

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the
Continued Membership
of
Merrill Lynch, Pierce, Fenner & Smith
Incorporated
CRD No. 7691

Notice Pursuant to
Rule 19h-1
Securities Exchange Act
of 1934

SD-2339

January 17, 2024

I. Introduction

On October 14, 2022, Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch” or “the Firm”) submitted a Membership Continuance Application (“MC-400A Application” or “Application”) to FINRA’s Credentialing Registration, Education, and Disclosure Department (“CRED”).¹ The Application seeks to permit the Firm, a FINRA member, to continue its membership with FINRA notwithstanding its statutory disqualification. A hearing was not held in this matter; rather, pursuant to FINRA Rule 9523(b), FINRA’s Department of Member Supervision (“FINRA,” “Member Supervision,” or “Department”) approves the Application and is filing this Notice pursuant to Rule 19h-1 of the Securities Exchange Act of 1934 (“Exchange Act” or “SEA”).

II. The Statutorily Disqualifying Event

The Firm is subject to statutory disqualification, as that term is defined in Section 3(a)(39)(F) of the Exchange Act, incorporating by reference Section 15(b)(4)(D) and (E), as a result of a September 2022 Order issued by the Securities and Exchange Commission (“SEC” or “Commission”) finding that the Firm willfully violated Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) and failed reasonably to supervise its employees with a view to preventing or detecting certain of its employees’ aiding and abetting violations of Section 17(a) of the Exchange Act and Rule 17a-4(b)(4) thereunder (“SEC Order”).²

¹ See MC-400A Application and related attachments compiled by CRED, with a cover memorandum dated October 24, 2022, attached as Exhibit 1.

² See SEC Order, *In re BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated*, Exchange Act Release No. 95921 (Sept. 27, 2022), attached as Exhibit 2.

The SEC Order also triggered disqualification under Rules 262(a)(4), 506(d)(1)(iv), and 602(c)(3) of the Securities Act of 1933 and Rule 503(a)(4)(ii) of Regulation Crowdfunding. On September 27, 2022, the SEC granted a waiver from the application of the disqualification provisions of these Rules. See *In re Certain*

According to the SEC Order, from at least January 2018 to September 2021, numerous Merrill Lynch employees sent and received off-channel communications that related to the Firm's business, and a majority of these written communications was not maintained or preserved by the Firm.³ Further, supervisors who were responsible for preventing this misconduct among junior employees routinely communicated off-channel using their personal devices, and, in so doing, failed to comply with Firm policies by communicating using non-Firm approved methods on their personal devices about the Firm's broker-dealer business.⁴

The Firm was ordered to cease and desist from committing or causing any future violations, censured, ordered to pay a civil money penalty of \$125,00,000, jointly and severally with affiliate BofA Securities, Inc. ("BofA"), and ordered to comply with undertakings.⁵

III. Remedial Measures

In its Application, the Firm represented that it has undertaken significant remedial measures in response to the SEC's investigation and findings, including enhancing policies, procedures and training concerning the use of approved communications methods, including on personal devices, and implementing changes to technology available to employees.⁶ Specifically, the Firm began issuing compliance advisories reminding employees of Merrill Lynch policy against business-related communications on unapproved devices and platforms; created a working group comprised of leadership across various internal stakeholders to assess unapproved text message communications and making appropriate policy or supervisory enhancement recommendations; updated relevant Firm policies governing communication with clients; developed regular reporting to detect when employees are not using firm-issued phones; and conducted a disciplinary review of all current Firm employees identified within the course of the SEC's review.⁷ According to the SEC Order, the SEC considered the Firm's prompt remedial actions and cooperation with the Commission when determining to accept the Offer of Settlement.⁸

The Firm represented that it further committed to future remedial measures including a

Broker-Dealer Practices, Securities Act Release No. 11109 (Sept. 27, 2022), attached as Exhibit 3.

³ See Exhibit 2 at p. 2, para. 3.

⁴ *Id.* at p. 2, para. 4; p. 4, para. 17.

⁵ *Id.* at pp. 6-10. The Firm represented that the civil penalty was paid on October 5, 2022. See Correspondence from Elizabeth Marino to FINRA dated April 6, 2023 (with exhibits) and December 19, 2023, collectively attached as Exhibit 4 at FINRA p. 2 FINRA p. 7, Response 1. The Firm represented that it is in compliance with all undertakings. *Id.* at FINRA pp. 32-34.

⁶ See Exhibit 1 at FINRA p. 24.

⁷ *Id.*

⁸ See Exhibit 2 at p. 6.

comprehensive review of Firm supervisory and compliance policies and procedures designed to ensure that Firm electronic communications are appropriately preserved; a review of training to ensure that personnel are complying with Firm policies and federal securities laws regarding the preservation of electronic communications; an assessment of the Firm's surveillance program to ensure record retention compliance; an assessment of technological solutions that the Firm has begun implementing to meet record retention requirements, including an assessment of the likelihood that Firm personnel will use the technological solutions going forward; an assessment of preventative methods used with regard to the use of unauthorized methods of business communications, including a review of policies and procedures to determine whether they provide for any significant technology and/or behavioral restrictions that prevent the risk of use of unapproved communications methods; a review of electronic communications surveillance routines; a review of the framework addressing instances of non-compliance by Firm employees concerning the use of personal devices to communicate about Firm business in the past; and an assessment of its program for the preservation of electronic communications, including those found on personal devices.⁹

IV. Firm Background

The Firm has been a FINRA member since January 26, 1937.¹⁰ It is headquartered in New York, NY with 4,137 branches, 808 of which are Offices of Supervisory Jurisdiction.¹¹ The Firm employs approximately 28,640 registered representatives (5,312 of which are registered principals), 38,612 non-registered fingerprint employees, and 51 operations professionals.¹² The Firm employs three representatives who are subject to statutorily disqualification.¹³

Merrill Lynch is approved to engage in the following lines of business: exchange member engaged in exchange commission business other than floor activities; broker or dealer making inter-dealer markets in corporate securities over-the-counter; broker or dealer retailing corporate equity securities over-the-counter; broker or dealer selling corporate debt securities; underwriter or selling group participant (corporate securities other than mutual funds); mutual fund retailer; U.S. government securities dealer; U.S. government securities broker; municipal securities dealer; municipal securities broker; broker or dealer selling variable life insurance or annuities; solicitor of time deposits in a financial institution; put and call broker or dealer or option writer; broker or dealer selling securities

⁹ See Exhibit 1 at FINRA pp. 24-26.

¹⁰ See CRD Excerpt: Organization Registration Status, attached as Exhibit 5.

¹¹ FINRA confirmed this through analysis of the Firm's information contained in the Central Registration Depository ("CRD"), last performed on December 7, 2023.

¹² *Id.*

¹³ Steven Robert Cross (CRD# 1785567), Gaines C. Walker (CRD# 728023), and Lawrence Kimball Barber, Jr. (CRD# 2932803). All are currently classified as a Tier 3 statutorily disqualified individual, permitted to associate without any special supervision. See Appendix A.

of non-profit organizations; investment advisory services; trading securities for own account; private placements of securities; broker or dealer selling interests in mortgages or other receivables; broker or dealer involved in a networking, kiosk, or similar arrangement with a bank, savings bank or association, or credit union; broker or dealer involved in a networking, kiosk, or similar arrangement with an insurance company or agency; engages in other securities business;¹⁴ effects transactions in futures, commodities, commodity options as a broker for others or dealer for own account; and engages in other non-securities business.¹⁵

The Firm is a member of the following self-regulatory organizations (“SROs”): Cboe Exchange, Inc. (“Cboe”); Cboe BYX Exchange, Inc. (“BYX”); Cboe BZX Exchange, Inc. (“BZX”); Cboe EDGA Exchange, Inc. (“EDGA”); Cboe EDGX Exchange, Inc. (“EDGX”); Investors Exchange LLC (“IEX”); The Nasdaq Stock Market LLC (“Nasdaq”); New York Stock Exchange (“NYSE”);¹⁶ Municipal Securities Rulemaking Board (“MSRB”); The Depository Trust Company (“DTC”), the Fixed Income Clearing Corporation - Government Securities Division (“FICC-GOV”), and the National Securities Clearing Corporation (“NSCC”).¹⁷

Recent Examinations

In the past two years, FINRA completed one routine examination of the Firm resulting in a referral that remains open, and five non-routine examinations resulting in cautionary action letters. The SEC also completed four examinations of the Firm resulting in deficiency findings in the last two years.

A. Routine FINRA Examinations

In March 2023, FINRA staff identified one exception that was referred to FINRA’s Department of Enforcement (“Enforcement”).¹⁸ That exception related to the Firm’s failure

¹⁴ Per the Firm’s CRD Record, the “other securities business” includes, transacting in commercial paper, other short-term instruments, exempted securities and precious metals; offering financial planning tools; engaging in transactions, such as repurchase agreements, reverse repurchase agreements; and engaging in financial advisory services and clearing services. *See* CRD Excerpts: Types of Business and Other Business Descriptions, collectively attached as Exhibit 6.

¹⁵ *Id.* Per the Firm’s CRD Record, the “other non-securities business” includes transacting in short term instruments and precious metals; offering financial planning tools; margin lending on securities; and financial advisory services.

¹⁶ *See* Exhibit 5. FINRA notes that per the Firm’s CRD record, the Firm requested termination from EDGA, EDGX, and IEX in June 2019.

¹⁷ Membership in these organizations was verified by FINRA staff through a search of public member directories, last performed on December 7, 2023.

¹⁸ *See* Disposition Letter for Examination No. 20220734149 dated March 27, 2023, Examination Report dated January 27, 2023, and Firm Response dated February 17, 2023, collectively attached as Exhibit 7, at FINRA p. 1.

to provide adequate disclosures to customers executing trades through the Firm's self-directed platform and failure to establish and maintain a supervisory system reasonably designed to comply with the Firm's time of trade disclosure obligations.¹⁹ That matter remains open.²⁰ That matter further noted two areas of review involving the Firm's Global Sports and Entertainment Program and independent verification of assets at custodial accounts that were referred to other FINRA departments to determine the appropriate dispositions.²¹ In May 2023, FINRA closed the area of review examining the Firm's Global Sports and Entertainment Program without further action, but the remaining review remains open.²²

B. Non-Routine FINRA Examinations

In August 2023, FINRA issued three Cautionary Actions to the Firm. First, FINRA issued two Cautionary Actions²³ to the Firm for erroneously media reporting error correction trades to the Over-the-Counter Trade Reporting Facility ("ORF") and the FINRA/Nasdaq Trade Reporting Facility ("FNTRF") with incorrect execution date and time,²⁴ media reporting trades to ORF and FNTRF with the incorrect buy/sell code,²⁵ media reporting trades to FNTRF with incorrect execution price,²⁶ and failing to maintain and enforce supervisory procedures reasonably designed to ensure compliance with FINRA Trade Reporting rules.²⁷ The Firm responded in writing that the Firm was processing trade error corrections involving price adjustments through the use of an error account and has since altered its approach to providing a cash credit while adhering to tax reporting processes.²⁸ The Firm represented that it was revising its written supervisory procedures ("WSPs") to address FINRA's findings²⁹ and had completed a submission of reversals for each identified media trade reported to the FNTRF with an incorrect execution price.³⁰ Then,

¹⁹ *Id.* at FINRA p. 5.

²⁰ FINRA confirmed this through a review of internal records, last performed on December 7, 2023

²¹ *See* Exhibit 7 at FINRA pp. 5-6.

²² *Id.* at FINRA Exhibit p. 5. *See* Disposition Letter for Examination No. 20220754562 dated May 18, 2023, attached as Exhibit 8.

²³ *See* Disposition Letters for Examination Nos. 20220754240 and 20220754241 dated August 9, 2023 and the Firm's Response dated September 1, 2023, collectively attached as Exhibit 9.

²⁴ *Id.* at FINRA p. 1, para. 1; FINRA p. 3, para. 1.

²⁵ *Id.* at FINRA p. 1, para. 2; FINRA p. 3, para. 2.

²⁶ *Id.* at FINRA p. 3, para. 3.

²⁷ *Id.* at FINRA p. 1, para. 3; FINRA p. 4, para. 4.

²⁸ *Id.* at FINRA pp. 6-7, Response 2.

²⁹ *Id.* at FINRA pp. 6-7, Response 3.

³⁰ *Id.* at FINRA p. 7, Response 4.

FINRA issued one additional Cautionary Action to the Firm for registering an individual with one or more final criminal matters in the prior five years without first submitting a written request for a materiality consultation or filing a continuing membership application seeking approval in violation of FINRA Rule 1017(a)(7).³¹

In August 2022, FINRA issued a Cautionary Action to the Firm for failing to implement reasonably designed market access controls designed to prevent potentially erroneous executions in violation of SEC Rule 15c3-5(c)(1)(ii).³² Specifically, the Firm’s “Max Safety Price” control identified a customer order but an incorrect internal message indicating “No Exchange Available” was displayed to Firm Trade Support Desk personnel, leading to inferior executions and a customer loss in excess of \$30,000.³³ The Firm subsequently provided restitution to the customer.³⁴

In January 2022, FINRA issued a Cautionary Action to the Firm for failing to maintain a supervisory system reasonably designed to achieve compliance with respect to securities laws and regulations and MSRB rules concerning accurate reporting of the Non-Transaction Based Compensation (“NTBC”) indicator.³⁵ The Firm responded in writing that it obtained MSRB guidance to cure the NTBC indicator violation in conjunction with its affiliate, BofA Securities, and was in the process of fully implementing the necessary technology development by the end of the second quarter of 2022.³⁶

C. SEC Examinations

In July 2023, the SEC issued the Firm a deficiency letter relating to the Firm’s failure to reasonably mitigate a conflict of interest generated by financial advisors’ incentives to decrease, waive, or maintain upfront placement fees (“upfront fees”) in the private equity fund business in violation of Regulation BI’s Conflict of Interest Obligation.³⁷ Specifically, the Firm did not maintain any written policy or procedure concerning the reduction or waiver of the upfront fees, including the factors financial advisors should consider when

³¹ See Disposition Letter for Examination No. 20230790409 dated August 15, 2023 (the Firm did not provide a written response) with redactions added by FINRA, attached as Exhibit 10.

³² See Disposition Letter for Examination No. 20200678317 dated August 15, 2022 (the Firm did not provide a written response), attached as Exhibit 11.

³³ *Id.*

³⁴ *Id.*

³⁵ See Disposition Letter for Examination No. 20200676034 dated January 7, 2022, and the Firm’s Response dated February 4, 2022, collectively attached as Exhibit 12, at FINRA p. 1.

³⁶ *Id.* at FINRA p. 4.

³⁷ See SEC Deficiency Letter for File No. 8-7221 dated July 12, 2023, and Firm Response dated August 11, 2023, collectively attached as Exhibit 13, at FINRA pp. 3-4.

determining whether to reduce or waive such fees.³⁸ The Firm responded in writing contesting the SEC's finding, but also represented that in light of the deficiency letter, the Firm would implement written policies and procedures to further mitigate the potential conflict of interest by outlining factors for financial advisors to consider in determining whether to reduce or waive upfront fees on private equity funds and also implement a supervisory procedure to conduct a periodic review of private equity fund discounting behavior by financial advisors.³⁹

In June 2023, the SEC issued the Firm a deficiency letter relating to the Firm's failure to comply with MSRB Rule G-15(a)(i)(F)(1) governing confirmations, Rule G-27 governing supervisory system requirements, and Rule G-30(a) governing fair and reasonable pricing procedures.⁴⁰ Specifically, the Firm failed to evidence that the results of Bid Wanted in Competition ("BWIC") prices were considered against other objective data to ensure the determination of an accurate Prevailing Market Price ("PMP") and failed to accurately impute mark-downs disclosed on its confirmations to customers that sold municipal securities via BWIC sells in instances where the contemporaneous cost method was utilized.⁴¹ The Firm failed to evidence that it reasonably designed and maintained a supervisory system related to a third-party vendor relationship and failed to adopt and enforce WSPs in that regard.⁴² The SEC additionally found that the Firm failed to establish procedures related to the consideration of objective data in determining whether the BWIC price may be appropriately used as the PMP, and therefore failed to ensure the accurate determination of PMP in instances where the BWIC price was used as PMP under the contemporaneous cost method.⁴³ The Firm responded in writing contesting the SEC's findings, but committed to formalizing its pre-trade review processes in its WSPs, updating the BWIC blotter application, and enhancing its WSPs with respect to its third-party vendor relationship.⁴⁴

In August 2022, the SEC issued the Firm a deficiency letter relating to the Firm's failure to comply with Regulation NMS Rule 606 by failing to produce accurate and complete order handling reports.⁴⁵ In particular, the Firm failed to identify the appropriate venues

³⁸ *Id.* at FINRA p. 4.

³⁹ *Id.* at FINRA p. 10.

⁴⁰ See SEC Deficiency Letter for File No. 8-7221 dated June 14, 2023, and Firm Response dated July 21, 2023, collectively attached as Exhibit 14, at FINRA pp. 3-6.

⁴¹ *Id.* at FINRA p. 3.

⁴² *Id.* at FINRA p. 4.

⁴³ *Id.* at FINRA pp. 5-6.

⁴⁴ *Id.* at FINRA pp. 10-19.

⁴⁵ See SEC Deficiency Letter for File No. 8-7221 dated August 30, 2022, and Firm Response dated September 28, 2022, collectively attached as Exhibit 15, at FINRA p. 3.

for certain orders, failed to disclose the material aspects of its relationship with venues, and failed to make certain reports correctly.⁴⁶ The SEC further identified material weaknesses in the Firm’s controls for ensuring compliance with Regulation NMS Rule 606.⁴⁷ The Firm responded in writing that it was taking steps to address the deficiency findings including working with its service provider to refine venue disclosures and making adjustments to its Rule 606(b)(1) reports.⁴⁸

In April 2022, the SEC issued the Firm a deficiency letter relating to the failure of the Firm’s WSPs to address new issue concession based products purchased in brokerage accounts and subsequently journalized to investment advisory accounts, or the removal of these security positions from advisory fee calculations for a specified period of time to prevent overcharging customers, in violation of FINRA Rule 3110.⁴⁹ The Firm responded in writing that it was in the process of implementing a process enhancement regarding new issue products purchased in brokerage accounts and moved into advisory accounts while continuing to explore the development of an automated solution to identify purchases of new issue products in brokerage accounts and implement a pro-rata fee deferral on the transferred position within twelve (12) months of purchase.⁵⁰

Regulatory Actions

In approximately the past two years, Merrill has been the subject of various disciplinary matters. These disciplinary matters resulted in five Letters of Acceptance, Waiver and Consent (“AWCs”) entered into with FINRA; one Offer of Settlement and Consent entered into with the Commodities Futures Trading Commission (“CFTC”); and one Consent Order entered into with the State of New Hampshire. In the last five years, the Firm has also been the subject of four disqualifying orders issued by the SEC, besides the SEC Order at issue in this Notice.⁵¹

A. FINRA Actions

On July 11, 2023, the Firm entered into an AWC with FINRA in connection with the Firm’s failure to apply the \$5,000 threshold applicable to broker-dealers to determine when to file a category of Suspicious Activity Reports (“SARs”) from January 2009 through November

⁴⁶ *Id.* at FINRA pp. 3-4.

⁴⁷ *Id.* at FINRA pp. 4-5.

⁴⁸ *Id.* at FINRA pp. 7-9.

⁴⁹ See SEC Deficiency Letter for File No. 8-7221 dated April 28, 2022, and Firm Response dated May 26, 2022, collectively attached as Exhibit 16, at FINRA p. 3.

⁵⁰ *Id.* at FINRA pp. 5-6.

⁵¹ See CRD Snapshot Record for Merrill Lynch dated December 11, 2023, attached as Exhibit 17.

2019.⁵² The Firm consented to a censure and a \$6 million fine.⁵³

On May 1, 2023, the Firm entered into an AWC with FINRA in connection with the Firm’s failure to establish and maintain a supervisory system reasonably designed to ensure the Firm trainees did not place unsolicited telemarketing calls to individuals on the national do-not-call registry and the Firm’s do-not-call list.⁵⁴ The Firm consented to a censure and a \$700,000 fine.⁵⁵

On June 1, 2022, the Firm entered into an AWC with FINRA in connection with the Firm’s failure to establish and maintain a supervisory system reasonably designed to supervise the sale of Class C mutual fund shares.⁵⁶ In particular, the Firm failed to correctly identify and implement applicable limits on purchases, which resulted in customers purchasing Class C shares when Class A shares were available, typically at a lower cost, resulting in customers paying excess fees and expenses.⁵⁷ The FINRA AWC acknowledged the Firm’s extraordinary cooperation, and the Firm consented to a censure and to pay approximately \$15.2 million in restitution.⁵⁸

On December 20, 2021, the Firm entered into an AWC with FINRA in connection with the Firm’s failure to reasonably supervise the transmittal of customer funds via externally initiated Automated Clearing House (“ACH”) transfers, resulting in two registered representatives stealing several millions of dollars from customers of the Firm.⁵⁹ Upon discovery of one of the representative’s conduct, the Firm developed a tool to identify externally initiated fraudulent ACH transfers, which aided the Firm in discovering the second representative’s misconduct.⁶⁰ Also, the Firm either paid, or made reasonable efforts to pay, restitution to each of the affected customers or their estates prior to the issuance of the AWC.⁶¹ The Firm consented to a censure, a \$950,000 fine, and agreed to

⁵² See FINRA AWC No. 2020066667001 dated July 11, 2023, attached as Exhibit 18.

⁵³ *Id.* at p. 4. The Firm paid its fine on July 19, 2023. See Form U6 Filing for Matter No. 2020066667001 dated August 9, 2023, attached as Exhibit 19, at p. 3.

⁵⁴ See FINRA AWC No. 2019062900001 dated May 1, 2023, attached as Exhibit 20.

⁵⁵ *Id.* at p. 4. The fine was paid on May 16, 2023. See CRD Disclosure Occurrence Composite for Occurrence No. 2271251, attached as Exhibit 21, at p. 2.

⁵⁶ See FINRA AWC No. 2020068535401 dated June 1, 2022, attached as Exhibit 22.

⁵⁷ *Id.* at pp. 2-3.

⁵⁸ *Id.* at pp. 3-4. The Firm represented that it paid the required restitution prior to September 14, 2022 and submitted documentation in support. See Exhibit 4 at FINRA p. 3 Response 3; FINRA p. 19.

⁵⁹ See FINRA AWC No. 2018057201801 dated December 20, 2021, attached as Exhibit 23.

⁶⁰ *Id.* at p. 5.

⁶¹ *Id.*

an undertaking that the Firm certify that it completed a review of its policies, procedures, and systems regarding the monitoring of transmittals of customer funds and that they are reasonably designed to achieve compliance with applicable securities laws, regulations, and FINRA rules.⁶²

On December 20, 2021, the Firm entered into another AWC with FINRA in connection with the Firm's failure to comply with FINRA Rule 8210 during the course of two FINRA Department of Enforcement investigations.⁶³ Specifically, the Firm failed to timely produce responsive documents for up to two years or more and, in one instance, failed to produce telephone records that were destroyed by a vendor despite a pending Rule 8210 request calling for their production.⁶⁴ The Firm consented to a censure, a \$1,200,000 fine, and agreed to an undertaking to certify that the Firm has established and implemented policies, procedures, processes, and internal controls reasonably designed to address and remediate the issues identified in the AWC.⁶⁵

B. CFTC Action

On September 27, 2022, the CFTC issued an order finding that the Firm violated Section 4g of the Commodity Exchange Act (7 U.S.C. § 6g) and Commission Regulations 1.31, 1.35, and 166.3 (17 C.F.R. §§ 1.31, 1.35, 166.3 (2021)).⁶⁶ These violations were based on the same misconduct underlying the SEC Order that is the subject of the Firm's Application. The Firm was ordered to cease and desist from violating the cited sections of the Commodity Exchange Act and Commission Regulations; to pay a \$100,000,000 civil penalty, payable jointly and severally with BofA and Bank of America, N.A.; and to comply with various undertakings related to the Firm's preservation of records related to electronic communications.⁶⁷

⁶² *Id.* The Firm represented that the fine was paid on December 30, 2021 and provided proof of payment. *See* Exhibit 4 at FINRA pp. 3-4, Response 5; FINRA p. 24. The Firm also represented that it complied with the undertakings and provided a corrective action statement. *See* Certification Letter from the Firm to FINRA dated May 19, 2022, attached as Exhibit 24. *See also* Exhibit 4 at FINRA p. 25.

⁶³ *See* FINRA AWC No. 2018058015702 dated December 20, 2021, attached as Exhibit 25.

⁶⁴ *Id.* at p. 2.

⁶⁵ *Id.* at p. 5. The Firm represented that the fine was paid on January 3, 2022 and provided proof of compliance with the undertakings. *See* Exhibit 4 at FINRA p. 3 Response 4; FINRA pp. 20-23.

⁶⁶ *See* CFTC Order, *In re Bank of America, N.A., BofA Securities, Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated*, CFTC Docket No. 22-38 (Sept. 27, 2022), attached as Exhibit 26. FINRA has determined that this is not a disqualifying event.

⁶⁷ *Id.* at pp. 13-16. The Firm represented that the civil penalty was paid on October 5, 2022. *See* Exhibit 4 at FINRA p. 2 Response 2; FINRA pp. 8-18. The Firm also represented that it is in full compliance with the undertakings required by the CFTC Order. *Id.* at FINRA p. 2, Response 2; FINRA p. 32-34.

C. State of New Hampshire Action

On May 2, 2023, the Firm entered into a Consent Order with the State of New Hampshire Department of State Bureau of Securities Regulation pertaining to the Firm's failure to properly supervise its representatives' telemarketing practices, which lead to the Firm contacting prohibited numbers on the national do not call registry or the Firm's internal do not call list.⁶⁸ The Firm was ordered to cease and desist from further violations of N.H.RSA 421-B:4-406(k) and to pay a \$650,000 administrative fine comprised plus \$50,000 to cover the cost of investigation.⁶⁹

D. SEC Actions

On July 11, 2023, the SEC issued an order finding that the Firm willfully violated Exchange Act Section 17(a) and Rule 17a-8 thereunder.⁷⁰ As a broker-dealer, the Firm was required to file SARs on transactions or attempted transactions aggregating to at least \$5,000 that it knew, suspected, or had reason to suspect may have been in furtherance of criminal activity.⁷¹ From January 2009 through November 2019, the Firm inaccurately applied a \$25,000 threshold rather than the correct \$5,000 threshold in making these assessments and therefore failed to file a number of SARs.⁷² The Firm was ordered to cease and desist from committing or causing any violations and any future violations of Exchange Act Section 17(a) and Rule 17a-8 thereunder, censured, and ordered to pay a \$6,000,000 civil money penalty.⁷³

On April 3, 2023, the SEC issued an order finding that the Firm willfully violated Sections 206(2) and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 206(4)-7 thereunder.⁷⁴ The order found that the Firm charged advisory clients undisclosed

⁶⁸ See Correspondence from Elizabeth Marino to FINRA dated November 17, 2023, with Exhibits including Consent Order, *In re Merrill Lynch, Pierce, Fenner and Smith Incorporated*, Case No. I-2022000023 (New Hampshire Bureau of Securities Regulation, May 2, 2023) with redactions added by FINRA, collectively attached as Exhibit 27, at FINRA pp. 4-9.

⁶⁹ *Id.* at FINRA pp. 8-9. The Firm paid the amounts owed on May 15, 2023. *Id.* at FINRA p. 2, Response 1.

⁷⁰ See SEC Order, *In re Merrill Lynch, Pierce, Fenner & Smith Incorporated; and BAC North America Holding Co.*, Exchange Act Release No. 97872 (July 11, 2023), attached as Exhibit 28. This order subjects the Firm to a statutory disqualification as defined in Exchange Act Section 3(a)(39)(F), incorporating by reference Section 15(b)(4)(D).

⁷¹ *Id.* at p. 2, para. A.

⁷² *Id.* at p. 2, para. A; pp. 2-4, para. C-D.

⁷³ *Id.* at p. 5, para. IV. On August 4, 2023, the Firm submitted an affirmation to FINRA that sanctions are no longer in effect and proof of fine payment. Since there are no sanctions in effect for statutory disqualification purposes, an application to continue in membership is no longer required under FINRA rules. See [FINRA Regulatory Notice 09-19](#) (June 15, 2009). As such, a 19h-1 Notice was not filed in connection with this matter.

⁷⁴ See SEC Order, *In re Merrill Lynch, Pierce, Fenner & Smith Incorporated*, Exchange Act Release No. 97242 (April 3, 2023), attached as Exhibit 29. This order subjects the Firm to a statutory disqualification as

fees for transfers of funds to or from their accounts requiring foreign currency exchanges and materially misstated in advisory agreements that it charged a markup or markdown on the transactions while not also disclosing that it charged an additional fee that was equal to or greater than the markup or markdown in over 80% of the relevant transactions.⁷⁵ The order further found that the Firm failed to adopt and implement WSPs reasonably designed to prevent violations of the Advisers Act in connection with currency transfers requiring foreign currency exchanges for wrap fee clients.⁷⁶ Consequently, the Firm was censured, ordered to cease and desist from committing or causing violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, and ordered to pay disgorgement, prejudgment interest, and a civil penalty totaling \$9,694,714.⁷⁷

On April 17, 2020, the SEC issued an order finding that the Firm willfully violated Section 206(2) of the Advisers Act.⁷⁸ The order found that the Firm purchased, recommended, or held for advisory clients, mutual fund share classes that charged 12b-1 fees instead of lower-cost share classes of the same funds for which the clients were eligible and failed to disclose related conflicts of interest in its Form ADV or otherwise.⁷⁹ Consequently, the Firm was censured, ordered to comply with specific undertakings, and ordered to pay disgorgement and prejudgment interest to affected customers totaling \$325,376.⁸⁰

On March 22, 2019, the SEC issued an order finding that the Firm violated Section 17(a)(3) of the Securities Act of 1933 (“Securities Act”) and failed to reasonably supervise its associated persons within the meaning of Section 15(b)(4)(E) of the Exchange Act.⁸¹ The order found that the Firm received pre-released American Depository Receipts (“ADRs”) from pre-release brokers in circumstances where it should have known that such ADRs

defined in Exchange Act Section 3(a)(39)(F), incorporating by reference Section 15(b)(4)(D).

⁷⁵ *Id.* at pp. 3-4.

⁷⁶ *Id.* at p. 5.

⁷⁷ *Id.* at pp. 5-6. On April 20, 2023, the Firm submitted an affirmation to FINRA that sanctions are no longer in effect. Since there are no sanctions in effect for statutory disqualification purposes, an application to continue in membership is no longer required under FINRA rules. As such, a 19h-1 Notice was not filed in connection with this matter.

⁷⁸ See SEC Order, *In re Merrill Lynch, Pierce, Fenner & Smith, Incorporated*, Advisers Act Release No. 5479 (April 17, 2020), attached as Exhibit 30. This order subjects the Firm to a statutory disqualification as defined in Exchange Act Section 3(a)(39)(F), incorporating by reference Section 15(b)(4)(D).

⁷⁹ *Id.* at p. 2.

⁸⁰ *Id.* at pp. 4-9. On May 7, 2020, the Firm submitted an affirmation to FINRA that sanctions are no longer in effect. Since there are no sanctions in effect for statutory disqualification purposes, an application to continue in membership is no longer required under FINRA rules. As such, a 19h-1 Notice was not filed in connection with this matter.

⁸¹ See SEC Order, *In re Merrill Lynch, Pierce, Fenner & Smith Incorporated*, Exchange Act Release No. 85395 (March 22, 2019), attached as Exhibit 31. This order subjects the Firm to a statutory disqualification as defined in Exchange Act Section 3(a)(39)(F), incorporating by reference Section 15(b)(4)(E).

likely had been pre-released without compliance with the pre-release brokers' obligations under the pre-release agreements.⁸² In addition, the Firm's supervisory policies and procedures were not reasonably designed and implemented to provide sufficient oversight to associated persons to prevent and detect their violations of Section 17(a)(3) of the Securities Act, and thus the Firm failed to reasonably supervise its associated persons.⁸³ Consequently, the Firm was censured and ordered to pay disgorgement, prejudgment interest, and a civil penalty totaling approximately \$8,000,000.⁸⁴

V. Prior SEA Rule 19h-1 Notices

FINRA previously filed four SEA Rule 19h-1 Notices approving the Firm's continued membership notwithstanding the existence of its statutory disqualification.

On December 6, 2017, FINRA filed a Rule 19h-1 Notice approving the Firm's continued membership notwithstanding its statutory disqualification resulting from a November 25, 2014 U.S. District Court for the Western District of North Carolina final judgment that permanently enjoined the Firm from violating Sections 5(b)(1) and 17(a)(2) and (3) of the Securities Act.⁸⁵ The SEC acknowledged FINRA's Notice on February 1, 2018.⁸⁶

On April 5, 2017, FINRA filed a Rule 19h-1 Notice approving the Firm's continued membership notwithstanding its statutory disqualification resulting from a June 1, 2015 SEC order finding that the Firm willfully violated Regulation SHO.⁸⁷ The SEC acknowledged FINRA's Notice on May 16, 2017.⁸⁸

On August 10, 2015, FINRA filed a Rule 19h-1 Notice approving the Firm's continued membership notwithstanding its statutory disqualification resulting from a June 18, 2015 SEC order finding that the Firm willfully violated Section 17(a)(2) of the Securities Act.⁸⁹

⁸² *Id.* at pp. 2-3.

⁸³ *Id.* at p. 7.

⁸⁴ *Id.* at p. 8. On April 16, 2019, the Firm submitted an affirmation to FINRA that sanctions are no longer in effect. Since there are no sanctions in effect for statutory disqualification purposes, an application to continue membership is no longer required under FINRA rules. As such, a 19h-1 Notice was not filed in connection with this matter.

⁸⁵ See *In re the Continued Membership of Merrill Lynch, Pierce, Fenner & Smith Incorporated*, SD-2056 (FINRA NAC Dec. 6, 2017), and the SEC's Letter of Acknowledgement dated February 1, 2018, collectively attached as Exhibit 32.

⁸⁶ *Id.* at FINRA p. 14.

⁸⁷ See *In re the Continued Membership of Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corporation*, SD-2074 & SD-2075 (FINRA April 5, 2017), and the SEC's Letter of Acknowledgement dated May 16, 2017, collectively attached as Exhibit 33.

⁸⁸ *Id.* at FINRA p. 17.

⁸⁹ See *In re the Continued Membership of Citigroup Global Markets Inc., Merrill Lynch, Pierce, Fenner &*

The SEC acknowledged FINRA's Notice on August 20, 2015.⁹⁰

On May 15, 2013, FINRA filed a Rule 19h-1 Notice approving the Firm's continued membership notwithstanding its statutory disqualification resulting from a March 11, 2009 SEC order finding that the Firm willfully violated Section 15(f) of the Exchange Act and Section 204A of the Advisers Act.⁹¹ The SEC acknowledged FINRA's Notice on September 26, 2013.⁹²

VI. The Firm's Proposed Continued Membership with FINRA Plan of Heightened Supervision

The Firm seeks to continue its membership with FINRA notwithstanding its status as a disqualified member. The Firm has agreed to the following Plan of Heightened Supervision ("Supervision Plan" or "Plan") as a condition of its continued membership with FINRA.⁹³

Merrill Lynch, Pierce, Fenner & Smith (the "Firm") is subject to statutory disqualification pursuant to 3(a)(39)(F) of the Securities Exchange Act of 1934, which incorporates by reference Sections 15(b)(4)(D) & (E), as a result of an order issued by the U.S. Securities and Exchange Commission dated September 27, 2022, which found that the Firm willfully violated Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-4(b)(4) thereunder. The Order also found that the Firm failed to reasonably supervise its employees within the meaning of Section 15(b)(4)(E).

For the purpose of this Supervision Plan, the term "Digital Communication Channels" means all written electronic methods of communication used to conduct Firm business, including but not limited to, text message platforms, whether via SMS messaging, iMessage, or other messaging services such as WhatsApp; direct messaging platforms including Twitter, Instagram, LinkedIn, Slack, or Bloomberg Messaging; non-firm domain email accounts; and any other written electronic business-related correspondence. "Digital Communication Channels" encompass platforms used to exchange messages with internal or external stakeholders using either a personal or Firm-provided device.

Smith Incorporated, and Raymond James & Associated, Inc., SD-MCDC-031, SD-MCDC-033, & SD-MCDC-003 (FINRA August 10, 2015), and the SEC's Letter of Acknowledgement dated August 20, 2015, collectively attached as Exhibit 34.

⁹⁰ *Id.* at FINRA p. 6.

⁹¹ See *In re the Continued Membership of Merrill Lynch, Pierce, Fenner & Smith Incorporated*, SD-1792 (FINRA May 15, 2013), and the SEC's Letter of Acknowledgement dated September 26, 2013, collectively attached as Exhibit 35.

⁹² *Id.* at FINRA p. 7.

⁹³ See Executed Consent to Plan of Heightened Supervision dated December 1, 2023, attached as Exhibit 36.

For the purpose of the Supervision Plan, the term “Off-Channel Communications” means all business-related written electronic messages sent on Digital Communication Channels that are not captured by Firm surveillance and record-keeping systems.

In consenting to this Supervision Plan, the Firm agrees to the following:

1. The Firm shall comply with all of the undertakings outlined in the Securities and Exchange Commission (“SEC” or “Commission”) Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Section 15(b) and 21(C) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, In re BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated, Exchange Act Release No. 95921 (September 27, 2022) (“SEC Order”).
2. The Firm shall maintain copies of all correspondence between the Firm and Commission staff relating to the SEC Order, including documenting when Commission staff grants extensions to the deadlines set forth in the SEC Order. The Firm shall maintain copies of all such correspondence in a readily accessible place for ease of review by FINRA staff.
3. The Firm shall provide FINRA’s Statutory Disqualification Group with copies of all certifications submitted to the SEC upon completion of the undertakings as specified in the SEC Order. The Firm shall maintain copies of all certifications in a readily accessible place for ease of review by FINRA staff.
4. The Firm shall maintain copies of all reports and supporting documentation submitted to SEC staff in accordance with the SEC Order, as well as any other documentation needed to evidence the status and completion of each of the undertakings outlined in the SEC Order. The Firm shall maintain copies of such documentation in a readily accessible place for ease of review by FINRA staff.
5. Within six months of the SEC’s Letter of Acknowledgement in this matter (“LOA”), to the extent that it has not already done so within the past six months, and on at least an annual basis thereafter, for a term of six years from the date of the LOA, the Firm shall conduct training for all associated persons regarding the Digital Communication Channels that the Firm has approved for business communication, along with the Firm’s current policies regarding retention of business-related electronic communications. The Firm shall maintain a record of individual completion of said training and a copy of said training materials in a readily accessible place for ease of review by FINRA staff.
6. The Firm shall conduct the training described in item number 5 above for all new hires, within sixty-five days from the date of commencement of new hire training, for a term of six years from the date of the LOA. The Firm shall retain a record of all new hire training, including a copy of all written training materials, and keep

said record(s) in a readily accessible place for ease of review by FINRA staff.

7. Within 90 days of the LOA, the Firm shall, to the extent that it has not already done so, establish and maintain a written list(s) of all Digital Communication Channels that its associated persons are permitted to use to communicate about Firm business. The list(s) shall be provided to all of the Firm's associated persons at least on a semi-annual basis, for a term of six years from the date of the LOA. The Firm shall require that all associated persons obtain written approval for use of any Digital Communication Channels to communicate about Firm business that are not already on the approved list(s) maintained by the Firm. The Firm shall maintain a record of all requests and approvals or rejections of each request, including the date of the requests and the Firm's decision. The Firm shall maintain copies of such requests and decisions in a readily accessible place for ease of review by FINRA staff.
8. The Firm shall require all associated persons to disclose on at least a semi-annual basis, for a term of six years from the date of the LOA, any unapproved Digital Communication Channels he/she is using to communicate about Firm business. The Firm shall retain records of such disclosures in a readily accessible place for ease of review by FINRA staff.
9. Subject to Paragraph 7 above, the Firm shall prohibit associated persons from using Off-Channel Communications.
10. Within 90 days of the LOA, the Firm shall, to the extent that it has not already done so, develop a process whereby, in the event that an associated person sends or receives an Off-Channel Communication, the Off-Channel Communication is submitted to the Firm and retained in compliance with relevant securities laws and regulations. For a term of six years from the date of the LOA, the Firm shall maintain a record of all such Off-Channel Communications, including a record of the Firm's receipt of the communication, in a readily accessible place for ease of review by FINRA staff.
11. Within 90 days of the LOA, the Firm shall, to the extent that it has not already done so, develop and maintain written policies and procedures detailing the Firm's processes for disciplining associated persons who use Off-Channel Communications to communicate about Firm business ("disciplinary processes"). When the Firm uses these disciplinary processes, the Firm shall document each instance. The Firm shall retain records of such written policies and procedures and records of these disciplinary processes and each outcome. The Firm's written policies and procedures concerning these disciplinary processes will be owned by the Employee Relations team.
12. All requested documents and certifications under this Supervision Plan shall be sent directly to FINRA's Statutory Disqualification Group at SDMailbox@FINRA.org.
13. The Firm shall obtain written approval from FINRA's Statutory Disqualification

Group prior to changing any provision of the Supervision Plan.

14. The Firm shall submit any proposed changes or other requested information under this Supervision Plan to FINRA's Statutory Disqualification Group at SDMailbox@FINRA.org.

VII. Discussion

After carefully reviewing the entire record in this matter, FINRA approves the Firm's request to continue its membership with FINRA, subject to the terms and conditions set forth herein. In evaluating the Firm's Application, FINRA assessed whether the Firm has demonstrated that its continued membership is consistent with the public interest and does not create an unreasonable risk of harm to investors or the markets. *See FINRA By-Laws, Art. III, Sec. 3(d); cf. Frank Kufrovich*, 55 S.E.C. 616, 624 (2002) (holding that FINRA "may deny an application by a firm for association with a statutorily-disqualified individual if it determines that employment under the proposed plan would not be consistent with the public interest and the protection of investors"). Typically, factors that bear on FINRA's assessment include, among other things, the nature and gravity of the statutorily disqualifying misconduct, the time elapsed since its occurrence, the restrictions imposed, the Firm's regulatory history, and whether there has been any intervening misconduct.

As of the date of this Notice, FINRA has determined that the Firm's continued membership is consistent with the public interest and does not create an unreasonable risk of harm to investors or the markets. While the SEC Order identified serious violations of securities laws, the Firm was not expelled or suspended, nor were any limitations placed on the Firm's securities activities. Although the SEC Order triggered certain disqualifications from exemptions from registration available under the Securities Act of 1933 ("Securities Act"), specifically Regulations A, D and E of the Securities Act and Regulation Crowdfunding, the SEC granted the Firm a waiver from the application of the disqualification provisions of Rules 262(a)(4)(ii), 506(d)(1)(iv)(B), and 602(c)(3) of the Securities Act and Rule 503(a)(4)(ii) of Regulation Crowdfunding.⁹⁴ Moreover, the Firm promptly paid the required monetary penalty to the SEC and monetary penalty imposed by the CFTC order with similar findings as the disqualifying order.⁹⁵ Additionally, the Firm represented that it is in compliance with the ordered undertakings.⁹⁶

Member Supervision also acknowledges that within the SEC Order the SEC considered the Firm's prompt remedial actions and cooperation with the Commission when determining to accept the Offer of Settlement.⁹⁷ The Firm has also represented that it has enhanced its policies, procedures, training, technology platforms, surveillance system, and disciplinary

⁹⁴ See Exhibit 3.

⁹⁵ See Exhibit 4 at FINRA pp. 1-2, Responses 1 and 2; FINRA pp. 7-18.

⁹⁶ *Id.* at FINRA pp. 32-34.

⁹⁷ See Exhibit 2 at p. 6.

structure pertaining to the use of unapproved electronic communication methods and electronic communications retention more broadly.⁹⁸

It is well settled that a firm's regulatory history bears upon the assessment of its ability to comply with securities law and regulations. *See In the Matter of the Continued Association of Craig Scott Taddonio with Meyers Associate, L.P.*, SD-2117, slip op. at 24-25 (FINRA NAC March 8, 2017). However, the corrective measures taken by firms to address deficiencies are weighed in determining whether to approve applications. *See In the Matter of the Association of X with the Sponsoring Firm*, SD11007 (FINRA NAC 2011) (where a firm's corrective actions negated Member Regulation's assertion that the firm failed to appreciate or respect securities rules and regulations). FINRA has also previously approved applications for continued membership where the firms had extensive regulatory history, including disqualifying events. *See In the Matter of the Continued Membership of Deutsche Bank Securities, Inc.*, SD-2190 (FINRA Jan. 14, 2020) and *In the Matter of the Continued Membership of Citigroup Global Markets, Inc.*, SD-2082 (FINRA May 2, 2017) (approving continued membership where the firms had extensive regulatory history, including recent disqualifying events).

In its evaluation of the Firm's Application, FINRA acknowledges the Firm's recent regulatory and disciplinary history, including its additional statutory disqualifying events. Member Supervision also notes that, as of the date of this Notice, the Firm has paid all fines and has either fully complied with all undertakings ordered by regulators or demonstrated that it is currently complying with undertakings as applicable in the underlying SEC and related CFTC orders. None of these prior disciplinary matters would prevent the continuance of the Firm as a FINRA member. With respect to the Firm's recent examination exceptions, the Firm took steps to resolve exceptions noted by FINRA staff including by making necessary technological changes and making efforts to pay customer restitution where appropriate.

FINRA is further reassured by the controls set in place by the Firm's Supervision Plan, which bolster the undertakings outlined in the SEC Order and will continue to provide oversight of the Firm and compliance with its remaining undertakings. In accordance with the Plan, the Firm agreed to conduct annual training for all associated persons, including new hires, regarding the Firm's approved digital communication methods and record retention policies. Further, the Plan calls for the Firm to maintain a list of approved digital communication methods that associated persons are permitted to use for Firm business and to circulate that list to its associated persons semi-annually. The Plan requires the Firm's associated persons to obtain written approval to use digital communication channels not already approved. The Plan prohibits the use of off-channel communications and requires associated persons to semi-annually disclose any unapproved digital communication methods they are using for Firm business; they must also forward any off-channel communications that may have taken place to the Firm for retention purposes. These provisions will help to ensure that the Firm is aware of the communication methods being used by associated persons so that it can appropriately monitor, capture, and retain those

⁹⁸ See Exhibit 1 at FINRA p. 23.

communications. Additionally, the Plan mandates that the Firm develop policies and procedures for disciplining associated persons who use unapproved communication methods for Firm business and segregate all certifications, reports, and supporting documentation submitted to the SEC regarding compliance with the undertakings, for ease of review by FINRA staff to ensure ongoing compliance.

The Department is further reassured by the progress the Firm has made on the undertakings required by the SEC. Specifically, the Firm retained an independent consultant in a timely manner in accordance with the SEC Order and has submitted periodic reports to the Commission regarding individuals who were disciplined for conduct related to the preservation of electronic communications.⁹⁹ In February 2023, the independent consultant submitted a written report of its findings to the Firm, BofA, the SEC, and the CFTC.¹⁰⁰ In July 2023, the Firm and BofA implemented a plan of action to adopt the recommendations contained in the independent consultant's report.¹⁰¹

Following the approval of the Firm's continued membership in FINRA, FINRA intends to utilize its examination and surveillance processes to monitor the Firm's continued compliance with the standards prescribed by Exchange Act Rule 19h-1 and FINRA Rule 9523.

Thus, FINRA is satisfied, based on the foregoing and on the Firm's representations made pursuant to the Supervision Plan, that the Firm's continued membership in FINRA is consistent with the public interest and does not create an unreasonable risk of harm to the market or investors. Accordingly, FINRA approves Merrill Lynch's Application to continue its membership with FINRA.

FINRA certifies that the Firm meets all qualification requirements and represents that the Firm is registered with several other SROs including Cboe; BYX; BZX; EDGA; EDGX; IEX; Nasdaq; NYSE; DTC, FICC-GOV, and NSCC. The SROs have been provided with the terms and conditions of the Firm's proposed continued membership, and they concur with FINRA.

In conformity with the provisions of Rule 19h-1 of the Exchange Act, the continued membership of the Firm will become effective within 30 days of the receipt of this notice by the Commission, unless otherwise notified by the SEC.

⁹⁹ See Exhibit 4 at FINRA pp. 1-2, Response 1; FINRA pp. 8-14.

¹⁰⁰ *Id.* at FINRA p. 34.

¹⁰¹ *Id.*

On Behalf of FINRA,



Marcia E. Asquith
Executive Vice President & Corporate Secretary

Appendix A

**Statutory Disqualified Individuals
Associated with Merrill Lynch, Pierce, Fenner & Smith Incorporated**

[REDACTED]

[REDACTED]

[REDACTED]

Exhibits
SD-2339

1. Merrill Lynch's MC-400A Application and related attachments compiled by FINRA's CRED, with a cover memorandum dated October 24, 2022.
2. SEC Order, *In re BofA Securities, Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated*, Exchange Act Release No. 95921 (Sept. 27, 2022).
3. *In re Certain Broker-Dealer Practices*, Securities Act Release No. 11109 (Sept. 27, 2022).
4. Correspondence from Elizabeth Marino to FINRA dated April 6, 2023 (with exhibits) and December 19, 2023.
5. CRD Excerpt: Organization Registration Status.
6. CRD Excerpts: Types of Business and Other Business Descriptions.
7. Disposition Letter for Examination No. 20220734149 dated March 27, 2023, Examination Report dated January 27, 2023, and Firm Response dated February 17, 2023.
8. Disposition Letter for Examination No. 20220754562 dated May 18, 2023.
9. Disposition Letters for Examination Nos. 20220754240 and 20220754241 dated August 9, 2023 and the Firm's Response dated September 1, 2023.
10. Disposition Letter for Examination No. 20230790409 dated August 15, 2023 (the Firm did not provide a written response) with redactions added by FINRA.
11. Disposition Letter for Examination No. 20200678317 dated August 15, 2022 (the Firm did not provide a written response).
12. Disposition Letter for Examination No. 20200676034 dated January 7, 2022, and the Firm's Response dated February 4, 2022.
13. SEC Deficiency Letter for File No. 8-7221 dated July 12, 2023, and Firm Response dated August 11, 2023.
14. SEC Deficiency Letter for File No. 8-7221 dated June 14, 2023, and Firm Response dated July 21, 2023.

15. SEC Deficiency Letter for File No. 8-7221 dated August 30, 2022, and Firm Response dated September 28, 2022.
16. SEC Deficiency Letter for File No. 8-7221 dated April 28, 2022, and Firm Response dated May 26, 2022.
17. CRD Snapshot Record for Merrill Lynch dated December 11, 2023.
18. FINRA AWC No. 2020066667001 dated July 11, 2023.
19. Form U6 Filing for Matter No. 2020066667001 dated August 9, 2023.
20. FINRA AWC No. 2019062900001 dated May 1, 2023.
21. CRD Disclosure Occurrence Composite for Occurrence No. 2271251.
22. FINRA AWC No. 2020068535401 dated June 1, 2022.
23. FINRA AWC No. 2018057201801 dated December 20, 2021.
24. Certification Letter from the Firm to FINRA dated May 19, 2022.
25. FINRA AWC No. 2018058015702 dated December 20, 2021.
26. CFTC Order, *In re Bank of America, N.A., BofA Securities, Inc., and Merrill Lynch, Pierce, Fenner & Smith Incorporated*, CFTC Docket No. 22-38 (Sept. 27, 2022).
27. Correspondence from Elizabeth Marino to FINRA dated November 17, 2023, with Exhibits including Consent Order, *In re Merrill Lynch, Pierce, Fenner and Smith Incorporated*, Case No. I-2022000023 (New Hampshire Bureau of Securities Regulation, May 2, 2023), with redactions added by FINRA.
28. SEC Order, *In re Merrill Lynch, Pierce, Fenner & Smith Incorporated; and BAC North America Holding Co.*, Exchange Act Release No. 97872 (July 11, 2023).
29. SEC Order, *In re Merrill Lynch, Pierce, Fenner & Smith Incorporated*, Exchange Act Release No. 97242 (April 3, 2023).
30. SEC Order, *In re Merrill Lynch, Pierce, Fenner & Smith, Incorporated*, Admin. Proc. File No. 3-19753, Advisers Act Release No. 5479 (April 17, 2020).

31. SEC Order, *In re Merrill Lynch, Pierce, Fenner & Smith Incorporated*, Exchange Act Release No. 85395 (March 22, 2019).
32. *In re the Continued Membership of Merrill Lynch, Pierce, Fenner & Smith Incorporated*, SD-2056 (FINRA NAC Dec. 6, 2017), and the SEC's Letter of Acknowledgement dated February 1, 2018.
33. *In re the Continued Membership of Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corporation*, SD-2074 & SD-2075 (FINRA April 5, 2017), and the SEC's Letter of Acknowledgement dated May 16, 2017.
34. *In re the Continued Membership of Citigroup Global Markets Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, and Raymond James & Associated, Inc.*, SD-MCDC-031, SD-MCDC-033, & SD-MCDC-003 (FINRA August 10, 2015), and the SEC's Letter of Acknowledgement dated August 20, 2015.
35. *In re the Continued Membership of Merrill Lynch, Pierce, Fenner & Smith Incorporated*, SD-1792 (FINRA May 15, 2013), and the SEC's Letter of Acknowledgement dated September 26, 2013.
36. Executed Consent to Plan of Heightened Supervision dated December 1, 2023.

Exhibit A

Plan of Heightened Supervision

Merrill Lynch, Pierce, Fenner & Smith Incorporated (the “Firm”) is subject to statutory disqualification pursuant to Section 3(a)(39)(F) of the Securities Exchange Act of 1934, which incorporates by reference Sections 15(b)(4)(D) & (E), as a result of an order issued by the U.S. Securities and Exchange Commission (“SEC” or “Commission”) dated September 27, 2022, which found that the Firm willfully violated Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-4(b)(4) thereunder (“SEC Order”). The SEC Order also found that the Firm failed reasonably to supervise its employees within the meaning of Section 15(b)(4)(E).

In consenting to this Supervision Plan¹ (“Supervision Plan”), the Firm agrees to the following:

1. The Firm shall comply with all the undertakings outlined in the SEC Order.
2. The Firm shall maintain copies of all correspondence between the Firm and Commission staff relating to the SEC Order, including documenting when Commission staff grants extensions to the deadlines set forth in the SEC Order. The Firm shall maintain copies of all such correspondence in a readily accessible place for ease of review by FINRA staff.
3. The Firm shall maintain copies of all reports and supporting documentation submitted to SEC staff in accordance with the SEC Order, as well as any other documentation needed to evidence the status and completion of each of the undertakings outlined in the SEC Order. The Firm shall maintain copies of such documentation in a readily accessible place for ease of review by FINRA staff.
4. The Firm shall provide FINRA’s Statutory Disqualification Group with copies of all certifications submitted to the SEC upon completion of the undertakings as specified under paragraph 36 of the SEC Order.
5. This Supervision Plan shall take effect on the date the Firm executes its consent to this Supervision Plan. The Supervision Plan shall be in effect until FINRA’s receipt of the Firm’s final certifications required by the SEC Order, after which time the Supervision Plan and its provisions thereto will expire.
6. All requested documents and certifications under this Supervision Plan shall be sent directly to FINRA’s Statutory Disqualification Group at SDMailbox@FINRA.org.
7. The Firm shall obtain written approval from FINRA’s Statutory Disqualification Group prior to changing any provision of the Supervision Plan.

¹ This Supervision Plan supersedes the Firm’s previous Supervision Plan executed on December 1, 2023.

8. The Firm shall submit any proposed changes or other requested information under this Supervision Plan to FINRA's Statutory Disqualification Group at SDMailbox@FINRA.org.