UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 83408 / June 12, 2018

ADMINISTRATIVE PROCEEDING
File No. 3-18538

In the Matter of **MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") against Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill," "Firm," or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement of Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Offer"), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of the Order Instituting Administrative Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of the Order and the Offer, the Commission makes the findings set forth below.[1]

Summary

These proceedings arise out of Merrill's failure reasonably to supervise Firm personnel so as to prevent and detect violations of antifraud provisions of the federal securities laws in connection with Merrill's secondary market purchases and sales of certain bonds known as non-agency residential mortgage-backed securities ("non-agency RMBS").[2] The trading that is the subject of the Order took place from June 2009 through December 2012 ("Relevant Period") and involved intra-day purchases and sales of non-agency RMBS from and to Merrill customers. During the Relevant Period, Merrill personnel who purchased and sold non-agency RMBS made false or misleading statements, directly and indirectly, to Merrill customers and/or charged Merrill customers undisclosed excessive mark-ups.[3] By engaging in this conduct, Merrill personnel acted knowingly or recklessly.

Merrill had both policies that prohibited false or misleading statements and the means to monitor communications for such statements. The Firm, however, failed reasonably to implement procedures to monitor for the types of false or misleading statements that are the subject of this Order. Merrill also had policies that prohibited excessive mark-ups and procedures to monitor for excessive mark-ups on transactions in non-agency RMBS, but the policies and procedures were not reasonably designed and implemented. Due to these deficiencies, Merrill failed reasonably to perform a meaningful review of potentially excessive mark-ups on certain non-agency RMBS transactions, including transactions that are the subject of the Order.

Under the circumstances described above, Merrill failed reasonably to supervise for violations of antifraud provisions of the federal securities laws within the meaning of section 15(b)(4)(E) of the Exchange Act.

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[1] The findings herein are made pursuant to the Offer and are not binding on any other person or entity in this or any other proceeding.

[2] Non-agency RMBS are residential mortgage-backed securities that are sponsored by private entities and not government-sponsored entities.

[3] A mark-up is the difference between the price charged to the customer for a security and the prevailing market price for that security. *E.g., Grandon v. Merrill Lynch & Co., Inc.*, 147 F. 3d 184, 189 (2d Cir. 1998). In the instant matter, the prevailing market price for the security involved in each of the transactions was Merrill's contemporaneous cost for the security. *See id.*

Respondent

1. Merrill Lynch, Pierce, Fenner & Smith Incorporated is a Delaware corporation with its principal place of business in New York, New York. It is and, at all relevant times, was a subsidiary of Bank of America Corporation and a broker-dealer and an investment adviser registered with the Commission.[4]

Background

2. During the Relevant Period, Merrill was a broker-dealer engaged in secondary market trading of non-agency RMBS. In trading non-agency RMBS, Merrill purchased the securities for its own account and then sold them from its own account to its customers. All of the customers with whom Merrill traded non-agency RMBS in the instant matter were institutions. Merrill did not charge a commission on the trades. The profit that the Firm made on any given transaction instead came from the difference between the price at which Merrill sold securities and the price at which it had purchased them. In many instances, the purchase and sale took place within minutes or hours and involved little or no risk to Merrill. The false or misleading statements led customers to accept less, or pay more, for securities than they otherwise might have accepted or paid.

3. Also during the Relevant Period, Merrill had policies that prohibited its personnel from making false or misleading statements and from charging unreasonable mark-ups.

False or Misleading Statements to Merrill Customers

4. The false or misleading statements and undisclosed excessive mark-ups that are the subject of the Order took place in the context of certain intra-day trades of non-agency RMBS. The excessive mark-ups resulted in unfair prices to customers as well as unreasonable profits to Merrill.

5. During the Relevant Period, Merrill personnel, directly and indirectly, made false or misleading statements to Merrill customers in both the purchase and the sale of non-agency RMBS.[5] Among other things, they made false or misleading statements about the price at which the securities could be bought or sold; the amount of profit that Merrill would be making on trades;

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[4] During some of the Relevant Period, Bank of America Corporation had another broker-dealer and investment adviser subsidiary, Banc of America Securities LLC, through which some of the subject transactions may have been conducted. Banc of America Securities LLC merged with Merrill and terminated its registration as an investment adviser on or about March 23, 2010, and as a broker-dealer on or about November 1, 2010. In describing the conduct at issue in this Order, both broker-dealer and investment adviser subsidiaries are referred to as Merrill.

[5] In some instances, Merrill traders made false or misleading statements directly to customers. In other instances, traders made false or misleading statements to Merrill salespersons, and the salespersons then communicated the false or misleading information to customers. In certain instances, Merrill salespersons made their own false or misleading statements to customers.

and, after Merrill had agreed to purchase securities from a seller, whether Merrill still was in active negotiations with the seller.

6. In one instance, for example, a Merrill trader received an order from a selling customer to sell approximately $31,534,000 original face amount of a bond at a price of 75-00. The trader communicated that information about the order to a Merrill salesperson, and the salesperson communicated the information to a potential buying customer. The buyer and the salesperson then engaged in negotiations during which the buyer expressed interest in purchasing only $15,000,000 original face amount of the bond. The salesperson said that that would be acceptable, and the buyer eventually bid 74-00 for $15,000,000 of the bond. The salesperson communicated information about the bid to the trader. The trader then contacted a different potential seller about the bid. The trader explained that he was contacting this seller rather than the initial seller because the trader considered the initial seller's reserve, or minimum, price to be "unrealistic." During his negotiations with the second seller, the trader made false or misleading statements, including

a. misrepresenting that Merrill had received a bid for $15,000,000 of the bond at a price of 68-00 rather than the 74-00 price that the buyer had bid;

b. misrepresenting that the trader had pushed the buyer "pretty hard" to get the buyer to a bid in the high 60s when, in reality, the salesperson had sought a price of 75-00 from the buyer and had received a bid of 74-00;[6] and

c. misrepresenting that the trader had received a 69-00 bid from the buyer, when, in fact, the buyer had bid 74-00, not 69-00, for the bond.

There is no evidence that either the trader or the salesperson told the buyer that the trader considered the 75-00 price that the first seller had offered to be unrealistic or that, as a result, the trader had decided to try to buy the bond from the second seller at a lower price. Merrill ultimately purchased $29,966,000 of the bond from the second seller at 70-00 and sold $15,966,000 of the bond to the buyer at 74-00. Merrill made profits of approximately $386,042 on this intra-day transaction.

7. In another instance, a different Merrill trader learned of the planned sale of $30,000,000 original face amount of a bond. Together with a Merrill salesperson, the trader contacted a potential buying customer to find out whether the buyer was interested in purchasing the bond. Following that contact, Merrill submitted a bid price of 41-00 for the bond to the seller. After the submission of that bid, the trader asked the buyer what the buyer wanted to "show" for the bond, i.e., the price that the buyer wanted shown to the seller. The buyer gave the trader a price of 41.626 ("41-20+") to be shown. Approximately fifty-three seconds later, the trader told the

[6] The trader did not have direct communications with the buyer; rather, the salesperson had those communications.

buyer that the bond would be bought at the 41-20+ price. The trader further told the buyer that the "cover" price for the bond, which is the second highest bid for the bond, had been 41-16. In having these communications with the buyer, the trader made false or misleading statements, including

a. indicating that the buyer's 41-20+ bid would be shown to the seller, when, in fact, that price would not have been shown to the seller because the seller sold the bond to Merrill at the lower price of 41-00 and

b. representing that the "cover" bid had been 41-16, when, in fact, that would not have been the second highest bid because the seller sold Merrill the bond for a price lower than the purported 41-16 "cover."

After learning of the 41-20+ purchase price, the buyer asked the trader whether the buyer could pay Merrill 41-28 for the bond, and the trader agreed. The 41-28 price to which the buyer and the trader agreed was approximately eight ticks higher than the 41-20+ price that the buyer understood had been submitted to the seller. If Merrill had purchased the bond for the 41-20+ price, those eight ticks would have served as Merrill's compensation for the transaction. In reality, however, Merrill's compensation was twenty-eight ticks, which represented profits to Merrill of approximately $104,069 on this intra-day transaction.[7]

8. From the transactions in which Merrill personnel, directly or indirectly, made false or misleading statements to Merrill customers, Merrill made profits of at least $2,311,392.

9. The information about which Merrill personnel made false or misleading statements was important to the investment decisions of Merrill customers. In making those false or misleading statements, the Merrill personnel acted knowingly or recklessly. Under these circumstances, Merrill personnel violated antifraud provisions of the federal securities laws.

[7] Prior to the time when the buyer told the trader to "show" the 41-20+ bid, the trader had received an expression of interest in the bond from the buyer. The trader then submitted a 41-00 bid to the seller and, notwithstanding that the buyer had not submitted a bid, represented that the 41-00 bid was a customer bid. The buyer thereafter asked the trader to show the 41-20+ bid. Although the records do not reflect whether the seller accepted Merrill's 41-00 bid shortly before or shortly after the buyer submitted its 41-20+ bid, this transaction appeared to involve little, if any, risk to Merrill.

Excessive Mark-Ups Charged to Merrill Customers

10. At times during the Relevant Period, Merrill traders also charged customers mark-ups that bore no reasonable relationship to the prevailing market prices.[8]

11. In one instance, Merrill purchased $15,621,000 original face amount of a bond at a price of 1.86. Later that day, a trader, through a salesperson, sold the bond to a Merrill customer at a price of 4.00. The 4.00 price represented an intra-day mark-up of 115.1% and profits to Merrill of approximately $334,289.

12. In another instance, Merrill purchased $8,278,000 original face amount of a bond at a price of 34.6125. Later that day, a different trader, through another salesperson, sold the bond to a Merrill customer at a price of 40.00. The 40.00 price represented an intra-day mark-up of approximately 15.6% and profits to Merrill of approximately $388,182.

13. Excluding four transactions that also included false or misleading statements, Merrill made at least $6,318,914 in unreasonable profits from transactions in which the Firm charged undisclosed excessive mark-ups.

14. Merrill traders did not disclose the excessive mark-ups charged to Merrill customers.[9] Information about those mark-ups would have been important to the investment decisions of those customers. By failing to disclose the excessive mark-ups, Merrill traders acted knowingly or recklessly. Under these circumstances, their conduct violated antifraud provisions of the federal securities laws.

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[8] Based on trade data furnished by Merrill, the average mark-up charged on Merrill intra-day non-agency RMBS transactions during the Relevant Period was less than 1.4%. This average is less than the average reflected in the data in the Trade Reporting and Compliance Engine ("TRACE") for intra-day non-agency RMBS trades that the Financial Industry Regulatory Authority developed and maintained. TRACE is a system through which broker-dealers report over-the-counter secondary market transactions in eligible fixed income securities. Trading in non-agency RMBS began to be reported in TRACE in May 2011.

[9] Under the "shingle theory," a broker-dealer "creates an implied duty to disclose excessive markups by 'hanging out its professional shingle.'" *Grandon*, 147 F.3d at 192 (quoting *Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017, 1034 (4th Cir. 1997) (quoting Commission reply brief)). When a broker-dealer, without disclosure, charges a customer a mark-up that results in a price that is not reasonably related to the prevailing market price, the broker-dealer commits fraud. *Id.* at 190 (quoting *Bank of Lexington & Trust Co .v. Vining Sparks Securities, Inc.*, 959 F. 2d 606, 613 (6th Cir. 1992)). The examples of excessive mark-ups in paragraphs 11. and 12. above of the Order are not meant to suggest that mark-ups below the levels reflected in those examples could not be excessive.

Merrill's Failure to Supervise

15. During the Relevant Period, Merrill had policies that prohibited Firm personnel from making false or misleading statements to Merrill customers. Those policies, for example, identified "Prohibited Business Practices," which included "Misrepresentation[s]." As set forth in Merrill's policies, "[m]isrepresentation of material facts includes ambiguous statements, silence, concealment or the failure to act where a duty to act exists. Misrepresentation also applies to false statements made regarding services or products offered by BAML [Merrill], . . . or the method of compensation for services." In addition to the policies prohibiting false or misleading statements, Merrill had policies that prohibited the charging of unreasonable mark-ups.

16. Merrill had procedures that provided for the review of electronic communications with third parties, e.g. Merrill customers, for violations of Firm policies. During the Relevant Period, there was a group of six to nine individuals at any given time responsible for reviewing communications of personnel in seventy to eighty groups at Merrill, including the traders and salespersons who purchased and sold non-agency RMBS. There were approximately 10,000 people in those seventy to eighty groups.

17. The reviewing personnel conducted a daily review of communications approximately one to two days after the communications took place. The communications reviewed were a sample of approximately one percent of each of the seventy to eighty groups' communications. There was no requirement for these communications to be reviewed for the types of false or misleading statements at issue in this Order. The reviews themselves were limited to determining whether each individual communication reflected a potential violation of Firm policy rather than determining whether a communication, when considered together with other communications related to the same transaction, reflected a potential false or misleading statement related to that transaction. Merrill's surveillance systems never detected any of the false or misleading statements at issue in this Order.

18. Under these circumstances, Merrill failed reasonably to implement procedures for the review of communications that reasonably would be expected to prevent and detect false or misleading statements to Merrill customers. During the Relevant Period, the market for non-agency RMBS was opaque because there was no public mechanism for capturing bid and offer prices. Due in part to the opacity of the market, there was a heightened risk that traders or salespersons might make false or misleading statements about pricing and other information to customers. In such circumstances, Merrill needed to implement procedures reasonably designed to detect such false or misleading statements in order to address the risks arising from its business.

19. With respect to mark-ups, although Merrill had policies that prohibited charging excessive mark-ups, the policies were not reasonably designed to prevent and detect violations by the traders and salespersons who purchased and sold non-agency RMBS. Merrill's policies provided that the Commission and the Financial Industry Regulatory Authority ("FINRA") "take the position that mark-ups on debt securities generally should be less than 5% and should be lower than mark-ups on an equivalent dollar amount of equity securities. Depending upon the circumstances, mark-ups of less than 5% may be considered unfair and unreasonable." The

policies further provided that "[t]raders and Account Representatives are prohibited from charging customers a mark-up, mark-down, or commission that is unfair and/or unreasonable." The policies then referenced FINRA mark-up rules and interpretive materials that provided an exemption from FINRA mark-up rules for transactions in non-investment grade debt securities, such as non-agency RMBS, sold to qualified institutional buyers.[10] The policies, however, further provided that, regardless of whether transactions were exempt from the FINRA's mark-up rules, "consideration must be given to the SEC's anti-fraud rules for mark-ups above 10%." Requiring such consideration only for mark-ups above ten percent fostered an incorrect belief held by some traders and other Merrill personnel that mark-ups up to ten percent on transactions exempt from FINRA mark-up rules were per se reasonable and did not require an assessment of whether a mark-up was reasonably related to the prevailing market price.

20. Merrill's procedures for monitoring for excessive mark-ups on transactions in non-agency RMBS also were flawed. During the Relevant Period, Merrill used an electronic monitoring system that provided alerts for non-agency RMBS transactions with mark-ups above either 0.25% or 1.00%, depending on the product. If an alert was triggered, the Merrill compliance department was to review the transaction and determine whether the mark-up was excessive. Resolution of an alert included escalation of the relevant transaction to management personnel in the Compliance department and/or supervisory personnel in the line-of-business.

21. Notwithstanding certain mark-ups that were significantly in excess of industry and Merrill averages, Merrill did not perform a reasonable review of the trades for which alerts were generated to determine whether the mark-ups were excessive, and the firm did not reverse or cancel any of the non-agency RMBS transactions at issue in this Order. Merrill personnel, often working from a drop-down menu, used resolution codes such as "within the context of the market," "isolated incident," "odd lot trade," or "other" to explain many of the determinations made. In addition, for certain transactions, Merrill personnel simply referenced FINRA policy on transactions with qualified institutional buyers, described *supra* at note 10, but failed to consider compliance with antifraud provisions of the federal securities laws. Under these circumstances, Merrill failed reasonably to implement procedures to prevent and detect undisclosed excessive mark-ups.

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[10] As relevant to this matter, the FINRA had a policy that provided that a mark-up or mark-down to a customer of no more than five percent generally was fair ("five percent guidance"). NASD rule 2440 (June 13, 2008); IM-2440-1 (June 13, 2008); IM-2440-2 (July 5, 2007). Subject to certain criteria, however, the term "customer" did not include a qualified institutional buyer ("QIB"), as defined in Securities Act of 1933 rule 144A, that was buying or selling a non-investment grade debt security. IM-2440-2(b)(9). Regardless of the applicability of the five percent guidance, the FINRA was explicit in stating that "[a] broker-dealer may also be liable for excessive mark-ups under the anti-fraud provisions of the Securities Act and the [Exchange] Act." *Mark-Ups on Debt Securities*, NASD Notice 07-28, 2007 WL 1668330, at *3 n.3 (June 5, 2007) (citations omitted). As such, even if a customer purchasing non-investment grade RMBS was a QIB—as were most, if not all, of the customers in the transactions that are the subject of this Order—the QIB provision in the FINRA mark-up and mark-down policies did not provide a justification for allowing excessive mark-ups under the antifraud provision of the federal securities laws.

22. The traders and salespersons who purchased and sold non-agency RMBS were subject to the supervision of Merrill. By failing to have procedures that reasonably would be expected to prevent and detect false or misleading statements, and by failing to have policies and procedures that reasonably would be expected to prevent and detect excessive mark-ups, Merrill, within the meaning of section 15(b)(4)(E) of the Exchange Act, failed reasonably to supervise with a view to preventing violations of antifraud provisions of the federal securities laws by Merrill traders and salespersons who purchased and sold non-agency RMBS.

Remedial Efforts Undertaken by Merrill

23. In determining to accept the offer, the Commission considered remedial steps that Merrill has undertaken.

24. With respect to false or misleading statements, Merrill, among other things, has

a. enhanced its policies prohibiting false or misleading statements,

b. enhanced its surveillance procedures for detecting false or misleading statements by adding search terms to aid in its reviews, creating an electronic communications monitoring tool that compiles communications related to a trade in which the mark-up exceeds a certain percentage,

c. required the RMBS desk supervisor periodically to review several days' worth of electronic communications of each RMBS desk employee for potential false or misleading statements, and

d. enhanced its training on the prohibition on false or misleading statements.

25. With respect to excessive mark-ups, Merrill, among other things, has

a. enhanced its policies prohibiting excessive mark-ups by, among other things, having policies specifically directed at mark-ups on securities that had been purchased as part of an auction of multiple securities,

b. enhanced its surveillance procedures for preventing excessive mark-ups by requiring surveillance employees to document and record the specific bases for the resolution of mark-up alerts and by establishing an independent review of all RMBS trades with mark-ups above 1.5%, and

c. enhanced its training on the prohibition of excessive mark-ups, including by reminding employees that mark-ups are subject to monitoring and surveillance by the firm.

Cooperation

26. Merrill agrees to cooperate fully with the Commission in any and all investigations, litigations, or other proceedings relating to or arising from the matters described in the Order. In connection with such cooperation, Merrill shall do the following:

a. produce, without service of a notice or subpoena, any and all non-privileged documents and other information requested by Commission staff;

b. use its best efforts to cause its officers, employees, and directors to be interviewed by Commission staff at such time as Commission staff may reasonably direct;

c. provide any certification or authentication of business records of the Firm as may be reasonably requested by Commission staff;

d. use its best efforts to cause its officers, employees, and directors to appear and testify without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by Commission staff; and

e. consistent with all lawful obligations, maintain in strict confidence communications with Commission staff pursuant to this provision.

IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest, to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to section 15(b) of the Exchange Act, it is hereby ORDERED that

A. Merrill is censured for failing reasonably to supervise within the meaning of section 15(b)(4)(E) of the Exchange Act.

B. Merrill shall, within 180 days of the entry of the Order, pay disgorgement and pre-judgment interest totaling $10,535,441 as follows:

1. Merrill shall pay disgorgement of $2,311,392 and pre-judgment interest of $513,884, for the transactions that involved false or misleading statements made to Merrill customers;

2. Merrill shall pay disgorgement of $6,318,914 and pre-judgment interest of $1,391,251, for the transactions that involved only excessive mark-ups charged to Merrill customers;

3. Within ten (10) days of the issuance of this Order, Merrill shall deposit $10,535,441 (the "Distribution Fund") into an escrow account at a financial institution not unacceptable to Commission staff, and Merrill shall provide such Commission staff with evidence of such deposit in a form acceptable to such Commission staff. If timely payment into the escrow account is not made, additional interest shall accrue pursuant to rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600;

4. Merrill shall be responsible for administering the Distribution Fund and may hire one or more professionals or other third parties to assist it in the administration of the distribution. Merrill shall distribute to customers and former customers an amount representing

   a. the amount of profits, including pre-judgment interest, that Merrill made from the transactions referenced in the Order that involved false or misleading statements to Merrill customers and

   b. the amount of unreasonable profits, including pre-judgment interest, that Merrill made from the transactions referenced in the Order that involved only excessive mark-ups charged to Merrill customers.

   No portion of the Distribution Fund shall be paid to any customer or former customer in which Merrill, or any of its officers or directors, has a financial interest. The distributions shall be made pursuant to a disbursement calculation (the "Distribution Calculation") that will be submitted to, and reviewed and approved by, Commission staff in accordance with this paragraph IV.B. Such calculation shall be subject to a *de minimis* threshold, as described in paragraph IV.B.5. below;

5. Merrill shall, within forty-five (45) days of the entry of this Order, submit a proposed Distribution Calculation to the staff for its review and approval that, at a minimum, identifies the following:

   a. the name of each affected customer or former customer;

   b. the exact amount of the payment to be made from the Distribution Fund to each affected customer or former customer; and

   c. the amount of any *de minimis* threshold to be applied.

   At or around the time of submission of the proposed Distribution Calculation to Commission staff, Merrill, along with any third-parties or professionals retained by Respondent to assist in formulating the methodology for its proposed Distribution Calculation and/or administration of the Distribution, shall make themselves available for a

conference call with Commission staff to explain the methodology used in preparing the proposed Distribution Calculation and its implementation, and to provide such Commission staff with an opportunity to ask questions. Merrill also shall provide to Commission staff such additional information and supporting documentation as such Commission staff may request for its review. In the event of one or more objections by Commission staff to the proposed Distribution Calculation or any of its information or supporting documentation, Merrill shall submit either a revised Distribution Calculation for the review and approval by Commission staff or additional information or supporting documentation within ten (10) days of the date that Merrill is notified of the objection. Any revised Distribution Calculation shall be subject to all of the provisions of this paragraph IV.B.

6. Respondent shall complete the disbursement of all amounts payable to eligible customers and former customers within seventy-five (75) days of the date when Commission staff approves the Distribution Calculation, unless such time period is extended, as provided below in paragraph IV.B.11.

7. If Merrill is unable to distribute or return any portion of the Distribution Fund for any reason, including an inability to locate an affected customer or former customer, or any factors beyond Respondent's control, Respondent shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury in accordance with section 21F(g)(3) of the Securities Exchange Act of 1934. Payment must be made in one of the following ways:

   a. Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

   b. Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

   c. Respondent may pay by certified check, bank cashier's check, or United States postal money order made payable to the Securities

and Exchange Commission and hand-delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Merrill as the Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Andrew B. Sporkin, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-6013.

8. A Distribution Fund is a Qualified Settlement Fund ("QSF") under section 468B(g) of the Internal Revenue Code ("IRC"), 26 U.S.C. §§ 1.468B.1-1.468B.5. Respondent shall be responsible for any and all tax compliance and may retain any professional services necessary. The costs and expenses of any such professional services shall be borne by Respondent and shall not be paid out of the Distribution Fund.

9. Respondent shall be responsible for all costs of the administration of the Distribution Fund and may retain any professional services necessary. The costs and expenses of the administration of the Distribution Fund shall be borne by Respondent and shall not be paid out of the Distribution Fund.

10. Within 30 days after Respondent completes the disbursement of all amounts payable to affected customers and former customers, Respondent shall return all undisbursed funds to the Commission. Within 150 days after Respondent completes the disbursement of the Distribution Fund, the Respondent shall submit to the Commission staff a final accounting and certification of the disposition of the Distribution Fund for Commission approval, which final accounting and certification shall include, but not be limited to the amount paid to each payee; the date of each payment; the check number or other identifier of money transferred or proof of payment made; the amount of any returned payment and the date received; a description of any effort to locate a prospective payee whose payment was returned, or to whom payment was not made for any reason; and an affirmation that Merrill has made payments to all affected customers and former customers in accordance with the Calculation approved by Commission staff. Respondent shall submit proof and all supporting documentation of such payment (whether in the form of electronic payments or cancelled checks) in a form acceptable to the Commission staff under a cover letter that identifies Respondent and the file number of these proceedings to Andrew B. Sporkin, Assistant Director, Division of

Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-6013. Respondent shall provide any and all supporting documentation for the accounting and certification to the Commission staff upon its request and shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

11. The Commission staff may extend any of the procedural dates set forth in this paragraph IV. B. for good cause shown. Deadlines for dates relating to the Distribution Fund shall be counted in calendar days, except that if the last day falls on a weekend or federal holiday, the next business day shall be considered to be the last day.

C. Respondent shall, within ten (10) days of the entry of the Order, pay a civil money penalty in the amount of $5,267,720 to the Commission for transfer to the general fund of the United States Treasury, subject to section 21F(g)(3) of the Exchange Act. If timely payment of the civil money penalty is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Payment must be made in one of the following ways:

1. Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

2. Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

3. Respondent may pay by certified check, bank cashier's check, or United States postal money order made payable to the Securities and Exchange Commission and hand-delivered or mailed to

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Merrill as the Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Andrew B. Sporkin, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-6013.

D. Amounts ordered to be paid as civil money penalties pursuant to the Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil

penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields
Secretary