

STATE OF NEW HAMPSHIRE  
BUREAU OF SECURITIES REGULATION  
DEPARTMENT OF STATE  
25 CAPITOL STREET  
CONCORD, NH 03301

**CONSENT ORDER**

Merrill Lynch, Pierce, Fenner & Smith Incorporated (CRD #7691)

Charles Kenahan (CRD #1351974)

COM2019-000

- I. For purposes of settling the above-referenced matter and in lieu of further administrative proceedings, Merrill Lynch, Pierce, Fenner & Smith Incorporated (hereinafter referred to as “ML”), and Charles Kenahan (hereinafter referred to as “CK”) have submitted an offer of settlement, which the Bureau of Securities Regulation, Department of State, State of New Hampshire (hereinafter referred to as the “Bureau”) has determined to accept. Accordingly, and without admitting or denying the facts, violations or statements of law contained herein, ML and CK do hereby consent to the entry of this Consent Order:

**STATEMENT OF FACTS**

1. ML is a licensed broker-dealer and investment adviser with principal offices located at One Bryant Park, New York, New York 10036. ML’s CRD number is 7691 and SEC number is 8-7221. ML has been a licensed broker-dealer in New Hampshire since February 2, 1983. CK was a registered representative and investment adviser representative for ML from December 2007 to July 2019 when he was terminated following several customer complaints against him and ML that were the subject of the Bureau’s investigation.
2. The conduct leading to this enforcement action and Consent Order took place when CK was based in ML’s branch office located at 100 Federal Street in Boston, Massachusetts 02110 from December 2007 to August 2018 (hereinafter referred to as the “relevant time period”). CK and his partner focused on servicing the accounts of high net worth customers including Investor #1 who resides in Rye, New Hampshire along with his family.
3. Investor #1 and entities that he and his family beneficially owned had multiple accounts with CK and ML, many of which were overseen by Investor #1’s attorney (“Attorney #1”), in his capacity as trustee and/or managing member of limited liability companies. Attorney #1 maintained his place of business in Massachusetts. The multiple accounts were part of a comprehensive estate plan devised by Investor #1 and Attorney #1 along

with other lawyers and estate planners to oversee and administer the family assets that were of significant value. CK serviced Investor #1's accounts prior to his employment with ML and brought Investor #1 over from his prior broker-dealer in December 2007. CK received a 4.5 million dollar forgivable loan. Investor #1 had a long-standing relationship with CK having met CK through CK's partner who had assisted Investor #1 with his business taxes starting in the 1980s.

4. After CK made the switch in broker-dealers, he met with Investor #1 at his home in Rye, New Hampshire and explained that he was making the switch and he wanted Investor #1 to also switch to ML. At this meeting, CK and Investor #1 discussed the fact that Investor #1 was receiving a five cent per share commission rate for stock trading at his prior broker-dealer and he wanted the same rate from ML. CK agreed, but the agreement was oral and not written. It was determined at that time as well that most of Investor #1's accounts would be nondiscretionary and commission-based accounts. When Investor #1 began his relationship with ML, the numerous account opening documents that were completed indicated an investment objective of growth and a risk tolerance of aggressive. The objective was changed to total return in 2011.
5. When Investor #1 account opening documents were filled out, Investor #1 designated various recipients for his ML account statements, ML tax statements, and trade confirmations. As to many accounts, such items were sent care of Investor #1's accountants located in Massachusetts, with duplicate documents sent to Attorney #1 in Massachusetts. Investor #1 also received trade confirmations and account statements. Investor #1 is a successful businessman and public figure who relied on others to manage his everyday record keeping and document safekeeping. Investor #1 infrequently used e-mail to communicate with CK and would typically communicate with CK via his cell phone but was often hard to reach. Although Investor #1's designees received ML monthly account statements and trading confirmations, Investor #1 did not keep track of and was not aware of the day-to-day activity in his ML accounts.
6. In January 2019, the Bureau received a complaint from Investor #1 against CK and ML alleging numerous violations of the New Hampshire Uniform Securities Act RSA 421-B. Some of Investor #1's accounts sustained heavy losses at a time when the stock market was gaining. Investor #1's complaint alleged excessive trading, unsuitable trading, breach of the five cents per share oral agreement, mismarked trade tickets, unsuitable trading of initial public offerings, unsuitable trading of inverse and leveraged exchange traded funds, and that ML failed to supervise CK. Investor #1 had also filed an arbitration claim against CK and ML that is pending before the Financial Industry Regulatory Authority's Office of Dispute Resolution. The arbitration claim will be settled in coordination with this matter.
7. During the course of his relationship with ML and CK, Investor #1 was focused on global events and economies. At times Investor #1 would meet with ML research analysts and/or strategist in New Hampshire in order to learn about ML investment strategies. CK also sent to Investor #1 various investment research reports and strategy

materials from ML, including materials addressing domestic equities, foreign equities, and dividend income strategies. One particular research report was called the Global Best of Breed. That strategy is a quantitative screen developed by the Investment Strategy team of ML Research. Various Global Best of Breed stocks would be added or removed from the list by the Investment Strategy team on a quarterly basis based on the screen. From inception through February 2018, the strategy's price return significantly outperformed the relevant benchmark index, based on the stated methodology of performance calculation. However, CK deviated from the strategy's buy and sell recommendations, and made purchases and sales inconsistent with the strategy, resulting in trading losses, rather than gains, and earning high commissions for CK.

8. Investor #1's accounts were in the tens of millions of dollars. Millions of dollars were being transacted in and out of securities picked for trading by CK and ML on an almost daily basis and the commissions generated were in the millions of dollars. ML earned over twenty million dollars in revenue, including commissions, over the relevant time-period.
9. Despite the fact that ML and CK had orally agreed with Investor #1 to trade securities in his accounts at five cents per share, Investor #1 paid over five cents per share contrary to the agreement in hundreds of small transactions for which ML charged its customary \$50 or \$75 minimum commission.
10. Despite the fact that CK picked and recommended hundreds of different securities to buy and sell for Investor #1's accounts, hundreds of the trades were marked unsolicited. In particular, CK regularly devised lists of securities from the various ML research reports to buy and sell. Many of those listed as buys and sells were mismarked as unsolicited when they were in fact solicited. This was not in keeping with ML's policies and procedures regarding the designation of trades as solicited on order tickets. On several occasions, CK recommended the purchase and sale of stock in Monitise, a security not followed by ML research, which trades also resulted in losses for Investor #1; the trade tickets for the purchases were mismarked as unsolicited when they were solicited. CK repeated this conduct regarding Monitise across multiple customer accounts including the customers that complained about CK. Those sales violated ML's internal policy not to recommend a security not followed by ML research.
11. CK excessively traded several Global Best of Breed stocks in and out of Investor #1's accounts without regard to the losses that the trading generated and without regard to the high commissions paid by Investor #1. CK implemented his own trading strategy that ultimately benefited himself, and not Investor #1, and was not in keeping with the ML research strategy. Further, despite the fact that initial public offerings of preferred stock are best utilized for a buy and hold strategy, CK sold those stocks shortly after the offering without regard to the losses and the high commissions incurred by Investor #1. This was not in keeping with ML's policy and procedure prohibiting excessive and unsuitable trading.

12. Despite ML policy and procedure regarding the purchase of many inverse and leveraged exchange traded funds requiring that they not be solicited and should be purchased only on an unsolicited basis, CK solicited the purchases of these securities by Investor #1 and held these securities in his accounts for extended periods, sometimes resulting in losses to Investor #1. Those trades were unsuitable and also marked unsolicited when they were solicited.
13. Inverse and leveraged exchange-traded funds (“ETFs”) represent an interest in a portfolio of securities that track an underlying benchmark or index. Inverse and leveraged ETFs are complex and are unlike traditional mutual funds since they trade throughout the day at market prices as opposed to traditional mutual funds that are priced at the end of each trading day based on net asset value. Inverse and leveraged ETFs have different performance objectives than regular ETFs. Regular ETFs track the underlying index or benchmark whereas inverse and leveraged ETFs are designed to reach their stated performance objectives on a daily basis. Inverse ETFs seek to deliver the opposite of the performance of the index or benchmark they track. Since inverse and leveraged ETFs seek to achieve their performance on a daily basis, their performance over longer periods of time, such as weeks, months or years, can have significantly different results. This negative effect can be made worse in a volatile market. Large losses can accrue through what’s known as “compounding.” Compounding occurs when the price of inverse and leveraged ETFs drop over a number of days and the losses compound rather than track the index or benchmark. The Bureau determined that, to the detriment of Investor #1’s accounts, CK’s trading strategy included improper trading of leveraged and inverse ETFs by holding positions in these funds for long periods and compounding losses. These trades were unsuitable and some of these trades resulted in losses in Investor #1’s accounts.
14. Most of the ML accounts of Investor #1 were nondiscretionary which requires that each and every trade be authorized by the customer. Pursuant to ML’s policies and regulatory requirements, the customer’s authorization for secondary equity market trades in a nondiscretionary account should be contemporaneous with the time of the trade and be confirmed with a confirmation statement sent to the customer in accordance with the Rules of the Financial Industry Regulatory Authority (FINRA). Despite this requirement, CK did not contact Investor #1 or his authorized representative to receive contemporaneous trading authority for each and every trade. There are numerous instances where trades were executed without contemporaneous trading authority contrary to ML’s own policies and procedures.
15. CK was terminated by ML in 2019 and Investor #1’s accounts are no longer with ML since 2018.
16. ML had policies and procedures in place that are supposed to be reasonably designed to supervise the conduct of its agents and prevent the type of trading that occurred in Investor #1’s accounts. According to the policies and procedures, suitability reviews should be conducted by principals who will approve or reject representative recommendations and determine if they meet the stated investment objectives.

Excessive trading is prohibited and turnover ratio and in-and-out trading are factors in determining excessive trading. Had ML followed its own policies and procedures, ML would have discovered the above-described trading. As a result, ML failed to fulfill its supervisory obligations with respect to Investor #1's accounts.

#### STATEMENTS OF LAW

1. CK and ML are "persons" within the meaning of RSA 421-B:2, XVI (prior to January 1, 2016) and RSA 421-B:1-102(39) (on or after January 1, 2016).
2. ML is a broker-dealer within the meaning of RSA 421-B:2, III (prior to January 1, 2016) and RSA 421-B:1-102(6) (on or after January 1, 2016).
3. CK is a broker-dealer agent of ML within the meaning of RSA 421-B:2, II (prior to January 1, 2016) and RSA 421-B:1-102(3) (on or after January 1, 2016).
4. Pursuant to RSA 421-B:3-a (prior to January 1, 2016) and RSA 421-B:5-501(b) (on or after January 1, 2016), in recommending to a customer the purchase, sale or exchange of a security, a broker-dealer or broker-dealer agent must have reasonable grounds for believing that the recommendation is suitable for the customer. CK violated these provisions as to Investor #1 with respect to the excessive trading of stocks and inappropriate trading of inverse and leveraged exchange traded funds and initial public offerings.
5. Pursuant to RSA 421-B:8, X (prior to January 1, 2016) and RSA 421-B:4-406(k) (on or after January 1, 2016), persons licensed under RSA 421-B to conduct securities business shall abide by the rules of the Securities and Exchange Commission and other self-regulating organizations (e.g., FINRA) which have jurisdiction over the licensee, which set forth standards of conduct in the securities industry. Pursuant to FINRA Rule 2232, a member shall, at or before the completion of any transaction in any security effected for or with an account of a customer, give or send to such customer written notification ("confirmation") in conformity with the requirement of SEC Rule 10b-10. Numerous transactions were reported by CK as unsolicited when they were in fact solicited resulting in inaccurate trade confirmations being sent to Investor #1 and Attorney #1.
6. Pursuant to RSA 421-B:8, X (prior to January 1, 2016) and RSA 421-B:4-406(k) (on or after January 1, 2016), persons licensed under RSA 421-B to conduct securities business shall abide by the rules of the Securities and Exchange Commission and other self-regulating organizations (e.g., FINRA) which have jurisdiction over the licensee, which set forth standards of conduct in the securities industry. ML violated this provision for failing to abide by FINRA Rule 3110 Supervision and CK violated Rule 2111 Suitability.
7. RSA 421-B:10, I(a) and (b)(2) (prior to January 1, 2016) allows the secretary of state to deny, suspend, or revoke any license or application if he finds that it is in the public interest and that the applicant or licensee has willfully violated or failed to comply with any

provision of RSA 421-B. CK is subject to this provision, and he should be permanently barred from licensure for violating the provisions of RSA 421-B.

8. Pursuant to RSA 421-B:10, I(a) and (b)(10) (prior to January 1, 2016) and RSA 421-B:4-412(d)(9) (on or after January 1, 2016), the secretary of state may by order fine a broker-dealer if he finds that it is in the public interest and that the applicant or licensee has failed to reasonably supervise its agents if it is a broker-dealer. ML failed to detect and to reasonably supervise CK's overcharging Investor #1, excessive trading, mismarked confirmations, and unsuitable trading of initial public offerings and inverse and leveraged ETFs. ML violated this provision for failing to supervise CK's trading in Investor #1's accounts.
9. Pursuant to RSA 421-B:23 (prior to January 1, 2016), whenever it appears to the secretary of state that any person has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule under this chapter, he shall have the power to issue and cause to be served upon such person an order requiring the person to cease and desist from violations of this chapter. Pursuant to RSA 421-B:6-604(a) (on or after January 1, 2016), if the secretary of state determines that a person has, is, or is about to materially aid in an act, practice, or course of business constituting a violation of this chapter, the secretary of state may issue an order directing the person to cease and desist from engaging in an act, practice, or course of business or to take other action necessary or appropriate to comply with this chapter. ML and CK are subject to these sections and should be required to cease and desist from engaging in the conduct as described in the Statement of Law.
10. Pursuant to RSA 421-B:26, III (prior to January 1, 2016) and RSA 421-B:6-604(d) (on or after January 1, 2016), any person who, either knowingly or negligently, violates any provisions of this chapter may, upon hearing, and in addition to any other penalty provided for by law, be subject to such suspension, revocation or denial of any registration or license, or an administrative fine not to exceed \$2,500, or both. Each of the acts specified shall constitute a separate violation. CK is subject to a permanent bar and ML is subject to a fine as to each violative customer account transaction.
11. Pursuant to RSA 421-B:26, V (prior to January 1, 2016) and RSA 421-B:6-604(e) (on or after January 1, 2016), the secretary of state can order Respondents to pay restitution for losses to Investor #1. ML is subject to this provision.
12. Pursuant to RSA 421-B:22, IV (prior to January 1, 2016) and RSA 421-B:6-604(g) (on or after January 1, 2016), in any investigation to determine whether any person has violated any rule or order under this title, the secretary of state shall be entitled to recover the costs of the investigation. ML is subject to this provision.

- II. In view of the foregoing, ML and CK agree to the following:
1. ML and CK agree that they voluntarily consented to the entry of this Consent Order and represent and aver that no employee or representative of the Bureau has made any promise, representation, or threat to induce their signing of this Order.
  2. ML and CK agree to waive their right to an administrative hearing and any appeal thereof under this chapter.
  3. ML and CK agree to cease and desist from any violations of N.H. RSA 421-B.
  4. CK agrees to be permanently barred from licensure and transacting any securities business in New Hampshire.
  5. This Consent Order is entered into for purposes of resolving the matter as described herein. This Order shall have no collateral estoppel effect in any other lawsuit, proceeding, or action, not described herein. Likewise, this Order shall not be construed to restrict the Bureau's right to initiate an administrative investigation or proceeding relative to conduct by ML and CK of which the Bureau has no knowledge at the time of the date of final entry of this Consent Order.
  6. ML and CK agree not to take any action or make any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any allegation in this Consent Order or create the impression that the Consent Order is without factual basis. Nothing in this provision affects ML and CK's right to take contrary legal or factual positions in litigation or other legal or regulatory proceedings in which the Bureau is not a party.
  7. ML agrees, pursuant to this Consent Order, to pay to the Bureau an administrative fine of One Million Seven-Hundred Fifty Thousand Dollars (\$1,750,000.00), plus costs of Two-Hundred Fifty Thousand Dollars (\$250,000.00), for a total of Two Million Dollars (\$2,000,000.00). Payment shall be made within 10 business days of the execution of the Consent Order to the State of New Hampshire. Payment must be made by 1) business check or certified check; 2) made payable to the State of New Hampshire; and 3) mailed to the Bureau of Securities Regulation, Department of State, State House, Room 204, Concord, New Hampshire, 03301.
  8. Upon the execution of this Consent Order and the contemporaneous execution of a private settlement agreement to resolve Investor #1's arbitration claims, ML agrees to pay restitution within 10 business days to Investor #1 in the amount of Twenty-Four Million Two-Hundred Fifty Thousand Dollars (\$24,250,000.00). The language of said settlement agreement will not qualify, amend, nullify, explain, contradict, define or otherwise dictate or control the Findings of Fact, Statements of Law, undertakings or sanctions ordered in this Consent Order. Nor shall this Consent Order limit any parties' rights or obligations under the private settlement agreement, however, in case of any conflict between the terms of this Consent Order and the terms of the private settlement

agreement, the terms of this Consent Order shall prevail.

9. Since the initiation of this investigation and enforcement action, ML has put in place and has provided evidence to the Bureau of the following regarding enhancements to its policies and procedures;
  - a. Designing and implementing a module that alerts supervisors to accounts in which the brokerage costs significantly exceed the fees that would likely be charged to a similarly-sized account enrolled in an investment advisory program;
  - b. designing and implementing a module that alerts supervisors to situations where certain clients generate a high level of revenues relative to the responsible financial advisor's overall compensation;
  - c. designing and implementing a module that alerts supervisors to any account of financial advisor with a pattern of liquidating preferred securities within one year of being purchased on the offering;
  - d. designing and implementing technology that automatically generates a letter to any client holding leveraged and inverse ETFs for 30 or more days, disclosing risks and reminding them the security is not designed to be held long term; and
  - e. instituting a process through which managers in branch offices initiate contact with the customers of that branch whose accounts generate the largest amounts of revenue even if there are no known concerns about those customers accounts.

III. In view of the foregoing, the Bureau deems it appropriate and in the public interest to accept and enter into this Order. THEREFORE IT IS HEREBY ORDERED THAT:

1. The Bureau finds as fact the allegations contained in Section I above;
2. The Bureau makes conclusions of law, based upon the Statements of Law above, as applied to the facts stated in Section I above;
3. Pursuant to RSA 421-B:6-604(a) and RSA 421-B:23 ML and CK Cease and Desist for violations of the New Hampshire Uniform Securities Act;
4. Pursuant to RSA 421-B:6-604(a), RSA 421-B:26, III, a permanent registration and licensure bar issues against CK for violations of the New Hampshire Uniform Securities Act;
5. Pursuant to RSA 421-B:6-604(d) and RSA 421-B:26, III, an administrative fine in the amount of one million seven-hundred fifty thousand dollars (\$1,750,000.00) is assessed against ML to be paid as indicated above;



6. Pursuant to RSA 421-B:6-604(g) and RSA 421-B:22 costs of this investigation in the amount of two-hundred fifty thousand dollars (\$250,000.00) are assessed against ML to be paid as indicated above;
7. Pursuant to RSA 421-B:26, V and RSA 421-B:6-604(e) ML shall pay restitution to Investor #1 in the amount of twenty-four million two-hundred fifty thousand dollars (\$24,250,000.00) under the conditions set forth above;
8. Pursuant to 17 C.F.R § 230.506(d)(2)(iii), nothing stated in this Consent Order gives rise to a disqualification under 17 C.F.R. § 230.506(d)(1)(iii) or any other statutory or regulatory disqualification provision; and
9. ML has instituted the supervisory enhancements referenced above.

Executed this \_\_\_\_\_ day of \_\_\_\_\_ 2020

\_\_\_\_\_  
Charles Kenahan

Executed this \_\_\_\_\_ day of \_\_\_\_\_ 2020

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Merrill Lynch, Pierce, Fenner & Smith Incorporated

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Print name and capacity

Executed this 7<sup>th</sup> day of December 2020



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Barry J. Glennon, Director

Executed this \_\_\_\_\_ day of \_\_\_\_\_ 2020

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Charles Kenahan

Executed this 2<sup>ND</sup> day of December 2020


Mark L. Keene  
Merrill Lynch, Pierce, Fenner & Smith Incorporated

MARK L. KEENE  
ASSOCIATE GENERAL COUNSEL  
Print name and capacity

Executed this \_\_\_\_\_ day of \_\_\_\_\_ 2020

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Barry J. Glennon, Director

Executed this 1<sup>ST</sup> day of December 2020

  
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Charles Kenahan

Executed this \_\_\_\_\_ day of \_\_\_\_\_ 2020

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Merrill Lynch, Pierce, Fenner & Smith Incorporated

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Print name and capacity

Executed this \_\_\_\_\_ day of \_\_\_\_\_ 2020

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Barry J. Glennon, Director