012
Date (mm/dd/yyyy)

By: J. David Montague

Reviewed by:

Timothy P. Burke

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Accepted by FINRA:

Jan. 25, 2012
Date

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

Thomas B. Lawson

Thomas B. Lawson
Vice President and Chief Counsel
FINRA Department of Enforcement
1801 K Street, N.W., 8th Floor
Washington, D.C. 20006

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CORRECTIVE ACTION STATEMENT

As a corrective action, Merrill Lynch and MLIFI stopped pursuing ATP collection actions in New York state court in January 2010, and will not do so in the future.

This Corrective Action Statement does not constitute factual or legal findings by FINRA, nor does it reflect the views of FINRA or its staff.

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