

**THE NASDAQ STOCK MARKET LLC  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 2013038684003**

TO: The Nasdaq Stock Market LLC  
c/o Department of Enforcement  
Financial Industry Regulatory Authority (“FINRA”)

RE: Merrill Lynch, Pierce, Fenner & Smith Incorporated, Respondent  
Broker-Dealer  
CRD No. 7691

Pursuant to Rule 9216 of The Nasdaq Stock Market LLC (“Nasdaq”) Code of Procedure, Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill” 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, Nasdaq 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 Nasdaq, or to which Nasdaq 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 Nasdaq:

**BACKGROUND**

Merrill has been a Nasdaq member since July 2006 and is headquartered in New York City. It is a full-service broker-dealer providing a broad range of financial services including sales and trading services, investment banking, underwriting services, retail brokerage, and wealth management services. Merrill employs approximately 35,000 registered representatives in approximately 3,900 branch offices worldwide.

Merrill does not have any relevant disciplinary history.

**SUMMARY**

From on or about September 1, 2013 through approximately June 2016 (the “Relevant Period”), Merrill did not reasonably supervise certain types of public and private side employee communications under the firm’s policies and procedures, in violation of Nasdaq Rule 3010(a) and Nasdaq Rule 2010A.

## **FACTS AND VIOLATIVE CONDUCT**

Nasdaq Rule 3010(a) states that “[e]ach member shall establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable Nasdaq rules.”<sup>1</sup>

Nasdaq Rule 2010A states that “[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.”<sup>2</sup>

### **Merrill Did Not Reasonably Supervise Public and Private Side Employee Communications.**

During the Relevant Period, Merrill maintained supervisory and compliance procedures that governed the management of information barriers and wall crossings. Those procedures included a firm-wide Enterprise Information Wall Policy, a Global Wealth and Investment Management (“GWIM”) Information Wall Policy, a Global Banking and Markets/Global Commercial Banking (“GBAM”) Information Wall Policy, and a Need to Know Policy. The firm’s policies required functional and physical separation of its private side and public side designated employees, and generally prohibited the flow of potential material nonpublic information (“MNPI”). During the Relevant Period, however, the firm’s systems and procedures for designating and training public and private side personnel, supervising communications between them, and escalating communications that disclosed potential MNPI, were not reasonable with respect to certain GWIM groups.

During the Relevant Period, a group within Merrill’s GWIM business unit (the “GWIM sub-group”) managed a proprietary distribution platform through which the firm offered certain exchange-traded notes (“ETNs”) issued by third parties. The GWIM sub-group included personnel responsible for the development of products on the platform and certain capital markets functions, who were generally designated as private side under the GWIM Information Wall Policy. It also included personnel responsible for the marketing and sale of ETNs offered through the platform, who were generally designated as public side personnel. The GWIM sub-group’s private and public side employees were permitted to engage in communications about the ETNs.

In 2013, Merrill designated certain personnel in the GWIM sub-group as private side under the GWIM Information Wall Policy in connection with a physical relocation, even though their principal responsibilities included marketing of the ETNs and other investment products. The re-designated personnel also worked in physical proximity to private side personnel in the GWIM sub-group responsible for product development. The re-designated personnel, however, did not receive reasonable training concerning the responsibilities of private side personnel with respect to the identification and monitoring of potential MNPI.

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<sup>1</sup> As of December 6, 2019, Nasdaq Rule 3010 is now cited as Nasdaq General 9, Section 20.

<sup>2</sup> As of December 6, 2019, Nasdaq Rule 2010A is now cited as Nasdaq General 9, Section 1(a).

During the fourth quarter of 2013, employees on the private side of the GWIM sub-groups came into possession of potential MNPI concerning a price dislocation in a thinly-held ETN. At least one employee whom GWIM had re-designated as private side earlier in 2013 discussed the potential MNPI in electronic mail with two public side Merrill employees who did not have a need to know the information as defined by the firm's policies. Merrill employees in the GWIM sub-group and in a group within the firm's GBAM business unit also shared the potential MNPI externally through the firm's electronic mail and instant messaging systems. The firm's systems did not identify these communications and, although an external recipient questioned whether the communications contained potential MNPI, these communications were not escalated for further review.

Although Merrill had electronic communication review procedures in place during the Relevant Period designed to detect the disclosure of potential MNPI, those procedures were not reasonably designed at the time. Specifically, in addition to a general lexicon search, Merrill had a targeted electronic review of communications between Merrill's public side and Merrill's private side that was triggered by Watch List and Restricted List securities, as well as triggered by the request for an employee wall cross. Those procedures, however, did not provide for the reasonable review of communications between public and private side employees because the firm's procedures did not describe a reasonable process for escalating for further review communications that contained potential MNPI. The firm also failed during the Relevant Period to reasonably enforce its procedures requiring functional and physical separation of public and private side personnel within the GWIM sub-group, to reasonably train re-designated private side personnel on how to identify and monitor communications containing potential MNPI, and to maintain reasonable procedures regarding monitoring and escalation of communications of potential MNPI. These failures to establish, maintain and enforce such procedures and systems excluded from supervisory review certain categories of communications between public and private side employees and created the risk that potential MNPI could be impermissibly disclosed. These failures also inhibited the firm's ability to identify any such potential disclosure and to take reasonable steps to mitigate or remediate any potential harm from such disclosure. As of June 2016, the firm had enhanced its GWIM and GBAM procedures to address the deficiencies described herein.

By reason of the foregoing, Merrill violated Nasdaq Rule 3010(a) and Nasdaq Rule 2010A.

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

- a censure, and
- a \$450,000 fine, of which \$90,000 shall be paid to Nasdaq.<sup>3</sup>

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<sup>3</sup> The remainder of the fine shall be paid to NYSE Arca, Inc., Cboe EDGX Exchange, Inc., Cboe EDGA Exchange, Inc., and FINRA.

Acceptance of this AWC is conditioned upon acceptance of similar settlement agreements in this matter between the Firm and each of the following self-regulatory organizations: NYSE Arca, Inc., Cboe EDGX Exchange, Inc., Cboe EDGA Exchange, Inc., and FINRA.

The firm agrees to pay the monetary sanction upon notice that this AWC has been accepted and that such payment is due and payable. It has submitted a Payment Information form showing the method by which it proposes to pay the fine imposed.

The firm 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

The firm specifically and voluntarily waives the following rights granted under Nasdaq's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against the firm;
- B. To be notified of the Formal 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 Nasdaq Review Council 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 prejudice of the Chief Regulatory Officer, the Nasdaq Review Council, or any member of the Nasdaq Review Council, 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 Rule 9143 or the separation of functions prohibitions of 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 FINRA's Department of Enforcement and the Nasdaq Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs ("ODA"), pursuant to Nasdaq 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 Nasdaq or any other regulator against the firm;
  - 2. Nasdaq may release this AWC or make a public announcement concerning this agreement and the subject matter thereof in accordance with Nasdaq Rule 8310 and IM-8310-3; and
  - 3. 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 Nasdaq, or to which Nasdaq is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects the firm's right to take legal or factual positions in litigation or other legal proceedings in which Nasdaq 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 Nasdaq, nor does it reflect the views of Nasdaq 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 it 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 herein and the prospect of avoiding the issuance of a Complaint, has been made to induce the firm to submit it.

March 17, 2021  
Date


Merrill Lynch, Pierce, Fenner & Smith Incorporated  
Respondent

By: MARK L. KEENE

Name: MARK L. KEENE

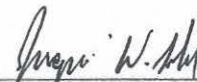
Title: ASSOCIATE GENERAL  
COUNSEL

Reviewed by:

  
Thomas J. Hennessey, Partner  
Counsel for Respondent  
Morgan Lewis & Bockius LLP  
One Federal Street  
Boston, MA 02110-1726

Accepted by Nasdaq:

March 24, 2021  
Date

  
Joaquin Gubb  
Senior Counsel  
Department of Enforcement

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