

**NYSE ARCA, INC.**  
**LETTER OF ACCEPTANCE, WAIVER, AND CONSENT**  
**NO. 2013038684002**

TO: NYSE Arca, Inc.

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

**From on or about September 1, 2013 through approximately June 2016 (the "Relevant Period"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill" or the "Firm") did not reasonably supervise certain types of public and private side employee communications under the Firm's policies and procedures, in violation of NYSE Arca Rule 6.18(c).<sup>1</sup> Merrill consents to a censure and a fine of \$450,000, of which \$90,000 shall be payable to NYSE Arca, Inc.**

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Pursuant to Rule 10.9216 of the NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") 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, NYSE Arca will not bring any future actions against the Firm alleging violations based on the same factual findings described herein.

**I. ACCEPTANCE AND CONSENT**

- A. Merrill 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 NYSE Arca, or to which NYSE Arca 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 NYSE Arca:

**BACKGROUND AND JURISDICTION**

1. The Firm became registered as an Equities Trading Permit ("ETP") holder and Options Trading Permit ("OTP") holder with NYSE Arca<sup>2</sup> in October 1958. The Firm ceased its registration with NYSE Arca on July 27, 2019. Because the Firm was notified of the formal inquiry into this matter prior to its termination of registration with the NYSE Arca, NYSE Arca retains jurisdiction over the Firm pursuant to Legacy NYSE Arca Rule 10.1(b). Merrill has been a FINRA member since 1937 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

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<sup>1</sup> NYSE Arca Equities Rule 6.18 is now denominated NYSE Arca Rule 11.18.

<sup>2</sup> Prior to August 17, 2017, the Exchange rules involved in this matter were called NYSE Arca Equities rules.

banking, underwriting services, retail brokerage, and wealth management services. Merrill employs approximately 35,000 registered representatives in approximately 3,900 branch offices worldwide.

2. Merrill does not have any relevant disciplinary history.

### **PROCEDURAL HISTORY**

3. This matter arises from a review conducted by the Department of Market Regulation at the Financial Industry Regulatory Authority ("FINRA").

### **VIOLATIONS**

4. NYSE Arca Rule 6.18(c) stated that "[e]ach ETP Holder, OTP Holder or OTP Firm must establish, maintain, and enforce written procedures to supervise the business in which it engages and to supervise the activities of its associated persons that are reasonably designed to ensure compliance with applicable federal securities laws and regulations, and with the NYSE Arca Rules."

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

5. 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.
6. 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.
7. 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.

8. 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.
9. Although the Firm 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, the Firm had a targeted electronic review of communications between its public side and its 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.
10. Accordingly, the Firm violated NYSE Arca Rule 6.18(c) during the Relevant Period.

## SANCTIONS

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

1. **Censure and fine in the amount of \$450,000, of which \$90,000 shall be payable to NYSE Arca.**<sup>3</sup>

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: The Nasdaq Stock Market LLC, 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. The Firm has submitted a Method of Payment Confirmation form showing the method by which it will 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 Firm agrees that it shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made pursuant to any insurance policy, with regard to any fine amounts that the Firm pays pursuant to this AWC, regardless of the use of the fine amounts. The Firm further agrees that it shall not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax for any fine amounts that the Firm pays pursuant to this AWC, regardless of the use of the fine amounts.

The sanctions imposed herein shall be effective on a date set by NYSE Regulation staff.

## II. WAIVER OF PROCEDURAL RIGHTS

The Firm specifically and voluntarily waives the following rights granted under the NYSE Arca 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

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<sup>3</sup> The remainder of the fine shall be paid to The Nasdaq Stock Market LLC, Cboe EDGX Exchange, Inc., Cboe EDGA Exchange, Inc., and FINRA.

- D. To appeal any such decision to the Exchange's Board of Directors 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 of NYSE Arca; the Exchange's Board of Directors, Disciplinary Action Committee ("DAC"), and Committee for Review ("CFR"); any Director, DAC member, or CFR member; Counsel to the Exchange Board of Directors or CFR; any other NYSE Arca employee; or any Regulatory Staff as defined in Rule 10.9120 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 communication prohibitions of Rule 10.9143 or the separation of functions prohibitions of Rule 10.9144, 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 by NYSE Regulation, and accepted by the Chief Regulatory Officer of NYSE Arca pursuant to NYSE Arca Rule 10.9216;
- 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. The AWC shall be sent to each Director and each member of the Committee for Review via courier, express delivery or electronic means, and shall be deemed final and shall constitute the complaint, answer, and decision in the matter, 10 days after it is sent to each Director and each member of the Committee for Review, unless review by the Exchange Board of Directors is requested pursuant to NYSE Arca Rule 10.9310(a)(1)(B);
  2. This AWC will become part of the Firm's permanent disciplinary record and may be considered in any future actions brought by the Exchange, or any other regulator against the Firm;
  3. NYSE Arca shall publish a copy of the AWC on its website in accordance with NYSE Arca Rule 10.8313;
  4. NYSE Arca may make a public announcement concerning this agreement and the subject matter thereof in accordance with NYSE Arca Rule 10.8313; and
  5. 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 the Exchange, or to which the Exchange 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 the Exchange is not a party.

- D. A signed copy of this AWC and the accompanying Method of Payment Confirmation form delivered by email, facsimile or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy.
- E. 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. Any such statement does not constitute factual or legal findings by the Exchange, nor does it reflect the views of NYSE Regulation or its staff.

The Firm certifies that, in connection with each of the Exchange's requests for information in connection with this matter, the Firm made a diligent inquiry of all persons and systems that reasonably had possession of responsive documents and that all responsive documents have been produced. In agreeing to the AWC, the Exchange has relied upon, among other things, the completeness of the document productions.

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

Mark L. Keene  
Merrill Lynch, Pierce, Fenner & Smith Incorporated  
Respondent

Print Name: MARK L. KEENE

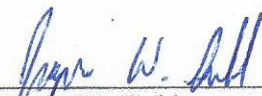
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Reviewed by:

  
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Counsel for Respondent

Accepted by NYSE Regulation

March 18, 2021  
Date

  
Joaquin W. Gubb  
Senior Counsel  
FINRA

Signed on behalf of NYSE Arca, Inc., by  
delegated authority from its Chief  
Regulatory Officer