

STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
SECURITIES DIVISION

IN THE MATTER OF DETERMINING
whether there has been a violation
of the Securities Act of Washington by:

Order Number S-09-397-09-CO01

CONSENT ORDER

MERRILL LYNCH, PIERCE, FENNER
& SMITH INCORPORATED,

Respondent.

INTRODUCTION

WHEREAS, Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) is a broker-dealer registered in the State of Washington, with a Central Registration Depository (“CRD”) number of 7691; and

State securities regulators from multiple jurisdictions have conducted coordinated investigations into the registration of Merrill Lynch Client Associates (“CAs”) and Merrill Lynch’s supervisory system with respect to the registrations of CAs; and

Merrill Lynch has cooperated with regulators conducting the investigations by responding to inquiries, providing documentary evidence and other materials, and providing regulators with access to facts relating to the investigations; and

Merrill Lynch has advised regulators of its agreement to resolve the investigations pursuant to the terms specified in this Consent Order (the “Order”); and

Merrill Lynch agrees to make certain changes in its supervisory system with respect to the registration of CAs, and to make certain payments in accordance with the terms of this Order; and

Merrill Lynch elects to waive permanently any right to a hearing and appeal under RCW

1 21.20.440 and RCW 34.05 with respect to this Order; and

2 Solely for the purpose of terminating the multi-state investigations, and in settlement of
3 the issues contained in this Order, Merrill Lynch, without admitting or denying the findings of
4 fact or conclusions of law contained in this Order, consents to the entry of this Order.

5 NOW, THEREFORE, the Securities Administrator, as administrator of the Securities Act
6 of Washington, RCW 21.20, hereby enters this Order.

7 **I.**

8 **FINDINGS OF FACT**

9 1. Merrill Lynch admits the jurisdiction of the Securities Division of the Washington
10 State Department of Financial Institutions in this matter.

11 Background on Client Associates

12 2. The CAs function as sales assistants and typically provide administrative and sales
13 support to one or more of Merrill Lynch's Financial Advisors ("FAs"). There are different titles
14 within the CA position, including Registered Client Associate and Registered Senior Client
15 Associate.

16 3. The responsibilities of a CA specifically include:

- 17 a. Handling client requests;
- 18 b. Resolving client inquiries and complaints;
- 19 c. Determining if client issues require escalation to the FA or the branch
20 management team; and
- 21 d. Processing of operational documents such as letters of authorization and client
22 check requests.

1 4. In addition to the responsibilities described above, and of particular significance to
2 this Order, some CAs are permitted to accept unsolicited orders from clients. As discussed
3 below, Merrill Lynch's written policies and procedures require that any CAs accepting client
4 orders first obtain the necessary licenses and registrations.

5 5. Notably, FAs might have a "primary CA" and a "secondary CA." As suggested by
6 the designation, the customary practice is that the primary CA would handle the FA's
7 administrative matters and client orders. However, if the primary CA was unavailable, the
8 secondary CA would handle the FA's administrative matters and client orders.

9 6. During the period from 2002 to the present, Merrill Lynch employed approximately
10 6,200 CAs (average) per year.

11 Registration Required

12 7. Pursuant to RCW 21.20.040(1), it is unlawful for an individual to transact business in
13 the State of Washington as a securities salesperson unless the individual is registered or exempt
14 from registration.

15 8. Accepting unsolicited orders on behalf of a broker-dealer in the State of Washington
16 constitutes acting as a securities salesperson as defined in RCW 21.20.005(2).

17 9. Pursuant to RCW 21.20.040(2), it is unlawful for a broker-dealer to employ a
18 securities salesperson who transacts business in the State of Washington unless the securities
19 salesperson is registered or exempt from registration.

20 Merrill Lynch Requires Registration of Client Associates

21 10. In order for a CA to accept client orders, Merrill Lynch generally required each CA to
22 pass the series 7 and 63 qualification exams and to register in the appropriate jurisdictions.
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1 11. At all times relevant to this Order, Merrill Lynch's policies and procedures specified
2 that each CA maintain registrations in the same jurisdictions as his or her FA, or broadly
3 required that each CA maintain registrations in all necessary jurisdictions.

4 Regulatory Investigations and Findings

5 12. In May 2008, state regulators received a tip alleging that Merrill Lynch was failing to
6 ensure its CAs were in compliance with jurisdictional registration requirements and its own
7 procedures. The tip alleged that Merrill Lynch CAs were registered in two jurisdictions – the
8 CA's home state and one neighboring state – because Merrill Lynch paid only for registrations in
9 two jurisdictions.

10 13. During the summer of 2008, Merrill Lynch received inquiries regarding CA
11 registrations from a number of state securities regulators.

12 14. Because Merrill Lynch's relevant trade records were maintained in hard copy and
13 only at branch offices across the country, the multi-state investigation focused on systemic issues
14 with Merrill Lynch CA registrations and related supervisory structure instead of attempting to
15 identify each incidence of unregistered activity. Specifically:

- 16 a. After accepting a client order, CAs accessed the electronic trading system to enter
17 the order;
- 18 b. The CAs did not have to identify themselves during the order entry process.
19 Therefore, there is no electronic record that identifies which orders were accepted
20 by CAs;
- 21 c. Instead, Merrill Lynch maintained a daily report that recorded the identity of the
22 person who accepted and/or entered each order. However, this report was not
23 maintained electronically, and was only maintained at the branch office where the

1 order was entered. Merrill Lynch represented that this daily report was the only
2 record that could identify who accepted a client order;

3 d. Merrill Lynch's trading system checked the registration of the FA, but did not
4 check the registration status of the person accepting the order to ensure that the
5 person was registered in the appropriate jurisdiction.

6 15. The multi-state investigation found that many CAs supported FAs registered in the
7 State of Washington when the CAs were not registered in the State of Washington as agents of
8 Merrill Lynch. This difference in registration status increased the possibility that CAs would
9 engage in unregistered activity.

10 16. The multi-state investigation found that certain Merrill Lynch CAs engaged in the
11 sale of securities in the State of Washington at times when the CAs were not appropriately
12 registered in the State of Washington.

13 Merrill Lynch's Remedial Measures and Cooperation

14 17. As a result of the inquiries by state regulators, Merrill Lynch conducted a review of
15 its CA registration practices.

16 18. Merrill Lynch's review found that as of June 30, 2008, the firm had 3,780 registered
17 CAs. Approximately 2,200, almost 60%, of those registered CAs were registered only in their
18 home state or their home state and one additional state.

19 19. Consistent with the fact that many Merrill Lynch CAs were only registered in one or
20 two jurisdictions, Merrill Lynch's review found incidences of trading by CAs not properly state
21 registered.

1 1. The Securities Division of the Washington State Department of Financial
2 Institutions has jurisdiction over this matter pursuant to the Securities Act of Washington, RCW
3 21.20.

4 2. Merrill Lynch failed to establish an adequate system to monitor the registration
5 status of persons accepting client orders. Pursuant to RCW 21.20.110(1)(j), such failure to
6 supervise constitutes grounds to censure and impose fines upon Merrill Lynch.

7 3. Merrill Lynch's failure to require its CAs to be registered in the appropriate
8 jurisdictions constitutes a failure to enforce its established written procedures. Pursuant to RCW
9 21.20.110(1)(j), such failure to supervise constitutes grounds to censure and impose fines upon
10 Merrill Lynch.

11 4. Merrill Lynch's sales of securities in the State of Washington through
12 unregistered CAs resulted in the employment of unregistered securities salespersons, in violation
13 of RCW 21.20.040(2).

14 5. Pursuant to RCW 21.20.390, Merrill Lynch's sales of securities in the State of
15 Washington through agents not registered in the State of Washington constitutes a basis to order
16 Merrill Lynch to cease and desist from employing unregistered agents.

17 6. Pursuant to RCW 21.20.110 and RCW 21.20.395, the violations described above
18 constitute bases for the assessment of an administrative fine against Merrill Lynch.

19 7. The Securities Division of the Washington State Department of Financial
20 Institutions finds the following relief appropriate and in the public interest.
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2 **III.**

3 **UNDERTAKINGS**

4 1. Merrill Lynch hereby undertakes and agrees to immediately establish and
5 maintain a trade monitoring system that prevents any person from entering client orders that
6 originate from jurisdictions where the person accepting the order is not appropriately registered.

7 2. Merrill Lynch further undertakes and agrees to file with the Securities Division of
8 the Washington State Department of Financial Institutions, within sixty days of the date of this
9 Order, a report describing Merrill Lynch's improvements in its ability to monitor the identity and
10 registration status of each person who accepts a client order entered on Merrill Lynch's trading
11 system.
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13 3. For the period from the date of this Order through December 31, 2010, Merrill
14 Lynch further undertakes and agrees to notify the Securities Division of the Washington State
15 Department of Financial Institutions if it finds that any person associated with Merrill Lynch
16 accepts a client order in the State of Washington without being registered, or exempt from
17 registration, with the Securities Division of the Washington State Department of Financial
18 Institutions as an agent of Merrill Lynch.
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20 **IV.**

21 **ORDER**

22 On the basis of the Findings of Fact, Conclusions of Law, and Merrill Lynch's consent to
23 the entry of this Order,
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1 IT IS HEREBY ORDERED:

2 1. This Order concludes the investigation by the Securities Division of the
3 Washington State Department of Financial Institutions and any other action that the Securities
4 Division of the Washington State Department of Financial Institutions could commence against
5 Merrill Lynch under applicable Washington State law on behalf of the State of Washington as it
6 relates to unregistered activity in the State of Washington by Merrill Lynch's CAs and Merrill
7 Lynch's supervision of CA registrations during the period from January 1, 2004 through the date of
8 this Order.

9 2. This Order is entered into solely for the purpose of resolving the referenced multi-
10 state investigation, and is not intended to be used for any other purpose. For any person or entity
11 not a party to the Order, this Order does not limit or create any private rights or remedies against
12 Merrill Lynch, limit or create liability of Merrill Lynch, or limit or create defenses of Merrill
13 Lynch to any claims.

14 3. Merrill Lynch shall cease and desist from violating the Securities Act of Washington
15 and shall comply with the Securities Act of Washington.

16 4. Within ten days after the entry of this Order, Merrill Lynch shall pay the sum of
17 four hundred ninety thousand, three hundred and twenty dollars (\$490,320.00) to the State of
18 Washington as a civil monetary penalty pursuant to RCW 21.20.110 and RCW 21.20.395, to be
19 deposited in the Securities Prosecution Fund, RCW 43.320.115.

20 5. Merrill Lynch shall pay up to a total of twenty six million, five hundred sixty three
21 thousand, ninety four dollars and fifty cents (\$26,563,094.50) in fines, penalties and any other
22 monetary sanctions among the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin
23 Islands pursuant to the calculations discussed with the multi-state working group.

1 6. However, if any state securities regulator determines not to accept Merrill
2 Lynch's settlement offer, the total amount of the payment to the State of Washington shall not be
3 affected, and shall remain at four hundred ninety thousand, three hundred and twenty dollars
4 (\$490,320.00).

5 7. Merrill Lynch is hereby ordered to comply with the Undertakings contained herein.

6 8. This Order is not intended by the Securities Division of the Washington State
7 Department of Financial Institutions to subject any Covered Person to any disqualifications
8 under the laws of the United States, any state, the District of Columbia, Puerto Rico, or the U.S.
9 Virgin Islands including, without limitation, any disqualification from relying upon the state or
10 federal registration exemptions or safe harbor provisions. "Covered Person," means Merrill
11 Lynch or any of its affiliates and their current or former officers, directors, employees, or other
12 persons that would otherwise be disqualified as a result of the Orders (as defined below).

13 9. This Order and the order of any other state in related proceedings against Merrill
14 Lynch (collectively, the "Orders") shall not disqualify any Covered Person from any business
15 that they otherwise are qualified, licensed or permitted to perform under applicable securities
16 laws of the State of Washington and any disqualifications from relying upon this state's
17 registration exemptions or safe harbor provisions that arise from the Orders are hereby waived.

18 10. This Order shall be binding upon Merrill Lynch and its successors and assigns as
19 well as to successors and assigns of relevant affiliates with respect to all conduct subject to the
20 provisions above and all future obligations, responsibilities, undertakings, commitments,
21 limitations, restrictions, events, and conditions.

22 Dated and Entered this 25th day of January, 2010.

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By: *Michael E. Stevenson*

MICHAEL E. STEVENSON
Securities Administrator

Approved by:

Suzanne Sarason

Suzanne Sarason
Chief of Enforcement

Presented by:

Bridgett Fisher

Bridgett Fisher
Enforcement Attorney

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2 **CONSENT TO ENTRY OF ADMINISTRATIVE ORDER BY MERRILL LYNCH**

3 Merrill Lynch hereby acknowledges that it has been served with a copy of this Consent
4 Order ("Order"), has read the foregoing Order, is aware of its right to a hearing and appeal in this
5 matter, and has waived the same.

6 Merrill Lynch admits the jurisdiction of the Securities Division of the Washington State
7 Department of Financial Institutions, neither admits nor denies the Findings of Fact and
8 Conclusions of Law contained in this Order, and consents to entry of this Order by the Securities
9 Division of the Washington State Department of Financial Institutions as settlement of the issues
10 contained in this Order.

11 Merrill Lynch agrees that it shall not claim, assert, or apply for a tax deduction or tax
12 credit with regard to any state, federal or local tax for any administrative monetary penalty that
13 Merrill Lynch shall pay pursuant to this Order.

14 Merrill Lynch states that no promise of any kind or nature whatsoever was made to it to
15 induce it to enter into this Order and that it has entered into this Order voluntarily.

16 David Futterman represents that he is an Associate General Counsel and, as such, has been
17 authorized to enter into this Order for and on behalf of Merrill Lynch.

18 Dated this 5 day of January, 2010.

19 MERRILL LYNCH, PIERCE, FENNER & SMITH
20 INCORPORATED
21 By: /s/ David Futterman
22 David Futterman
23 Title: Associate General Counsel

24 STATE OF NEW YORK)

1)SS.:
2 COUNTY OF NEW YORK)

3 I certify that David Futterman personally known to me, appeared before me this day and
4 acknowledged the due execution of the foregoing instrument.

5 Witness my hand and official seal, this the 5 day of January, 2010.
6 (Official Seal)

7 _____/s/ Marianne Bretton-Granatoor

8 Notary Public

9 My Commission Expires: 2010