

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

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 97872 / July 11, 2023**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 6342 / July 11, 2023**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-21524**

**In the Matter of**

**Merrill Lynch, Pierce,  
Fenner & Smith  
Incorporated; and BAC  
North America Holding Co.,**

**Respondents.**

**ORDER INSTITUTING ADMINISTRATIVE  
AND CEASE-AND-DESIST PROCEEDINGS  
PURSUANT TO SECTIONS 15(b) AND 21C OF  
THE SECURITIES EXCHANGE ACT OF 1934  
AND SECTION 203(e) OF THE INVESTMENT  
ADVISERS ACT OF 1940, MAKING FINDINGS,  
AND IMPOSING REMEDIAL SANCTIONS AND  
CEASE-AND-DESIST ORDERS**

**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 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) and Section 203(e) of the Investment Advisers Act of 1940 (“Advisers Act”) against Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill”) and BAC North America Holding Co. (“BACNAH”), collectively “Respondents.”

**II.**

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”) 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 and Section 203(e) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders (“Order”), as set forth below.

### III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

#### A. SUMMARY

From January 2009 to November 2019, Merrill failed to file certain Suspicious Activity Reports ("SARs") in violation of the broker-dealer books and records provisions of Exchange Act Section 17(a) and Rule 17a-8. Merrill, as a registered broker-dealer, was required to file SARs on transactions conducted or attempted by, at, or through it involving or aggregating to at least \$5,000 that it knew, suspected, or had reason to suspect, among other things, involved the use of Merrill to facilitate criminal activity. BACNAH, a subsidiary of Bank of America Corporation ("BAC") and the parent company of Merrill, assumed responsibility for creating and implementing Merrill's SAR policies and procedures and filing Merrill's SARs. During the relevant period, however, BACNAH's Fraud Investigations Group used a \$25,000 threshold, instead of the proper \$5,000 threshold, with respect to transactions or attempted transactions suspected of using Merrill to facilitate criminal activity where there was no substantial basis for identifying a suspect responsible for the suspected criminal activity ("no-suspect criminal activity"). The no-suspect criminal activity concerned Merrill customers who were victims of unauthorized debit card withdrawals, forged or altered checks, account intrusions, identity theft, and/or phone or internet scams. As a result, during the relevant period, BACNAH failed to file hundreds of SARs for Merrill on such activity. By failing to file the required SARs, Merrill violated the books and records provisions of Exchange Act Section 17(a) and Rule 17a-8, and BACNAH caused Merrill's violations of those provisions.

#### B. RESPONDENTS

1. Merrill is a subsidiary of BACNAH, is headquartered in New York, New York, and is dually-registered with the Commission as a broker-dealer and investment adviser. In December 2017, the Commission found that Merrill failed to file SARs on the suspicious movement of funds by its customers in violation of Exchange Act Section 17(a) and Rule 17a-8, censured it, and ordered it to cease and desist from future violations and to pay a \$13 million civil penalty. *See In Re Merrill Lynch, Pierce, Fenner & Smith Incorporated*, Rel. No. 34-82382 (Dec. 21, 2017).

2. BACNAH is a subsidiary of BAC, is headquartered in Charlotte, North Carolina, and is the parent company of Merrill and certain national banks.

#### C. MERRILL'S FAILURE TO FILE SARs

3. Merrill, as a registered broker-dealer, is required by rules promulgated by Financial Crimes Enforcement Network ("FinCEN") to file SARs on certain suspicious transactions or attempted transactions in its accounts. BACNAH operates an enterprise-wide SAR program that is responsible for (a) creating and implementing policies and procedures for Merrill and national bank affiliates, and (b) filing SARs for them. Among the suspicious activity on which Merrill must file SARs is suspected criminal activity, provided the activity meets or exceeds certain dollar

thresholds.<sup>1</sup> For broker-dealers such as Merrill, the threshold amount is \$5,000, regardless of whether the activity involves an insider at the broker-dealer or no-suspect criminal activity. 31 C.F.R. § 1023.320(a)(2). For national banks, the threshold amount is \$0 if an insider at the bank is involved, \$5,000 if there is a substantial basis for identifying a suspect responsible for the suspected criminal activity (“suspect criminal activity”), and \$25,000 if activity involves no-suspect criminal activity. 12 C.F.R. § 21.11(c).

4. After BAC acquired Merrill in January 2009, BACNAH’s Fraud Investigations Group assumed responsibility for detecting, investigating, and filing SARs on suspected criminal activity at Merrill that did not involve Merrill insiders, money laundering, or violations of the Bank Secrecy Act. The Fraud Investigations Group was already responsible for filing SARs on such activity in accounts of its affiliated national banks using the bank thresholds of \$5,000 for suspect criminal activity and \$25,000 for no-suspect criminal activity. The Fraud Investigations Group then improperly used the bank threshold amounts with respect to Merrill transactions. The Fraud Investigations Group’s enterprise-wide written SAR policies and procedures had a \$25,000 threshold for filing no-suspect criminal activity SARs, including for Merrill.

5. In about September 2019, an employee recognized that the Fraud Investigations Group was improperly using the \$25,000 threshold, and not the proper \$5,000 threshold, for no-suspect criminal activity at Merrill. In November 2019, the Fraud Investigations Group began using the proper \$5,000 threshold for no-suspect criminal activity at Merrill and began filing Merrill SARs on such activity.

6. As a result of BACNAH’s Fraud Investigations Group using the wrong threshold for Merrill no-suspect criminal activity from January 2009 to November 2019, Merrill failed to file hundreds of SARs on such activity. The no-suspect criminal activity concerned Merrill customers who were victims of unauthorized debit card withdrawals, forged or altered checks, account intrusions, identity theft, and/or phone or internet scams.

#### **D. VIOLATIONS**

7. Exchange Act 17(a) and Rule 17a-8 requires registered broker-dealers to “comply with the reporting, recordkeeping, and record retention requirements” of certain FinCEN rules. Those FinCEN rules require broker-dealers to file SARs with FinCEN to report a transaction (or a pattern of transactions of which the transaction is a part) conducted or attempted by, at, or through the broker-dealer involving or aggregating to at least \$5,000 that the broker dealer knows, suspects, or has reason to suspect, among other things, involves use of the broker-dealer to facilitate criminal activity. 31 C.F.R. § 1023.320(a)(2).

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<sup>1</sup> Broker-dealers and national banks are also required to file SARs on transactions or attempted transactions that they know, suspect, or have reason to suspect involve money laundering or violations of the Bank Secrecy Act or have no business or apparent lawful purpose. Merrill’s failure to file SARs at issue in this proceeding did not involve such suspicious activity.

8. As a result of the wrong threshold being used for no-suspect criminal activity SARs, Merrill failed to file hundreds of SARs and thereby willfully violated Exchange Act Section 17(a) and Rule 17a-8 thereunder.<sup>2</sup>

9. Exchange Act Section 21C(a) provides liability for one who “causes” a primary violation if it is shown that “(1) a primary violation occurred, (2) there was an act or omission by the respondent that was a cause of the violation, and (3) the respondent knew, or should have known, that his conduct would contribute to the violation.” *See In re Robert M. Fuller*, Rel. No. 34-48406 (Aug. 25, 2003) (Commission Opinion). Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *See Howard v. SEC*, 376 F.3d 1136, 1141 (D.C. Cir. 2004).

10. BACNAH is liable for causing Merrill’s violations of Exchange Act Section 17(a) and Rule 17a-8. Merrill committed a primary violation of Exchange Act Section 17(a) and Rule 17a-8. BACNAH’s acts and omissions caused Merrill’s violations in that it assumed responsibility for creating and implementing Merrill’s SARs program, used the wrong \$25,000 threshold for filing no-suspect criminal SARs, and as a result failed to file hundreds of SARs on such activity that fell between the proper \$5,000 threshold and the improper \$25,000 threshold. BACNAH should have known that the legal threshold for broker-dealers to file no-suspect criminal SARs was \$5,000, not \$25,000, and that using the improper threshold would contribute to Merrill’s primary violations of Exchange Act Section 17(a) and Rule 17a-8.

#### **E. RESPONDENTS’ REMEDIAL EFFORTS**

11. In determining to accept Respondents’ Offers, the Commission considered Respondents’ remedial acts and cooperation afforded to Commission staff.

12. After realizing that the wrong threshold was being used, BACNAH and Merrill acted to remediate the issue, including: (a) updating policies, procedures, and automated surveillance systems to properly account for the \$5,000 threshold and training its Fraud Investigations Group personnel responsible for filing SARs; (b) reviewing all other thresholds with respect to Merrill and confirming that they were using correct thresholds across the SAR program; (c) reporting the issue to Commission staff and other relevant regulators; and (d) conducting a look-back to 2014 (the earliest date for which Merrill retained records) and filing 865 SARs on no-suspect criminal activity that met the proper \$5,000 threshold.

13. Respondents also voluntarily conducted and shared results of their internal investigation that they conducted after discovering that they had been using the wrong threshold for no-suspect criminal activity SARs for Merrill.

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<sup>2</sup> *See Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (upholding the Commission’s determination that, for the purpose of Section 15, “willfulness” requires only “that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.” (internal quotation marks omitted)).

#### IV.

In view of the foregoing, the Commission deems it appropriate, in the public interest, to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 15(b) and 21C of the Exchange Act and Section 203(e) of the Advisers Act, it is hereby ORDERED that:

A. Respondents Merrill and BACNAH cease and desist from committing or causing any violations and any future violations of Exchange Act Section 17(a) and Rule 17a-8 promulgated thereunder.

B. Respondent Merrill is censured.

C. Respondent Merrill shall, within 14 days of the entry of this Order, pay a civil money penalty in the amount of \$6,000,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Payment must be made in one of the following ways:

(1) Merrill may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Merrill may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

(3) Merrill may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Merrill as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Katharine E. Zoladz, Co-Acting Regional Director, Division of Enforcement, Securities and Exchange Commission, 444 S. Flower Street, 9<sup>th</sup> Floor, Los Angeles, CA 90071.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Merrill agrees that in any Related Investor Action,

it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Merrill's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Merrill agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Merrill by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman  
Secretary