

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 2835 / January 30, 2009**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13358**

**In the Matter of**

**Jeffrey Swanson,**

**Respondent.**

**ORDER INSTITUTING  
ADMINISTRATIVE AND CEASE-AND-  
DESIST PROCEEDINGS PURSUANT TO  
SECTIONS 203(f) AND 203(k) OF THE  
INVESTMENT ADVISERS ACT OF 1940,  
MAKING FINDINGS, AND IMPOSING  
REMEDIAL SANCTIONS AND A CEASE-  
AND-DESIST ORDER AS TO JEFFREY  
SWANSON**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”), against Jeffrey Swanson (“Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### A. SUMMARY

From at least 2002 through 2005, Merrill Lynch Pierce Fenner & Smith, through its pension consulting services advisory program, breached its fiduciary duty to the firm's pension fund clients and prospective clients by misrepresenting and omitting to disclose material information. During this time period, Respondent was an investment adviser representative for Merrill Lynch, and in that capacity owed a fiduciary duty to his clients. Respondent's clients included public pension funds seeking advice in developing appropriate investment strategies and in selecting money managers to manage the assets entrusted to their care. In providing such advice, Respondent made misleading statements to some of the firm's pension consulting clients regarding the process by which Merrill Lynch assisted them in identifying new managers. As a result, Respondent aided and abetted and caused Merrill Lynch's violation of Section 206(2) of the Advisers Act.

#### B. RESPONDENT AND OTHER RELEVANT PARTIES

Jeffrey Swanson – age 42, of Jacksonville Beach, Florida was an investment adviser representative for Merrill Lynch from March 1994 to December 31, 2006. In October 2006, he resigned from Merrill Lynch. During the relevant time period, Respondent worked out of Merrill Lynch's Jacksonville office with a team of ten Merrill Lynch employees to provide advisory services to over 100 public pension clients in Florida. This group moved to office space in Ponte Vedra Beach in 2004 (the "Ponte Vedra office").

Merrill Lynch Pierce Fenner & Smith ("Merrill Lynch") – is the wholly-owned principal operating subsidiary of the holding company, Merrill Lynch & Co. Merrill Lynch has been registered with the Commission as a broker-dealer since March 12, 1959 and as an investment adviser since December 8, 1978.

Merrill Lynch Consulting Services ("Consulting Services") – is an advisory program offered under the auspices of Merrill Lynch's Wealth Management Group, and provides advisory services to high net worth and institutional clients, including public pension funds. The headquarters are in Jersey City, New Jersey.

#### C. FACTS

From 2002 through at least 2005, Merrill Lynch, through its Consulting Services program, provided advisory services to high net worth and institutional clients, including public pension funds. As an integral part of these services, it assisted clients in developing appropriate

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

investment policies and in identifying asset allocations to meet their individual needs. Merrill Lynch also monitored and evaluated clients' existing money managers to ensure that the managers' performances and investment styles remained consistent with the clients' investment objectives. It also helped clients to identify and evaluate new money managers so that the clients could select one or more such managers for the discretionary management of their accounts.

During the relevant time period, Respondent, an investment adviser representative in Merrill Lynch's Ponte Vedra office, worked with a team of Merrill Lynch employees to provide services to public pension fund clients in Florida, including many municipal employees, police and firefighters' pension funds. The headquarters for Merrill Lynch Consulting Services was located in Jersey City, New Jersey, and provided support to this office and to other investment adviser representatives throughout the country who provided advisory services.

During the relevant time period, Merrill Lynch and Respondent misrepresented the process used to identify managers for clients in breach of their fiduciary duty to those clients. Merrill Lynch, in written communications, and Respondent, in oral statements, emphasized the extensive in-house resources and research that would be available through Merrill Lynch to match each individual client with appropriate money managers for that client's needs. Their descriptions of these services, however, did not accurately describe the services that Merrill Lynch and Respondent were actually providing to the Ponte Vedra office's clients.

The Merrill Lynch disclosure statements provided to clients, as well as responses to client Requests for Proposals ("RFPs"), highlighted the extensive Merrill Lynch process that would be brought to bear on money manager selections for each client. These documents, taken together, described the typical procedure for selecting a new money manager as follows: A client would send a questionnaire, through its investment adviser representative, to Consulting Services headquarters in New Jersey, providing information regarding, among other things, the client's investment objectives and risk tolerance for the portfolio intended to be managed by the new manager. An investment manager research analyst in the Consulting Services offices in New Jersey would then compare the questionnaire against data about investment managers available to Merrill Lynch from a variety of sources, including both nonproprietary databases and subscription services, and generate a preliminary list of potential investment managers whose investment processes and styles appeared to be compatible with the client's financial objectives and requirements. The analyst would then apply various criteria to reduce the preliminary list to a group of typically three to five investment managers that appeared appropriate for the client. Merrill Lynch Consulting Services offices in New Jersey would then provide the requesting investment adviser representative with a list of managers and written background information on each manager, which would in turn be presented to the client. The documents provided to clients and potential clients regarding this service repeatedly refer to Merrill Lynch's large research staff and capabilities, giving the impression that those resources are deployed for every client's manager search.

Respondent's descriptions of these services to clients and prospective clients were consistent with the Merrill Lynch written materials. In presenting the manager identification service to clients and potential clients, he emphasized the breadth of resources available through

the New Jersey Consulting Services offices that would be available to a client in choosing a new manager. Respondent also emphasized that the performance-based reviews and quantitative and qualitative analyses conducted by the New Jersey Consulting Services offices on potential money managers would be tailored to fit the client's specific needs.

The Ponte Vedra office's procedures for performing manager searches, however, deviated from these descriptions. The New Jersey Consulting Services offices did not select potential money managers for Respondent's clients based on their specific needs. Rather, from approximately 2002 through 2005, members of Merrill Lynch's Ponte Vedra office conducted the manager search process themselves using a short list (the "Ponte Vedra list") of managers, which had been developed by the Ponte Vedra office. The Ponte Vedra list consisted of approximately sixty money managers from Merrill Lynch's vast approved list. The Ponte Vedra list was divided into ten or eleven categories of managers, each containing approximately six money managers, therefore potentially giving rise to a limited universe of recommendations. When one of Respondent's clients requested a new manager search, an associate in the Ponte Vedra office, working at Respondent's direction, would refer to the pre-existing Ponte Vedra list, obtain information on the managers on the list from publicly available databases, and compile this information into a booklet to be presented to the client. These search reports were not reviewed by Consulting Services headquarters in New Jersey. Rather, Respondent decided which managers from the Ponte Vedra list to present to his clients. In at least one instance regarding direct real estate investment managers, Respondent recommended money managers that he knew had not been screened by the New Jersey Consulting Services office and were not on the Merrill Lynch approved list. Respondent knew that these managers had been reviewed and placed on the Ponte Vedra list by the head of the Ponte Vedra office.

#### **D. DISCUSSION**

By making misleading statements to some of the firm's pension consulting clients, as discussed above, Merrill Lynch violated Section 206(2) of the Advisers Act, which provides that "[i]t shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly . . . to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."<sup>2</sup> As a result of the conduct described above, Respondent willfully<sup>3</sup> aided and abetted and caused Merrill Lynch's violation of Section 206(2) of the Advisers Act.

#### **IV.**

In view of the foregoing, the Commission deems it appropriate, in the public interest, to impose the sanctions agreed to in Respondent Swanson's Offer.

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<sup>2</sup> Proof of scienter is not required to establish a violation of Section 206(2) of the Advisers Act. SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963).

<sup>3</sup> A willful violation of the securities laws means merely "that the person charged with the violation knows what he is doing." Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)).

Accordingly, pursuant to Sections 203(f) and 203(k) of the Advisers Act, it is ORDERED that:

- A. Respondent is hereby censured; and
- B. Respondent shall cease and desist from committing or causing any violations and any future violations of Section 206(2) of the Advisers Act.

By the Commission.

Elizabeth M. Murphy  
Secretary