

**THE NASDAQ OPTIONS MARKET  
NOTICE OF ACCEPTANCE OF AWC**

**Certified, Return Receipt Requested**

**TO: Merrill Lynch, Pierce, Fenner & Smith, Inc.  
Eric J. Mueller  
Managing Director  
101 S. Tryon Street  
NC1-002-19-44  
Charlotte, NC 28255**

**FROM: The NASDAQ Options Market LLC ("Nasdaq")  
c/o Financial Industry Regulatory Authority ("FINRA")  
Department of Market Regulation  
9509 Key West Avenue  
Rockville, MD 20850**

**DATE: November 12, 2010**

**RE: Notice of Acceptance of Letter of Acceptance, Waiver and Consent No. 20080144510-01**

**Please be advised** that your above-referenced Letter of Acceptance, Waiver and Consent ("AWC") has been accepted by the Nasdaq Review Council's Review Subcommittee, or by the Office of Disciplinary Affairs on behalf of the Nasdaq Review Council, pursuant to Nasdaq Rule 9216. A copy of the AWC is enclosed herewith.

You are again reminded of your obligation, if currently registered, immediately to update your Uniform Application for Broker-Dealer Registration ("Form BD") to reflect the conclusion of this disciplinary action. Additionally, you must also notify FINRA (or NASDAQ if you are not a member of FINRA) in writing of any change of address or other changes required to be made to your Form BD.

You will be notified by the Registration and Disclosure Department regarding sanctions, and NASDAQ's Finance Department will send you an invoice regarding the payment of any fine.

Merrill Lynch, Pierce, Fenner & Smith, Inc.  
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If you have any questions concerning this matter, please call Eric Brown, Chief Counsel, at  
(212) 858-4308.



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Thomas R. Gira  
Executive Vice President  
Department of Market Regulation, FINRA

Signed on behalf of NASDAQ

Enclosure

cc: FINRA District 10 – New York  
Hans L. Reich, Regional Director  
165 Broadway, 52<sup>nd</sup> Floor  
New York, NY 10006-1400

Justin M. Kettler  
Assistant General Counsel  
Bank of America Merrill Lynch  
Banc of America Securities LLC  
One Bryant Park  
New York, NY 10036

Edward S. Knight, Chief Regulatory Officer  
The NASDAQ Stock Market LLC  
9600 Blackwell Road  
Rockville, MD 20850

**THE NASDAQ OPTIONS MARKET**  
**LETTER OF ACCEPTANCE, WAIVER AND CONSENT**  
**NO. 20080144510-01**

TO: The NASDAQ Options Market  
c/o Department of Market Regulation  
Financial Industry Regulatory Authority ("FINRA")

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

Pursuant to Rule 9216 of The NASDAQ Stock Market LLC ("Nasdaq")<sup>1</sup> Code of Procedure, Merrill Lynch, Pierce, Fenner & Smith, Inc. (the "Firm" or "Merrill") submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, Nasdaq will not bring any future actions against the firm alleging violations based on the same factual findings described herein.

**I.**

**ACCEPTANCE AND CONSENT**

- A. 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 Nasdaq, or to which Nasdaq is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by Nasdaq:

**BACKGROUND**

Merrill has been a member of FINRA since January 26, 1937, and its registration remains in effect. The Firm was approved for The NASDAQ Options Market, LLC ("NOM") membership on March 12, 2008, and its registration remains in effect.

**RELEVANT DISCIPLINARY HISTORY**

Merrill has no relevant disciplinary history.

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<sup>1</sup> All NASDAQ Options Market disciplinary matters are governed by The Nasdaq Code of Procedure.

## SUMMARY

In connection with matter 20080144510, the staff of the Department of Market Regulation of FINRA ("the staff") conducted a review of Merrill's options positions required to be reported in the LOPR during the period between March 31, 2008 and June 30, 2008 (the "review period") for compliance with the rules and regulations relating to position limits.

## FACTS AND VIOLATIVE CONDUCT

1. During the review period, Merrill failed to report positions to LOPR on three occasions and failed to accurately report the effective date for an options position to LOPR on two occasions. The conduct described in this paragraph constitutes separate and distinct violations of Chapter III, Section 10 of the NOM Rules.
2. During the review period, Merrill's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations, and the Rules of Nasdaq, concerning LOPR reporting. Specifically, the firm's supervisory system did not include adequate written supervisory procedures providing for: (i) the supervisory steps and reviews to be taken by the appropriate supervisor; (ii) the frequency of such reviews; and, (iii) how such reviews shall be documented. The conduct described in this paragraph constitutes a violation of Nasdaq Exchange Rules 2110 and 3010(a).

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

**A censure and a fine of \$10,000 (consisting of a \$5,000 fine for LOPR violations and a \$5,000 fine for supervision violations).**

Merrill agrees to pay the monetary sanctions upon notice that this AWC has been accepted and that such payments are due and payable. Merrill has submitted an Election of Payment form showing the method by which they propose to pay the fine imposed.

Merrill specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanctions imposed in this matter.

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

## II.

### WAIVER OF PROCEDURAL RIGHTS

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

- A. To have a Formal Complaint issued specifying the allegations against the firm;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, Merrill specifically and voluntarily waives any right to claim bias or prejudgment of the Chief Regulatory Officer, the Nasdaq Review Council, or any member of the Nasdaq Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

Merrill further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

### III.

#### OTHER MATTERS

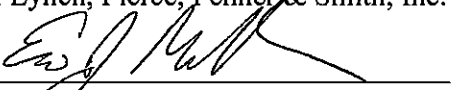
The firm understands that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by FINRA's Department of Market Regulation and the Nasdaq Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs ("ODA"), pursuant to Nasdaq Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against Merrill; and
- C. If accepted:
  - 1. This AWC will become part of Merrill's permanent disciplinary record and may be considered in any future actions brought by Nasdaq or any other regulator against the firm;
  - 2. This AWC will be made available through Nasdaq's public disclosure program in response to public inquiries about Merrill's disciplinary record;
  - 3. Nasdaq may make a public announcement concerning this agreement and the subject matter thereof in accordance with Nasdaq Rule 8310 and IM-8310-3; and
  - 4. Merrill may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. The firm may not take any position in any proceeding brought by or on behalf of Nasdaq, or to which Nasdaq is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects Merrill's right to take legal or factual positions in litigation or other legal proceedings in which Nasdaq is not a party.
- D. Merrill may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Merrill understands that it may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by Nasdaq, nor does it reflect the views of Nasdaq or its staff.

The undersigned, on behalf of Merrill, 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 Merrill to submit it.

9/23/2010  
Date


Respondent  
Merrill Lynch, Pierce, Fenner & Smith, Inc.

By: 

Name: Eric J. Mueller

Title: Managing Director

Reviewed by:

  
Attorney Name  
Counsel for Respondent

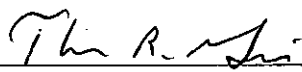
Firm Name: Merrill Lynch, Pierce, Fenner & Smith Inc.

Address: One Bryant Park, 5<sup>th</sup> Floor, NY, NY 10036

Telephone No.: 646-855-1186

Accepted by Nasdaq:

11/12/10  
Date

  
Thomas R. Gira  
Executive Vice President  
Department of Market Regulation

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

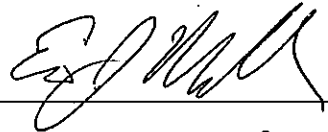
## ELECTION OF PAYMENT FORM

The Respondent intends to pay the fine proposed in the attached Letter of Acceptance, Waiver and Consent by the following method (check one):

- A firm check or bank check for the full amount;
- Wire transfer;
- Credit card authorization for the full amount;<sup>1</sup> or
- The installment payment plan (only if approved by FINRA staff and the Nasdaq Review Council).<sup>2</sup>

Respectfully submitted,  
Respondent  
Merrill Lynch, Pierce, Fenner & Smith Inc.

9/23/2010  
Date

By:   
Name: Eric S. Mueller  
Title: Managing Director

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<sup>1</sup> Only MasterCard, Visa and American Express are accepted for payment by credit card. If this option is chosen, the appropriate forms will be mailed to you, with an invoice, by NASDAQ's Finance Department. Do not include your credit card number on this form.

<sup>2</sup> The installment payment plan is only available for fines of \$5,000 or more. Certain interest payments, minimum initial and monthly payments, and other requirements apply. You must discuss these terms with FINRA staff prior to requesting this method of payment.