

**COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE SECRETARY OF THE COMMONWEALTH
SECURITIES DIVISION
ONE ASHBURTON PLACE, ROOM 1701
BOSTON, MASSACHUSETTS 02108**

IN THE MATTER OF:)))))
)))))
MERRILL LYNCH, PIERCE, FENNER &)))))
SMITH INCORPORATED)))))
)))))

CONSENT ORDER
Docket No. E-2014-0002

I. INTRODUCTION

This Consent Order (“Order”) is entered into by the Massachusetts Securities Division (“Division”) and Merrill Lynch, Pierce, Fenner & Smith Incorporated (hereinafter “Merrill Lynch”) arising out of an investigation initiated by the Division on January 14, 2014. On March 22, 2015, Merrill Lynch submitted an Offer of Settlement (“Offer”) to the Division for the purpose of disposing the allegations set forth in the Offer. Merrill Lynch neither admits nor denies the Allegations of Fact as set forth in Section VI or the Violations of Law set out in Section VII herein, and consents solely for the purpose of these proceedings to the entry of this Order by the Division, consistent with the language and terms of the Offer, settling the claims brought hereby with prejudice.

II. JURISDICTION AND AUTHORITY

1. The Massachusetts Securities Division is a division of the Office of the Secretary of the Commonwealth with jurisdiction over matters relating to securities, as provided for by the Act. The Act authorizes the Division to regulate: 1) the offers, sales, and purchases of securities; 2) those persons engaged in the business of effecting transactions in securities

for the account of others or for their own account; and 3) those persons transacting business as broker-dealers within the Commonwealth.

2. The Division instituted this action pursuant to the enforcement authority conferred upon it by Mass. Gen. Laws ch. 110A § 407A of the Act and Mass. Gen. Laws ch. 30A, wherein the Division has the authority to conduct an adjudicatory proceeding to enforce the provisions of the Act and all Regulations and rules promulgated thereunder.

3. The proceeding was brought in accordance with Mass. Gen. Laws. ch. 110A §§ 204 and 407A of the Act and its Regulations. Specifically, the acts and practices constituting violations occurred while Respondent was registered in the Commonwealth as a broker-dealer.

III. RELEVANT TIME PERIOD

4. Except as otherwise expressly stated, the conduct described herein occurred between 2010 and the current date (the “Relevant Time Period”).

IV. RESPONDENT

5. Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch” or the “Respondent”) is a Delaware corporation currently assigned Central Registration Depository (“CRD”) number 7691. Merrill Lynch was formed on November 10, 1958, and has been registered in Massachusetts as a broker-dealer since July 31, 1981. Merrill Lynch has a principal place of business at One Bryant Park, New York, NY 10036.

V. SUMMARY

6. During the Relevant Time Period, Merrill Lynch’s Optimal Practice Model team (hereinafter “OPM Team”) presented various versions of an OPM Tools Overview Presentation (hereinafter the “OPM Tools Presentation”) to selected financial advisors.

7. The OPM Tools Presentation was part of a larger presentation developed by the OPM Team (the “OPM Presentation”). The OPM Presentation discussed best practices for financial advisors and included a section titled “Delivering a Higher Standard of Care,” which discussed, among other things, Respondents’ suitability obligations and fiduciary standards.

8. The OPM Tools Presentation of the larger OPM Presentation included a section showing hypothetical examples, which could later be customized by financial advisors, and that demonstrated ways in which they could increase their business and manage services provided to their clients.

9. Merrill Lynch’s policies and procedures required that its Compliance department provide prior approval of internal-use materials. The OPM Team presented the OPM Tools Presentation two times in Boston prior to any Merrill Lynch Compliance approval.

VI. ALLEGATIONS OF FACT

A. The Creation of the Optimal Practice Model and the OPM Tools Presentation

10. Beginning in 2010, Merrill Lynch created an OPM Team focusing on supporting Merrill Lynch financial advisors.

11. As described by Merrill Lynch:

The OPM Team was created to develop a framework to assist Financial Advisors (“FAs”) better organize their practices to deliver more uniform and consistent customer service across [Merrill Lynch]. . . .

. . . The OPM model is intended to assist FAs to, among other things, *better serve their clients, position their practices to meet fiduciary requirements* as applicable, develop business opportunities, and administer a more efficient team/practice. (emphasis added)

12. The OPM Team was part of the line of business at Merrill Lynch, and among other things created internal presentations for use with financial advisors. Any materials created

by the OPM Team for use with financial advisors typically would be subject to review by a separate Merrill Lynch Compliance team, and then approved by a registered principal before being presented to financial advisors.

13. The OPM Team, including an OPM Team employee (hereinafter “OPM Team Employee”), began creating the OPM Tools Presentation in approximately October 2012.

B. The OPM Team’s Presentation at the Boston OPM Forum

14. In late 2012, Merrill Lynch invited a selected group of financial advisors to participate in the New England Optimal Practice Model Field and Forum program to be held in Boston, Massachusetts on January 14-17, 2013 (hereinafter the “Boston Forum”).

15. The invitation prepared by Merrill Lynch stated, “[t]his forum will provide you with a *unique opportunity* to identify ways to better serve your clients, *position your practice to help meet fiduciary requirements* and *grow your business* through the Optimal Business Model.” (emphasis added)

16. Merrill Lynch’s records reflect that 303 individuals attended the Boston Forum. Among the attendees were financial advisors, Merrill Lynch executives, and other Merrill Lynch directors and senior vice presidents.

17. According to testimony, the OPM Team Employee presented the OPM Tools Presentation in Boston (hereinafter the “Boston OPM Tools Presentation”) two times as part of the Boston Forum.

C. The Boston OPM Tools Presentation Was Presented at the Boston Forum Before A Version of the Presentation was Approved by Compliance.

18. The OPM Team presented the OPM Tools Presentation in Boston before submitting it to Merrill Lynch’s Global Wealth Investment Management Compliance training team (hereinafter “Merrill Lynch Internal-Use Compliance Team”), the designated

group within Merrill Lynch Compliance that reviewed internal-use materials. As a result, Merrill Lynch Compliance did not review or approve the Boston OPM Tools Presentation prior to its presentation in January 2013.

19. According to records produced by Merrill Lynch, the OPM Team did not submit any version of the OPM Tools Presentation for Compliance review until February 4, 2013.

20. According to records produced by Merrill Lynch, the Merrill Lynch Internal-Use Compliance Team did not approve any version of the OPM Tools Presentation until February 7, 2013, nearly a month after the first Boston OPM Tools Presentation. Approval by a registered principal was on February 15, 2013.

D. Merrill Lynch Did Not Reasonably Supervise the OPM Team’s Use of the Boston OPM Tools Presentation Pursuant to its Internal Policies and Procedures

1. The OPM Team Employee’s Testimony Concerning Internal-Use Document Procedures

21. OPM Team Employee, who presented the Boston OPM Tools Presentation, testified to OPM Team Employee’s understanding that Merrill Lynch Compliance was required to review the OPM Tools Presentation prior to its use through a “R5 process.”

22. Despite the OPM Team Employee’s erroneous reference to Merrill Lynch’s “R5 process,” Merrill Lynch described its “R3 process” as:

The “R3 process” (n/k/a the Marketing Review Center (“MRC”)) is the term formerly used for Merrill Lynch’s advertising and sales practice related internal communications review process. Certain content is submitted by marketing and line of business employees for review and approval by Compliance and designated Registered Principals through the MRC. Each Piece is automatically assigned a tracking number and after the content is reviewed by Compliance it is routed through the MRC system for the final review by the applicable registered principal. *Once approved, a piece may be used for a period up to 12 months if no material changes are made to the piece.* (emphasis added)

23. When asked about the Compliance review process for the Boston OPM Tools Presentation, the OPM Team Employee testified that OPM Team Employee assumed, but could not verify that the Boston OPM Tools presentation had been subject to prior review and approval by the Merrill Lynch Internal-Use Compliance Team. When questioned regarding Compliance review of internal-use materials, the OPM Team Employee testified, “I know I would have turned it in [to my supervisor], but I don’t recall specifically for the Boston event the process that occurred.”

24. When asked when he was made aware of how the Boston OPM Tools Presentation was approved, the OPM Team Employee explained, “I guess I would have assumed that the presentation made it into the overall deck and the conference and my manager had signed off on it that it had been approved.”

2. The Boston OPM Tools Presentation Did Not Include Disclosure Slides In the Manner Later Required by the Internal-Use Compliance Team

25. Pursuant to Merrill Lynch policies and procedures the Merrill Lynch Internal-Use Compliance Team is required to review all materials designated for internal-use, including, but not limited to, presentations, newsletters, FAQs, and best practices, to ensure they are not misleading, deceptive, or manipulative.

26. A member of the Merrill Lynch Internal-Use Compliance Team (hereinafter “Merrill Lynch Compliance Specialist”) testified that Merrill Lynch line of business personnel could not distribute internal-use materials prior to Merrill Lynch Internal-Use Compliance Team approval.

27. The Merrill Lynch Compliance Specialist testified that internal-use documents on which Compliance has commented also must be approved by a registered principal of the submitting business unit. As testified by the Merrill Lynch Compliance Specialist, “I send

it to the submitter and it's their responsibility to get it to the registered principal because they normally have to make whatever changes I've asked for before they send it to the registered principal if changes were requested.”

28. The Merrill Lynch Compliance Specialist testified that the Internal-Use Compliance Team does not administer a process to confirm that the submitting business unit implements changes directed by the Internal-Use Compliance Team.

29. According to testimony, the Merrill Lynch Compliance Specialist reviewed a version of the OPM Tools Presentation on February 7, 2013.

30. According to Merrill Lynch records, the Merrill Lynch Compliance Specialist recorded four comments on the 36-page OPM Tools Presentation over a span of approximately two hours.

31. Of the Merrill Lynch Compliance Specialist's four comments on the OPM Tools Presentation, two were not compliance related. One notation indicated a highlighted comment, and the other pointed out a grammatical error.

32. The Merrill Lynch Compliance Specialist's two substantive comments directed the inclusion of certain disclosures.

33. The Merrill Lynch Compliance Specialist's first substantive compliance comment read, “[n]eed to include the attached disclosure slide after this title slide” (hereinafter the “Required Disclosure Slide”).

34. The Required Disclosure Slide was not included in the Boston OPM Tools Presentation, as the Boston OPM Tools Presentation was not previously reviewed by Merrill Lynch Compliance. The Required Disclosure Slide was included at the beginning

of the Boston Forum, however, which the Merrill Lynch Compliance Specialist testified was adequate.

35. The Merrill Lynch Compliance Specialist's second substantive compliance comment was also absent from the Boston OPM Tools Presentation.

36. The Merrill Lynch Compliance Specialist's second substantive compliance comment read, "[t]his disclosure must be at the bottom of each slide." (hereinafter the "Internal-Use Disclosure").

37. The Internal-Use Disclosure, as mandated by the Merrill Lynch Compliance Specialist, read "For Internal Use Only – Not For Distribution To the Public." The disclosure on the Boston OPM Tools Presentation said "For Internal Use Only."

38. Failure of the OPM Team to submit the OPM Tools Presentation for Compliance approval prior to the Boston OPM Presentation contributed to a risk that the presentation may not be fair and balanced as required by internal policy, or could be misinterpreted by financial advisors who attended the Boston OPM Presentation.

3. The Boston OPM Tools Presentation Differed From the Version Later Submitted to the Merrill Lynch Internal-Use Compliance Team

39. The version of the OPM Tools Presentation submitted to Merrill Lynch Compliance for review included different content than that previously employed during the Boston OPM Tools Presentation

40. First, unlike the version of the OPM Tools Presentation submitted to Merrill Lynch Compliance for review, which contained the title "Optimal Practice Model: Tools," the OPM Team titled the Boston OPM Tools Presentation "OPM Tools Overview, Optimal Book Management Tool and Business Calculator."

41. Second, the version of the OPM Tools Presentation submitted for Compliance approval did not include slides presented during the Boston OPM Tools Presentation, included slides that were not part of the Boston presentation, and included slides with content different from the Boston Forum.

42. The Boston OPM Tools Presentation, and the version later submitted by the OPM Team to Compliance, each contained a “Business Calculator” section, comprised of five slides that illustrated different manners in which financial advisors could double their business revenue in five years (hereinafter the “Business Calculator Section”).

43. The Business Calculator Section included, among other things, an example that employed specific transactional assumptions to illustrate the manner in which advisors could prospectively increase business revenue through, among other things, transfer of existing customer assets from commission-based brokerage accounts, to fiduciary, fee-based alternatives. The underlying Business Calculator itself, from which the examples were generated, was an automated tool available to Merrill Lynch financial advisors through which they could vary a range of assumptions to generate potential future business revenue projections.

44. The Business Calculator Section of the Boston OPM Tools Presentation contained a heading that stated, “Steps Required to Double Production.”

45. In the Business Calculator Section of the OPM Tools Presentation, which the Merrill Lynch Compliance Specialist later reviewed, the OPM Team changed the heading to “Pre-filled Numbers (PMAC).”

46. The Business Calculator Section of the Boston OPM Tools Presentation used the terms “doubling your business,” “double production,” or “doubling production” twelve times.

47. The Business Calculator Section of the OPM Tools Presentation, which was later reviewed by the Merrill Lynch Compliance Specialist, used the terms “doubling your business,” “double production,” or “doubling production” eight times.

48. The version of the OPM Tools Presentation submitted for approval to the Merrill Lynch Internal-Use Compliance Team included the same Business Calculator example that was presented as part of the earlier Boston OPM Tools Presentation. The Merrill Lynch Internal-Use Compliance Team did not recommend revisions to the Business Calculator Section.

49. The Business Calculator Section of the OPM Tools Presentation itself did not include language regarding client suitability or the fiduciary requirements of Merrill Lynch financial advisors.

50. A separate section of the broader OPM Presentation, which was part of the version presented at the Boston Forum, was titled “Delivering a Higher Standard of Care,” and did, however, discuss client suitability and fiduciary requirements. Merrill Lynch’s policies and procedures and its financial advisor training programs also address client suitability and fiduciary requirements. The OPM Presentation, including the version presented at the Boston Forum, also states that “Nothing discussed or suggested in these materials should be construed as permission to supersede or circumvent any [Merrill Lynch] policies, procedures, rules and guidelines.”

51. The Division requested information regarding Massachusetts customer complaints regarding fees during the Relevant Time Period. Merrill Lynch provided information indicating that there were no customer complaints concerning fees arising from or related to the OPM Tools Presentation. The Division is not aware of customer impacts arising from or related to the OPM Tools Presentation.

E. Conclusion

52. The Boston OPM Tools Presentation was not approved by Merrill Lynch Compliance prior to the Boston Forum, which contributed to the risk that its contents may be misinterpreted by advisors who attended the Boston Forum, were they to interpret it without considering the broader OPM Presentation or other policies, procedures and training.

VII. VIOLATIONS OF LAW

Count I – Violations of Mass. Gen. Laws ch. 110A § 204(a)(2)(B)

53. The Division’s Regulations at 950 CMR 12.204(1)(a) require broker-dealers to observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business.

54. Section 204 of the Act provides, in pertinent part:

(a) The secretary may by order impose an administrative fine or censure or deny, suspend, or revoke any registration or take any other appropriate action if he finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:—

(B) has willfully violated or willfully failed to comply with any provision of this chapter or a predecessor chapter or any rule or order under this chapter or a predecessor

55. The Division herein re-alleges and restates the allegations of fact set forth in paragraphs 1 through 52 above. By failing to comply with its internal policies and procedures regarding prior approval of internal-use material, Merrill Lynch failed to observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business as required by 950 CMR 12.204(1)(a), resulting in a violation of Section 204(a)(2)(B) of the Act.

Count II – Violations of Mass. Gen. Laws ch. 110A § 204(a)(2)(J)

56. Section 204 of the Act provides, in pertinent part:

(a) The secretary may by order impose an administrative fine or censure or deny, suspend, or revoke any registration or take any other appropriate action if he finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:—

(J) has failed reasonably to supervise agents, investment adviser representatives or other employees to assure compliance with this chapter[.]

57. The Division herein re-alleges and restates the allegations of fact set forth in paragraphs 1 through 52 above.

58. For the reasons described above, Merrill Lynch did not reasonably supervise its OPM Team in connection with the Boston Forum, which constitutes a violation of Mass. Gen. Laws ch. 110A § 204(a)(2)(J).

VIII. ORDER

Merrill Lynch consents to the entry of this Order,

IT IS HEREBY ORDERED:

Merrill Lynch, Pierce, Fenner & Smith Incorporated in full and final settlement of these matters, and solely for the purpose of resolution of the allegations of fact and violations of law resulting from the Division's investigation neither admits nor denies the Allegations of Fact as set forth in Section VI or the Violations of Law set out in Section VII herein, makes the following representations, and agrees to the undertakings herein as part of the Order:

- A. Respondent agrees to permanently cease and desist from conduct in violation of the Act and Regulations in the Commonwealth;
- B. Respondent agrees to be censured by the Division;
- C. Respondent agrees to pay an administrative fine within twenty (20) calendar days following the date of this Order executed pursuant to the Offer is entered into the docket in the amount of \$2,500,000.00 (USD). Payment shall be: (1) made by United States postal money order, certified check, bank cashier's check, bank money order, or wire; (2) made payable to the Commonwealth of Massachusetts; (3) either hand-delivered, mailed to One Ashburton Place, Room 1701, Boston, Massachusetts 02108; or wired per Division instructions; and (4) submitted under cover letter or other documentation that identifies payment by Respondent and the docket number of the proceeding;
- D. Within one-hundred twenty (120) days from the date of this Order, the Chief Compliance Officer of Respondent shall provide a report to the Division ("Report"):

- a. Certifying that Respondent conducted a review of Merrill Lynch Wealth Management policies and procedures for the review and approval of internal-use materials; and,
 - b. Identifying the changes or enhancements to Merrill Lynch Wealth Management practices, policies, and procedures that have been, or will be made as a result of the review described in Paragraph D. a. above. In the event that Respondent has already implemented changes or enhancements to its policies and procedures for the review and approval of internal-use materials with respect to the Relevant Period, Respondent shall provide such information to the Division in the Report. The foregoing paragraphs obligate Respondent to review and report as stated, and do not obligate Respondent to undertake particular changes or enhancements beyond those identified in the review described above.
- E. At the request of the Respondent, the Division's staff may extend, for good cause shown, any of the procedural dates set forth above;
- Respondent agrees that it shall not seek or accept, directly or indirectly, reimbursement or indemnification, including, but not limited to, any payments made pursuant to any insurance policy, with regard to all amounts that Respondent shall pay pursuant to the Order;
- G. Respondent and its designee agrees that it shall not claim, assert, or apply for a tax deduction or tax credit with regard to any state, federal or local tax for any amounts that Respondent shall pay pursuant to the Order, unless otherwise required by law;

H. Respondent agrees that, upon issuance of this Order consistent with the Offer, if Respondent fails to comply with any of the terms set forth in the Order, the Enforcement Section may take appropriate action pursuant to Sections 101, 204, 407A and 408 of the Act. Additionally, Respondent agrees that, after a fair hearing and the issuance of an appropriate order finding that Respondent has not complied with the Order, the Enforcement Section may move to have the Order declared null and void, in whole or in part, and re-institute the administrative proceeding and associated investigation that had been brought against Respondent.


IX. DISQUALIFICATIONS

This Order waives any disqualification in the Massachusetts laws, or rules or regulations thereunder, including any disqualifications from relying upon the registration exemptions or safe harbor provisions to which Merrill Lynch or any of its affiliates may be subject. This Order is not intended to subject Merrill Lynch or its affiliates to any disqualifications contained in the federal securities laws, the rules and regulations thereunder, the rules and regulations of self-regulatory organizations or various states' and U.S. Territories' securities laws, including, without limitation, any disqualifications from relying upon registration exemptions or safe harbor provisions. In addition, this Order is not intended to form the basis for any such disqualifications.

Except in an action by the Division to enforce the obligations of this Order, any acts performed or documents executed in further of this Order: (a) may not be deemed or used as an admission of, or evidence of, the validity of any alleged wrongdoing, liability or lack of any wrongdoing or liability; or (b) may not be deemed or used as an admission of, or evidence of any such alleged fault or omission of Merrill Lynch in any civil, criminal,

arbitration or administrative proceeding in any court, administrative agency or other tribunal.

**WILLIAM FRANCIS GALVIN
SECRETARY OF THE COMMONWEALTH**

By: 
Bryan J. Lantagne
Director
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Dated: March 23, 2015