

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 2011029999301**

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

RE: Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch" or the "Firm"),  
Respondent  
CRD No. 7691

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, 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 the Firm alleging violations based on the same factual findings described herein.

**I.**

**ACCEPTANCE AND CONSENT**

- A. The Firm 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 is a Delaware corporation with its principal place of business in New York, New York.<sup>1</sup> The Firm is a global investment banking and multi-service brokerage firm that, among other things, provides retail brokerage, corporate and investment banking services, wealth management and commercial lending. It is registered with the Securities and Exchange Commission ("SEC") as a broker-dealer and investment adviser and has been a FINRA regulated firm since January 26, 1937. Merrill Lynch has more than 15,000 financial advisors and approximately \$2.2 trillion in customer assets.

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<sup>1</sup> Merrill Lynch is a wholly-owned subsidiary of Bank of America Corporation ("Bank of America"). On or about September 14, 2008, the boards of directors of Bank of America and Merrill Lynch & Co., Inc. unanimously approved the merger of the two entities. On December 5, 2008, Bank of America's shareholders voted to approve the merger and the merger closed on January 1, 2009.

## RELEVANT DISCIPLINARY HISTORY

From April 2003 to December 2011, Merrill Lynch failed to have an adequate supervisory system to ensure that customers in certain advisory programs were billed in accordance with contract and disclosure documents. The overbilling was generally caused by improper systems coding for the investment programs. As a result, the Firm violated Section 10 of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-10(a) thereunder, Exchange Act Rules 17a-3 and 17a-4, NASD Rules 2230, 2341, 2260(a), 3010, 3510(e) and 2110 and FINRA Rules 2251(a), 2264, 4370 and 2010, and agreed to a \$2.8 million fine. The Firm also remediated approximately \$32,174,369 to approximately 94,577 customer accounts.<sup>2</sup>

Between September 2006 and June 2008, Merrill Lynch failed to establish, maintain and enforce a supervisory system and written supervisory procedures reasonably designed to ensure that customers received appropriate “breakpoints” and “rollover and exchange” discounts on eligible purchases of unit investment trusts. Merrill Lynch failed to apply these sales charge discounts to customers’ eligible UIT purchases. As a result, the Firm violated NASD Rules 2210, 3010 and 2110 and agreed to a \$500,000 fine and an undertaking.<sup>3</sup>

From January 1, 2002 through December 31, 2004, Merrill Lynch failed to establish a supervisory system that was reasonably designed to identify certain opportunities for investors to purchase mutual funds at Net Asset Value (“NAV”) under available NAV Transfer Programs<sup>4</sup> and failed to exercise reasonable due diligence to identify the essential terms and conditions of the NAV Transfer Programs of certain mutual funds. As a result, certain customers who were eligible to purchase Class A shares under the NAV Transfer Programs either purchased Class A shares and incurred front-end sales charges that they should not have paid, or purchased other mutual fund share classes subject to back-end sales charges and higher ongoing distribution and service fees. The Firm overcharged customers more than \$15 million. As a result, the Firm violated NASD Rules 3010 and 2110 and agreed to a \$250,000 fine and remediation to affected customers.<sup>5</sup>

## OVERVIEW

Many mutual funds waive their up-front sales charges for retirement plans. Most of the mutual funds available on Merrill Lynch’s retail platform offered such waivers and disclosed those waivers in their prospectuses. However, Merrill

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<sup>2</sup> *Merrill Lynch, Pierce, Fenner & Smith Inc.*, AWC No. 20080141877 (Jun. 2012).

<sup>3</sup> *Merrill Lynch, Pierce, Fenner & Smith Inc.*, AWC No. 20080157013 (Jul. 2010).

<sup>4</sup> The NAV Transfer Programs allowed customers to purchase Class A shares at NAV and not pay any sales charges, if the customer invested proceeds from the redemption of shares of another mutual fund within specified time frames and previously had paid either a front-end or back-end sales charge.

<sup>5</sup> *Merrill Lynch, Pierce, Fenner & Smith Inc.*, AWC No. EAF040109003 (Feb. 2008).

Lynch failed to apply the waivers to certain eligible retirement plans that purchased shares of these mutual funds in brokerage accounts.

From at least January 2006 through December 2011, Merrill Lynch disadvantaged tens of thousands of small business retirement plan customers that were eligible to purchase Class A shares in certain mutual funds without a sales charge but were instead sold mutual funds with a front-end sales charge or Class B or C shares with back-end sales charges and higher ongoing fees and expenses.

Merrill Lynch learned of this problem in 2006, but elected not to notify its sales force and its customers that certain retirement plans could be eligible for sales charge waivers, and did not report its findings to FINRA until November 2011. Merrill Lynch has identified approximately 28,803 small business retirement plan accounts, including 401(k) plans,<sup>6</sup> whose participants qualified for, but did not receive the benefit of, the available sales charge waiver, after Merrill Lynch became aware of the problem.

Merrill Lynch also failed to provide certain 403(b)<sup>7</sup> retirement accounts with sale charge waivers although they were eligible for the waivers. Similarly, certain mutual funds waived their sales charges for certain charitable organizations purchasing shares of their funds. Merrill Lynch failed to provide those waivers to more than 3,200 accounts of charitable organizations.

Merrill Lynch has voluntarily paid remediation of approximately \$64.8 million to certain retirement plans and charitable organizations affected by this issue. As part of this settlement, it will provide additional restitution of:

- approximately \$21.2 million to an estimated 13,000 small business retirement accounts; and
- approximately \$3.2 million to an estimated 3,178 403(b) retirement accounts; Merrill Lynch will also voluntarily offer such accounts only Class A shares with sales charge waivers for all future mutual fund purchases.

During the periods described above, Merrill Lynch failed to establish, maintain and enforce a supervisory system and written procedures reasonably designed to ensure that eligible accounts received sales charge waivers as set forth in the

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<sup>6</sup> A 401(k) plan is a qualified plan that meets the standards set forth in the Internal Revenue Code (the "Code") for tax-favored status. It allows an employee to elect to have his or her employer contribute a portion of the employee's cash wages to the plan on a pre-tax basis. These deferred waivers are not subject to federal income tax withholding at the time of deferral.

<sup>7</sup> A 403(b) plan, also known as a tax-sheltered annuity plan, is a retirement plan for certain employees of public schools, employees of certain tax-exempt organizations, and certain ministers. Individual accounts in a 403(b) plan can be any of the following types: (1) an annuity contract, which is a contract provided through an insurance company; (2) A custodial account, which is an account invested in mutual funds; or (3) a retirement income account set up for church employees - generally, retirement income accounts can invest in either annuities or mutual funds.

mutual funds' prospectuses. In fact, although Merrill Lynch knew in 2006 that it was disadvantaging certain customers by failing to provide these waivers, it never notified or adequately trained its financial advisors to ensure that eligible customers received the waivers.

As a result of the foregoing, Merrill Lynch violated NASD Rules 2110 and 3010 and FINRA Rule 2010.<sup>8</sup>

## **FACTS AND VIOLATIVE CONDUCT**

### **Background of Mutual Fund Shares Classes**

The Firm sells mutual funds with different classes of shares representing interests in the same portfolio of securities, but differing in the structure and amount of sales charges paid directly by shareholders, and continuous, asset-based fees assessed on each shareholder's investment. Share class features and expenses, including fees and expenses and available sales charge waivers, are described by each mutual fund in its prospectus and/or statement of additional information.

Class A shares typically are subject to a front-end sales charge when originally purchased, and have annual fund expenses, including ongoing distribution and service fees ("fees") that are typically 0.25 percent. The majority of the front-end charge is paid to the selling broker-dealer as a concession. Investors purchase Class A shares at the applicable NAV, plus the initial sales charge. Most funds, however, offer certain investors a waiver of the initial sales charge associated with Class A shares under certain circumstances ("sales charge waiver").

Class B and C shares typically do not carry a front-end sales charge but have significantly higher fees (typically 1.00 percent) and may be subject to a contingent deferred sales charge ("CDSC").

Some mutual funds offer Class R shares for purchase by retirement plans. Class R shares typically are sold without a front-end sales charge. However, Class R shares typically have higher fees than Class A shares.

The different sales charges, breakpoints, waivers and fees associated with different share classes affect mutual fund investors' returns. If an investor qualifies for a Class A sales charge waiver and purchases Class A shares, the investor will not pay a front-end sales load. In contrast, a purchase of Class B or C shares of the same fund funds will be subject to higher ongoing fees, as well as potential application of a CDSC. Therefore, if an investor qualifies for a Class A

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<sup>8</sup> FINRA Rule 2010 replaced NASD Rule 2110 on December 15, 2008. Therefore, conduct occurring prior to December 15, 2008 was a violation of NASD Rule 2110 and conduct occurring on or after December 15, 2008 was a violation of FINRA Rule 2010.

sales charge waiver, there would be no reason for the investor to purchase any other class of shares that has a sales load and/or higher annual expenses.

### **Merrill Lynch Failed to Identify and Apply Available Sales Charge Waivers to Eligible Retirement Accounts**

#### *Retirement Cash Management Accounts 05*

Since the 1980s, Merrill Lynch offered a retirement account to small businesses known at the Firm as the Retirement Cash Management Account 05 (“RCMA 05”). Any qualified employee retirement plan under Section 401(a) of the Code (“Retirement Plan”)<sup>9</sup> was eligible to open an RCMA 05 account.

RCMA 05 accounts were brokerage accounts maintained on the Firm’s retail brokerage platform. The Firm therefore treated these accounts in the same manner as other retail customer accounts for purposes of determining share class eligibility for mutual fund purchases, rather than applying retirement plan-specified sales charge waivers.

As of May 31, 2012, Merrill Lynch maintained approximately 20,000 RCMA 05 accounts that held over \$3.2 billion in mutual fund assets.

At various times between January 2006 and December 2011, there were approximately 120 mutual fund families available for purchase by Retirement Plans in RCMA 05 accounts. Of these fund families, 106 offered sales charge waivers to Retirement Plan accounts, in some cases subject to eligibility criteria, such as plan size. However, during this period, Merrill Lynch routinely sold less favorable Class C shares to RCMA 05 accounts. Merrill Lynch also sold Class B shares or Class A shares with front-end charges to these accounts. However, most of the mutual funds available to RCMA 05 accounts offered Class A shares without a sales load to Retirement Plan accounts under the terms of the prospectuses. The Firm failed to identify that most of the mutual funds available to RCMA 05 accounts offered sales charge waivers to Retirement plans and, as a result, disadvantaged Retirement Plan account participants.<sup>10</sup>

Merrill Lynch first learned that it was not providing sales charge waivers to certain eligible RCMA 05 customers in early 2006. However, the Firm elected not to notify its sales force of its failure and continued to disadvantage its Retirement Plan customers until at least December 2011. The Firm self-reported

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<sup>9</sup> The Firm also offers Retirement Plans an account known as a Retirement Cash Management Account 08 (“RCMA 08”), which is governed by the Firm’s “Select Pricing Policy.” Under the Select Pricing Policy, customers are permitted to purchase, for specific approved funds, Class C, Class R, Class A or Class I shares without sales loads or CDSCs. Customers’ eligibility to purchase particular share classes in RCMA 08 accounts depends on the amount of the customer’s total plan assets.

<sup>10</sup> Additionally, by solely offering Class A, B and C shares, the Firm failed to follow prospectus language of one mutual fund which offered only Class R shares to Retirement Plan accounts.

the matter to FINRA in November 2011, and developed a remediation plan to restore disadvantaged customers to substantially the same financial position they would have been, if they had purchased Class A shares without sales charges. Merrill Lynch remediated approximately \$58 million, including interest, to approximately 16,000 current and 12,000 former RCMA 05 Retirement Plan accounts.<sup>11</sup>

As set forth below, Merrill Lynch will provide additional restitution to RCMA 05 customers who purchased shares of the 14 mutual fund families identified in Schedule A, but did not receive sales charge waivers. The Firm estimates that the restitution will include approximately 13,000 accounts and will be approximately \$21.2 million.

As a result of the foregoing, the Firm violated NASD Rule 2110 and FINRA Rule 2010.

#### 403(b) Retirement Accounts

Merrill Lynch offered 403(b) customers a retirement account called a Retirement Selector Account ("RSA"). In July 2008, Merrill Lynch closed the RSA program to new 403(b) retirement accounts, and in December 2008, prohibited deposits of new assets for existing RSA accounts. Established RSA accounts could continue to buy and sell mutual funds with existing assets in their accounts. As of December 2013, there were approximately 8,300 RSA accounts that held approximately \$419 million in mutual fund assets.

At various times between January 2006 and December 2011, there were approximately 120 mutual fund families available for purchase by RSA accounts. Certain fund families offered sales charge waivers to 403(b) retirement accounts. Similar to the RCMA 05 accounts, Merrill Lynch treated these accounts like non-retirement customer accounts for purposes of determining mutual fund share class eligibility.<sup>12</sup> As with the RCMA 05 program, the Firm failed to apply available sales charge waivers to these retirement accounts.

As set forth below, Merrill Lynch will provide restitution to 403(b) retirement accounts that purchased certain mutual fund families identified in Schedule B that qualified for, but did not receive, Class A shares without sales charges. The Firm estimates that the restitution will include approximately 3,178 RSA accounts and will be approximately \$3.2 million. Merrill Lynch will also voluntarily offer such retirement accounts only Class A shares with sales charge waivers for all future mutual funds purchases.

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<sup>11</sup> The Firm transitioned the accounts to a different platform in July 2012.

<sup>12</sup> The Firm offered accounts to 403(b) plans under its Advisor Alliance and Investment Link programs, which are governed by its Select Pricing Policy.

As a result of the foregoing, the Firm violated NASD Rule 2110 and FINRA Rule 2010.

### **Merrill Lynch Failed to Identify and Apply Sales Charge Waivers to Eligible Charitable Organizations**

In order to qualify as a tax-exempt entity under Section 501(c)(3) of the Code, a charitable organization must be organized and operated exclusively for exempt purposes, and none of its earnings may inure to any private shareholder or individual (“charitable organizations”)<sup>13</sup> Merrill Lynch routinely treated qualified charitable organization accounts as ordinary retail accounts for purposes of determining their eligibility for sales charge waivers.

From January 2004 through August 2011, there were approximately 120 mutual fund families available for purchase by charitable organizations in retail brokerage accounts at the Firm. Of these fund families, 13 offered sales charge waivers to charitable organizations. Merrill Lynch repeatedly disadvantaged charitable organizations that purchased shares of these mutual funds by selling them Class A shares with sales charges, or Class B or Class C shares that charged higher expense ratios than Class A shares.

Merrill Lynch first became aware of its failure to provide sales charge waivers to qualified charitable organizations accounts in or around April 2010 and self-reported the issue to FINRA in January 2011.<sup>14</sup>

The Firm subsequently developed a plan to place disadvantaged customers in substantially the same financial positions they would have been in, had they purchased Class A shares without a sales charge. In March 2012, Merrill Lynch remediated 1,505 charitable organization accounts more than \$2.7 million, and in March 2014, Merrill Lynch remediated an additional 2,119 charitable organization accounts nearly \$4.1 million.

As a result of the foregoing, the Firm violated NASD Rule 2110 and FINRA Rule 2010.

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<sup>13</sup> IRS Code Exemption Requirements – Section 501(c)(3) Organizations.

<sup>14</sup> Merrill Lynch determined that the cost of changing its operating system to facilitate these waivers would be prohibitive. Merrill Lynch asked each mutual fund family that offered such a waiver to consider limiting the waiver so that it would not apply to purchases effected through brokerage firms, thus relieving the Firm from administering the sales waivers. Six of the twelve fund families eliminated the 501(c)(3) waivers and five revised their prospectus language to require 501(c)(3) entities to purchase the funds directly from the fund company in order to receive the sales waivers. One fund family refused to limit the availability of the sales waiver, and as a result, Merrill Lynch stopped selling shares of that fund family on its retail platform.

**Merrill Lynch Failed to Establish an Adequate Supervisory System and Written Procedures Related to the Sale of Mutual Funds to Certain Retirement Accounts and Charitable Organizations**

*RCMA 05 Supervisory Failures*

In early 2006, Merrill Lynch became aware that the Firm was disadvantaging small business Retirement Plan customers in RCMA 05 accounts. These customers were not purchasing the most favorable Class A shares with sales charge waivers, because the Firm had treated these accounts as non-retirement retail accounts instead of Retirement Plans for the purpose of determining share class eligibility.

Even though certain supervisory, compliance and legal personnel became aware in 2006 that RCMA 05 accounts were being disadvantaged, the Firm elected not to notify its financial advisors that the accounts were eligible for sales charge waivers. For over six years, Merrill Lynch allowed its financial advisors to sell Class A shares with front-end sales charges or more costly Class B and Class C shares to these same accounts. Merrill Lynch's policies and procedures for mutual fund purchases on the retail brokerage platform were not designed to adequately supervise the administration of mutual fund sales charge waivers for RCMA 05 accounts.

Merrill Lynch formed a cross-disciplinary task force in 2006, comprised of members of various internal units including, the Retirement Group, Compliance, and Legal, to evaluate and recommend solutions to RCMA 05 account problems. By March 2007, the task force determined that the Firm's systems and procedures were not designed to systematically identify and provide mutual fund Class A sales charge waivers to eligible RCMA 05 customers.

The task force recommended, as a threshold matter, that the Firm develop and implement technological improvements that would permit the Firm to more readily identify RCMA 05 customers eligible for sales charge waivers. At the task force's recommendations, in December 2007, Merrill Lynch approved \$2.7 million to develop the technological improvements recommended by the task force. Development work on the improvements commenced in 2008, almost two full years after the Firm's discovery of this problem, but was never fully funded or implemented.

In addition to the systems shortcomings described above, Merrill Lynch also did not maintain adequate policies, procedures or practices to train its financial advisors to identify and apply manual sales charge waivers to eligible RCMA 05 customers. Moreover, the Firm did not take adequate steps to communicate this information to the sales force and did not change its written procedures or notify its customers.



Instead, in October 2010, Merrill Lynch emailed a Policy & Procedure Reminder (“the Reminder”) to its sales force, which advised that all financial advisors were responsible for making the determination whether a sales charge waiver was available pursuant to mutual fund prospectuses. Although the Firm was aware of the RCMA 05 pricing and technology problems since 2006, the Reminder did not specifically address the Firm’s inability to identify opportunities for eligible RCMA 05 customers to purchase mutual fund shares with sales charge waivers. Moreover, Merrill Lynch did not provide its financial advisors or supervisors with any other guidance or training to help them identify mutual funds that offered sales charge waivers to Retirement Plan accounts.

Merrill Lynch failed to establish and maintain an adequate supervisory system and written procedures to ensure that eligible RCMA 05 accounts purchased Class A shares with sales charge waivers when purchasing shares of certain mutual funds. Moreover, after the Firm became aware of its failure, the Firm failed to notify or train its financial advisors to determine whether the RCMA 05 accounts qualified for Class A shares with sales charge waivers. Lastly, after the Firm became aware of this issue, it failed to implement a supervisory system to follow up and ensure that RCMA 05 accounts purchased Class A shares with sales charge waivers.

#### 403(b) Retirement Account (RSA) Supervisory Failures

Since the 1980s, Merrill Lynch offered the RSA account for employees of 403(b) eligible entities. Like the accounts in the RCMA 05 program, Merrill Lynch did not consider 403(b) retirement accounts in the RSA program to be eligible for retirement plan specified sales charge waivers. However, certain of the mutual funds held by many RSA accounts at Merrill Lynch, as of December 2008, offered sales charge waivers to 403(b) retirement accounts. Since the Firm solely relied upon its financial advisors to determine opportunities for customers to receive Class A shares with sales charge waivers, it did not have adequate written policies or procedures to help financial advisors or supervisors make this determination, and did not have controls to detect instances in which sales charge waivers should have been applied, certain 403(b) retirement account customers who were eligible for Class A shares at NAV did not receive this benefit.

As a result, the Firm failed to establish and maintain an adequate supervisory system and written procedures to ensure that eligible 403(b) retirement accounts purchased Class A shares with sales charge waivers.

#### 501(c)(3) Supervisory Failures

The Firm failed to maintain an adequate system and written procedures reasonably designed to identify applicable sales charge waivers in mutual fund prospectuses for charitable organizations. The Firm’s supervisory procedures did not require any actions to determine whether Class A shares NAV pricing

provisions available to charitable organizations were provided to qualifying customers. In addition, the Firm did not have any systematic controls in place to prevent or detect instances where the waiver should have been, but was not, provided. Moreover, the Firm concluded that the cost of implementing system updates to automatically apply waivers to 501(c)(3) entities would be prohibitive.

Additionally, the Firm maintained procedures for an annual review to identify potential NAV purchase privileges. Although the mutual fund prospectuses set forth these NAV purchase privileges available to charitable organizations, the Firm failed to identify this purchase privilege for charitable organization customers and communicate the information to its sales force, and did not have procedures in place to monitor whether financial advisors were informing customers of available mutual fund sales charge waivers or ensuring that eligible customers were receiving such waivers. The procedures for manually applying sales waivers were not adequately distributed to financial advisors until October 2010, months after the Firm discovered that it had failed to provide sales charge waivers to eligible charitable organization customers. Further, these procedures were not incorporated into the Firm's Compliance Policy Manual until May 9, 2012.

#### Conclusion

Merrill Lynch's policies and procedures concerning sales charge waivers were inadequate. The Firm unreasonably relied on financial advisors to make appropriate determinations concerning mutual fund sales charges even after becoming aware of the problems related to the availability Class A shares at NAV, and failed to provide critical information its financial advisors needed to manually apply sales waivers for RCMA 05, 403(b) and eligible charitable organization accounts.

Thus, Merrill Lynch failed to establish and maintain an adequate supervisory system and written procedures to identify Class A mutual fund sales charge waivers in fund prospectuses, failed to adequately notify and train its financial advisors regarding mutual fund sales waiver eligibility requirements, and failed to have an adequate supervisory system to ensure that eligible accounts purchased Class A shares with sales charge waivers.

As a result, the Firm violated NASD Rules 3010 and 2110 and FINRA Rule 2010.

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

1. A censure;
2. A fine of \$8,000,000; and
3. Merrill Lynch agrees to pay the following restitution:

- a. Merrill Lynch will pay restitution to RCMA 05 accounts holders who purchased shares at Merrill Lynch from the 14 mutual fund families on Schedule A from January 1, 2006 through July 2012 and did not receive Class A shares of the funds at NAV. The Firm estimates that the restitution is approximately \$21.2 million, including interest to approximately 13,000 accounts.
- b. Merrill Lynch agrees to pay restitution to RSA customers who purchased shares at Merrill Lynch from the 3 mutual fund families on Schedule B from January 1, 2008 through the Notice of Acceptance of this AWC and did not receive Class A shares of the funds at NAV. The Firm estimates that the restitution is approximately \$3.2 million, plus interest to approximately 3,178 accounts.
- c. Restitution shall be provided to these eligible RCMA 05 accounts and eligible RSA accounts, as follows:
  - i. For each customer who paid an initial sales charge, Merrill Lynch shall refund the sales charge paid, plus interest, from the date of the purchase through the payment date at the rate set forth in Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2) (the "IRS Rate").
  - ii. For each customer who purchased shares other than Class A shares in the funds designated in Schedules A and B, respectively, with either a back-end or level load (including but not limited to Class B and C shares), Merrill Lynch shall pay restitution to the customer sufficient to place the customer in a substantially equivalent financial position to the position in which such customer would have been had the customer purchased Class A shares at NAV. The restitution, exclusive of American Funds, which is described in Section B.3(c)(iii) will include: (1) the ongoing asset-based expense differential for the Class B or C share purchases, using an estimate of 75 basis points as the expense differential; (2) CDSCs for eligible sales and transfers from the Firm; and (3) interest for these amounts from the date of each qualifying purchase, sale or transfer through the payment date at the IRS Rate.
  - iii. For each RCMA 05 customer who purchased a share class of American Funds other than Class R2 shares at NAV, Merrill Lynch shall pay restitution to the customer as follows: (1) sales charges incurred by customers for Class A share purchases; (2) CDSCs incurred by customers for eligible sales and transfers from the Firm; (3) the ongoing asset-based expense differential (where applicable) as between Class B or C share purchases and

comparable American Funds Class R2 shares; and (4) interest for these amounts from the date of each qualifying RCMA 05 purchase, sale or transfer through the payment date at the IRS Rate.

- iv. A registered principal on behalf of Respondent firm shall submit satisfactory proof of payment of restitution or of reasonable and documented efforts undertaken to effect restitution. Such proof shall be submitted to Senior Counsel Gerard Murphy, One World Financial Center, 200 Liberty Street, New York, NY 10281 either by letter that identifies the Respondent and the case number or by e-mail from a work-related account of the registered principal of Respondent firm to EnforcementNotice@FINRA.org. This proof shall be provided to the FINRA staff member listed above no later than 270 days after acceptance of the AWC with respect to eligible RCMA 05 and RSA accounts.
  - v. If for any reason Respondent cannot locate any customer eligible to receive the foregoing restitution after reasonable and documented efforts within 270 days from the date the AWC is accepted, or such additional period agreed to by a FINRA staff member in writing, Respondent shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed property or abandoned property fund for the state in which the customer is last known to have resided. Respondent shall provide satisfactory proof of such action to the FINRA staff member identified above and in the manner described above, within 14 days of forwarding the undistributed restitution and interest to the appropriate state authority.
- d. Upon written request showing good cause, FINRA staff may extend any of the procedural dates set forth above.

The Firm agrees to pay the monetary sanctions upon notice that this AWC has been accepted and that such payments are due and payable. The Firm has submitted an Election of Payment form showing the method by which the Firm proposes to pay the fine imposed.

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

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

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

## **II. WAIVER OF PROCEDURAL RIGHTS**

The Firm 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, the Firm 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.

The Firm 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**

The Firm 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 the Firm; and
- C. If accepted:

1. 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 the Firm;
2. this AWC will be made available through FINRA's public disclosure program in response to public inquiries about the Firm'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. The Firm 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. The Firm 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 the Firm'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. The Firm may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. The Firm 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.

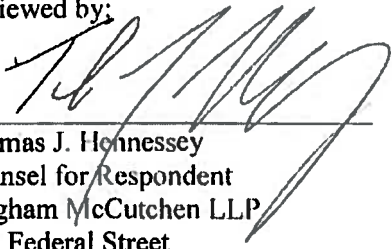
The undersigned, on behalf of the Firm, certifies that a person duly authorized to act on its behalf has read and understand all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that the Firm has agreed to its provisions voluntarily; and that no offer, threat, 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 the Firm to submit it.

Date: June 6, 2014

Merrill Lynch, Pierce, Fenner & Smith Incorporated  
Respondent

By: Mark L. Keene  
Mark L. Keene, Associate General Counsel

Reviewed by:



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Thomas J. Hennessey  
Counsel for Respondent  
Bingham McCutchen LLP  
One Federal Street  
Boston, MA 02110

Accepted by FINRA:

6.16.14  
Date

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



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Richard R. Best, Chief Counsel  
FINRA Department of Enforcement  
One World Financial Center  
200 Liberty Street  
New York, NY 10281  
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## **Schedule A**

The following Fund Families:

1. Alger
2. Allianz
3. American
4. AXA
5. Eagle
6. Ivy
7. Janus
8. Lord Abbett
9. Munder
10. PIMCO
11. Putnam
12. SunAmerica
13. Van Eck
14. Wells Fargo



## **Schedule B**

The following Fund Families:

1. Blackrock
2. Fidelity
3. Oppenheimer