

BEFORE THE ARKANSAS SECURITIES COMMISSIONER
CASE NO S-09-002
ORDER NO. S-09-002-10-CO01

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ARKANSAS SECURITIES DEPT.

**IN THE MATTER OF:
MERRILL LYNCH & PIERCE, FENNER & SMITH INCORPORATED,
RESPONDENT**

CONSENT ORDER

This Consent Order is entered pursuant to the Arkansas Securities Act, codified at Ark. Code Ann. §§ 23-42-101 through 23-42-509 (“Act”), the Rules of the Arkansas Securities Commissioner (“Rules”) promulgated under the Act and the Arkansas Administrative Procedures Act, codified at Ark. Code Ann. §§ 25-15-201 through 25-15-219 in accordance with an agreement by and between the Staff of the Arkansas Securities Department (“Staff”) and Merrill Lynch Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) in full and final settlement of all claims that could be brought against Merrill Lynch by the Staff on the basis of the facts set forth herein.

Merrill Lynch admits the jurisdiction of the Act and the Arkansas Securities Commissioner (“Commissioner”) waives its right to a formal hearing and appeal, without admitting or denying the findings of facts or conclusions of law made herein, consents to the entry of this order and agrees to abide by its terms in settlement of any possible violations committed by Merrill Lynch concerning the matters detailed in this order.

FINDINGS OF FACT

1. Merrill Lynch is a registered broker-dealer and investment adviser with a branch office located in Little Rock, Arkansas. Merrill Lynch has been registered in Arkansas since August 12, 1941.

2. AG1, at all relevant times, was a registered agent of the broker-dealer and a registered representative of the investment adviser employed at Merrill Lynch's branch office located in Little Rock, Arkansas. AG1 first became registered by the Department as the agent of the broker-dealer and the representative of the investment adviser at Merrill Lynch on August 5, 2005.

3. For the purposes of this Consent Order it is assumed that AG1 sold a Transamerica Extra 2008 variable annuity to an Arkansas local police pension fund ("APF1"). The sale of the variable annuity to APF1, along with other events detailed in ¶ 4, created a liquidity issue for APF1. Further, Merrill Lynch failed to detect and prevent the liquidity problem of APF1 that was created by its employee, AG1, so Merrill Lynch failed to act primarily for the benefit of its client, APF1.

4. For the purposes of this Consent Order it is assumed that during 2007 and 2008, AG1 represented to APF1's board that he would prepare the 2007 annual report for the Arkansas Fire and Police Pension Review Board ("PRB"). Unfortunately, AG1 did not complete and file APF1's 2007 annual report by the mandatory deadline. The PRB subsequently notified members of APF1's board that APF1 would not receive any state turn back money in 2008, because the aforementioned 2007 annual report had not been properly filed with the PRB. AG1's actions concerning APF1's 2007 annual report contributed to APF1 losing approximately \$160,000.00 in state turn back money. Merrill Lynch's failure to detect and prevent AG1's actions and/or inactions concerning APF1's 2007 annual PRB report was a failure by Merrill Lynch to act primarily for the benefit of its client, APF1.

5. Finally, for purposes of this Consent Order it is assumed that during the fall of 2008, AG1 contacted members of Arkansas pension fund two (“APF2”) to arrange a meeting. At APF2’s members meeting set up by AG1, AG1 offered to prepare election ballots to elect a board to manage the affairs of APF2. On two separate occasions AG1 prepared election ballots, drafted instruction letters, sent the ballots and letters to members of APF2, and collected and counted the ballots. At APF2’s members meeting held after the elections, AG1 appeared and reported the results of both elections to the membership of APF2. On October 27, 2008, the board of APF2, which was elected by the ballots prepared and counted by AG1, hired AG1 to provide investment advisory services to APF2. Merrill Lynch failed to prevent any of the outgoing or incoming correspondence concerning the election of the board for APF2. Therefore, Merrill Lynch failed to ensure that its employee, AG1, observe high standards of commercial honor and just and equitable principles of trade in the conduct of AG1’s and Merrill Lynch’s business with APF2.

6. AG1 was employed by Merrill Lynch at the time of the events detailed in ¶¶ 3-5.

7. Merrill Lynch failed to detect or prevent any of the rule violations committed by its employee, AG1.

APPLICABLE LAW

8. Rule 308.02 states that an investment adviser has the duty to act primarily for the benefit of its clients. Each investment adviser and representative shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business.

9. Ark. Code Ann. §23-42-308(a)(2)(B) provides that the Securities Commissioner may by order suspend or revoke any registration if he finds that the registrant has willfully violated or failed to comply with any rule or order under the Act.

10. Ark. Code Ann. §23-42-308(g) provides that the Securities Commissioner may fine any broker-dealer or investment adviser up to a maximum of five thousand dollars for each separate violation of this chapter.

CONCLUSIONS OF LAW

11. For purposes of this Consent Order it is concluded that in violation of Rule 308.02, AG1 failed to observe the high standards of commercial honor and just and equitable principles of trade when AG1 advised APF1 to sell certain securities to purchase a variable annuity. This investment advice benefited AG1 in the form a substantial commission payment without substantially benefiting his client, APF1.

12. For purposes of this Consent Order it is concluded that AG1 failed to observe the high standards of commercial honor and just and equitable principles of trade defined in Rule 308.02, when AG1 assured various clients that he would assume the responsibility for duties that traditionally do not fall within the activities of a registered representative of an investment adviser. Specifically, these violations concern AG1's promise and failure to prepare the annual PRB report for APF1, as well as the election of the governing board for APF2.

13. Although Merrill Lynch had written supervisory policies and procedures, and a system for applying such policies and procedures, Merrill Lynch's written supervisory policies and procedures and/or its application of said policies and procedures failed to detect and prevent the violations committed by its employee, AG1, as detailed in ¶¶ 3-5.

In addition, Merrill Lynch's failures concerning the violations committed by its employee, AG1, constitute three violations of Rule 308.02 by Merrill Lynch. Finally, Merrill Lynch's actions or inactions provide a basis for the Commissioner to impose a fine against Merrill Lynch.

14. The parties admit that the Commissioner has no authority or jurisdiction over any courts or other state or federal agencies or regulatory authorities. Nonetheless, the Commissioner does not intend for this Order to serve as a basis for Merrill Lynch's or any of its affiliates' or employees' disqualification from registration exemptions or safe harbor provisions contained in the following: the Act; federal securities laws, or the rules and regulations thereunder; rules and regulations of self regulatory organizations; or, various states' or U.S. Territories' securities laws. The Commissioner also does not intend for this Order to form the basis for the disqualification of Merrill Lynch or any of its affiliates or employees from any business that they are otherwise qualified or licensed to perform.

15. This Consent Order shall not be a ground to deny, suspend or revoke the broker-dealer, agent, investment adviser or investment adviser representative registration of any Covered Person pursuant to Ark. Code Ann. § 23-42-308, shall not be a ground of denial or revocation of the transactional or securities exemptions from registration in Ark. Code Ann. § 23-42-505, and shall not be a ground to issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any securities registration statement pursuant to Ark. Code Ann. § 23-42-405.

UNDERTAKINGS

In settlement of this matter, but without admitting or denying the findings of fact or conclusions of law made above, Merrill Lynch agrees to pay a fine in the amount of \$15,000.00 to the Department.

OPINION

This order is in the public interest. The facts as set out in ¶¶ 2-7 support the violations of the Rules as set out in ¶¶ 11-15.

ORDER

This Order concludes this investigation by the Arkansas Securities Department and any other action that the Arkansas Securities Department could commence under applicable Arkansas law on behalf of State of Arkansas as it relates to Merrill Lynch and the matters detailed herein.

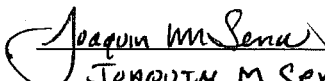
IT IS THEREFORE ORDERED that Merrill Lynch shall pay a fine in the amount of \$15,000.00 to the Department upon the execution of this Order.

WITNESS MY HAND AND SEAL on this 1st day of April, 2010.

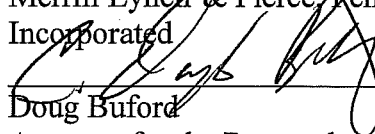


A. Heath Abshure
Arkansas Securities Commissioner

APPROVED AS TO FORM
AND CONTENT:

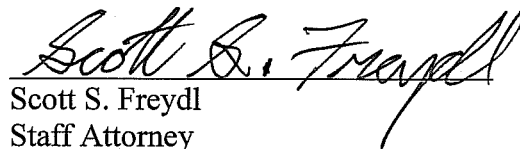


Joaquim M. Sena of
Merrill Lynch & Pierce, Fenner & Smith
Incorporated



Doug Buford
Attorney for the Respondent
Merrill Lynch & Pierce, Fenner & Smith Incorporated

APPROVED AS TO FORM
AND CONTENT:



Scott S. Freydl
Staff Attorney
Arkansas Securities Department