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

CONSENT ORDER
IN THE MATTER OF:

Merrill Lynch, Pierce, Fenner and Smith, Incorporated CRD # 7691

C-2013000010

I. For purposes of settling the above-captioned matter, and in lieu of further administrative proceedings, Merrill Lynch, Pierce, Fenner and Smith, Incorporated ("Merrill Lynch") has submitted an offer of settlement which the State of New Hampshire, Department of State, Bureau of Securities Regulation (the "Bureau") has determined to accept. Accordingly, without admitting or denying the facts or allegations contained herein, Merrill Lynch does hereby consent to the following undertakings and sanctions:

THE FACTS

1. Merrill Lynch is a broker-dealer with its principal place of business at One Bryant Park, New York, NY 10036 with, according to the Central Registration Depository ("CRD"), sixteen (16) branch offices within New Hampshire. As a broker-dealer, Merrill Lynch has been registered with the U.S. Securities and Exchange Commission ("SEC") since March 12, 1959 and has been licensed in New Hampshire since February 2, 1983. Merrill Lynch is also a member of the Financial Industry Regulatory Authority ("FINRA") and is subject to FINRA rules.

2. Since the inception of the Federal Trade Commission’s National Do Not Call Registry (the "National Do Not Call Registry"), according to the Federal Trade Commission’s ("FTC’s") 2013 National Do Not Call Registry Data Book, approximately 1,177,000 New Hampshire telephone numbers have been placed on the registry. This ranks New Hampshire, with a population of just over 1.3 million, number one in active registrations per capita in the nation, as it translates to approximately 89 registrations for every 100 New Hampshire residents.

3. The relevant time period for the Bureau’s investigation was January 1, 2011 to the present.

Applicable Telemarketing Definitions and Rules

4. Applicable telemarketing rules define “telemarketing” as “consisting of or relating to a plan,
program or campaign involving at least one outbound telephone call, for example cold-calling."

5. Applicable telemarketing rules define an “outbound telephone call” as a “telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution from a donor.”

6. Applicable telemarketing rules define the term “person” as “any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.”

7. Applicable telemarketing rules state that “no member or person associated with a member shall initiate any outbound telephone call to . . . [a]ny person who has registered his or her telephone number on the Federal Trade Commission's national do-not-call registry.”

8. Applicable telemarketing rules also state that “no member or person associated with a member shall initiate any outbound telephone call to . . . [a]ny person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member.”

9. During its investigation, the Bureau determined that Merrill Lynch agents licensed in New Hampshire made applicable telemarketing phone calls to New Hampshire residents who were not clients of Merrill Lynch at the time of the call and whose numbers appeared on Merrill Lynch’s firm-specific do not call list and the Federal Trade Commission’s National Do Not Call Registry.

**Recording and Demonstration of Applicable Telemarketing Exceptions**

10. In terms of the prohibition on initiating outbound telephone calls to telephone numbers on the National Do Not Call Registry, applicable telemarketing rules generally provide three exceptions to this prohibition. Applicable telemarketing rules provide that a party initiating outbound telephone calls will not be liable for violating the prohibition against calling telephone numbers on the FTC’s National Do Not Call Registry if: 1) the party initiating the outbound telephone call has an established business relationship with the recipient of the call; 2) the party initiating the outbound telephone call has prior written consent from the recipient of the call; and 3) the party initiating the outbound telephone call has a personal relationship with the recipient of the call, meaning the recipient of the call is either a family member, friend, or acquaintance of the caller.

11. In light of the high percentage of New Hampshire registrations on the National Do Not Call
Registry, Merrill Lynch agents licensed in New Hampshire often make outbound telephone calls to New Hampshire telephone numbers on the National Do Not Call Registry.

**Supervision of Merrill Lynch Agents Licensed in New Hampshire**

12. According to policies and procedures in the area of telemarketing made available or distributed to Merrill Lynch agents licensed in New Hampshire, Merrill Lynch placed the core of compliance with applicable telemarketing rules on those agents. However, based on both the documents and other information provided by Merrill Lynch during the course of the Bureau’s investigation, the Bureau determined that Merrill Lynch did not reasonably supervise the telemarketing activities of its agents licensed in New Hampshire.

**THE LAW**

1. Merrill Lynch is a “person” within the meaning of N.H. RSA 421-B:2, XVI, a “broker dealer” within the meaning of N.H. RSA 421-B:2, III, and is a registered member of FINRA.

2. Pursuant to N.H. RSA 421-B:8, X, persons licensed under this chapter to conduct securities business shall abide by the rules of the SEC, National Association of Securities Dealers (NASD, now FINRA), national and regional stock exchanges, and other self-regulating organizations which have jurisdiction over the licensee, which set forth standards of conduct in the securities industry. Merrill Lynch is subject to these provisions.

3. Applicable telemarketing rules define “telemarketing” as “consisting of or relating to a plan, program or campaign involving at least one outbound telephone call, for example cold-calling.”

4. Applicable telemarketing rules define an “outbound telephone call” as a “telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution from a donor.”

5. Applicable telemarketing rules define the term “person” as “any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.”

6. Applicable telemarketing rules state that “no member or person associated with a member shall initiate any outbound telephone call to . . . [a]ny person that previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the member. . . .” Merrill Lynch is subject to this provision. Thus, any applicable telemarketing phone calls placed by Merrill Lynch agents licensed in New Hampshire to New Hampshire residents whose telephone numbers appear on Merrill Lynch’s firm-specific do not call list
and who are not clients of Merrill Lynch is a violation of N.H. RSA 421-B:8, X.

7. Applicable telemarketing rules state that “no member or person associated with a member shall initiate any outbound telephone call to . . . [a]ny person who has registered his or her telephone number on the Federal Trade Commission’s national do-not-call registry.” However, there are three possible exceptions to this prohibition. Merrill Lynch is subject to this provision. Thus, any applicable telemarketing phone calls placed by Merrill Lynch agents licensed in New Hampshire to New Hampshire residents who are not clients of Merrill Lynch and whose telephone numbers are registered on the National Do Not Call Registry, to which none of the three exceptions apply, is a violation of N.H. RSA 421-B:8, X.

8. Further, N.H. RSA 421-B:10, I(b)(10), the secretary of state may by order deny, suspend, or revoke any license or application, or bar any person from licensure if he or she finds that the applicant or licensee or, in the case of a broker-dealer, issuer-dealer, or investment adviser, any partner, officer or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer, issuer-dealer, or investment adviser has failed reasonably to supervise his agents if he is a broker-dealer, issuer-dealer, or his employees if he is an investment adviser. Further, N.H. RSA 421-B:10, VI, in lieu of, or in addition to, any such order to suspend or revoke any license or application, the secretary of state may, upon hearing, assess an administrative fine of not more than $2,500 per violation. Merrill Lynch is subject to this provision.

9. Pursuant to N.H. RSA 421-B:26, III, 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, including the forfeiture of any application fee, or an administrative fine not to exceed $2,500, or both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal penalties imposed pursuant to RSA 421-B:24 or civil liabilities imposed pursuant to RSA 421-B:25. Merrill Lynch is subject to this provision.

10. Pursuant to N.H. RSA 421-B:23, 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 or order under this chapter, the secretary of state 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. Merrill Lynch is subject to this provision.

11. Pursuant to N.H. RSA 421-B:22, IV, in any investigation to determine whether any person has violated or is about to violate this title or any rule or order under this title, upon the secretary of state’s prevailing at hearing, or the person charged with the violation being found in default, or pursuant to a consent order issued by the secretary of state, the secretary of state shall be entitled to recover the costs of the investigation, and any related
proceedings, including reasonable attorney’s fees, in addition to any other penalty provided for under this chapter. Merrill Lynch is subject to this provision.

II. In view of the foregoing, Merrill Lynch agrees to the following undertakings and sanctions:

1. Merrill Lynch agrees to cease and desist from further violations of N.H. RSA 421-B.

2. Merrill Lynch agrees that this Order is entered into for the purpose of resolving only the matter as described herein. This Consent Order shall have no collateral estoppel effect in any other lawsuit, proceeding, or action, not described herein. Likewise, this Consent Order shall not be construed to restrict the Bureau’s right to initiate an administrative investigation or proceeding relative to conduct by Merrill Lynch which the Bureau has no knowledge at the time of the date of final entry of this Consent Order.

3. Merrill Lynch agrees not to take any action or make or permit to be made 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 Merrill Lynch’s testimonial obligations or right to take any legal positions in administrative proceedings or in litigation, in which the State of New Hampshire is not a party.

4. Since the initiation of the Bureau’s investigation, Merrill Lynch has agreed to and completed enhancements and provided evidence to the Bureau of the completed enhancements to its telemarketing policies and procedures including:

a. requiring approval by a branch manager of any scrubbed lead lists prior to utilizing such lead lists to make outbound telephone calls as defined by applicable telemarketing calls;

b. reviewing, on at least an annual basis, branch manager approval of scrubbed lead lists used by Merrill Lynch agents licensed in New Hampshire;

c. tracking referrals from affiliated entities in a centralized Merrill Lynch system including training for Merrill Lynch agents licensed in New Hampshire on policies and procedures regarding the tracking of referrals;

d. outlining what types of activity fall within telemarketing rules in order to inform Merrill Lynch agents licensed in New Hampshire when telemarketing rules may be implicated, including further explaining what constitutes telemarketing; and

e. requiring that any request to be removed from Merrill Lynch’s firm-specific do not call list be in writing, state clearly the number to be removed from the list, and be signed and dated by the individual requesting to be removed.
5. Merrill Lynch agrees, upon execution of this Consent Order, to pay the Bureau’s costs of 
investigation in the amount of Fifty Thousand Dollars ($50,000) and an administrative fine 
in the amount of Three Hundred and Fifty Thousand Dollars ($350,000). Merrill Lynch 
agrees to pay the total amount of Four Hundred Thousand Dollars ($400,000) to the State of 
New Hampshire, which will be applied to settlement of the above-captioned matter. 
Payment must be made by 1) business check, certified check, or postal money order; 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.

III. Based on 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. Merrill Lynch cease and desist from further violations of the act pursuant to RSA 421-B:23.

2. Merrill Lynch pay the Bureau’s costs of investigation in the amount of Fifty Thousand 
Dollars ($50,000) and an administrative fine in the amount of Three Hundred and Fifty 
Thousand Dollars ($350,000).

3. Merrill Lynch comply with all other undertakings and sanctions outlined herein.

Executed this 22nd day of Dec., 2014.

Mark L. Keene 

on behalf of Merrill Lynch

(Please print name below)

MARK L. KEENE 
ASSOCIATE GENERAL COUNSEL

Entered this 29th day of December, 2014.

Barry Glennon, Director 
N.H. Bureau of Securities Regulation