

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

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 6829 / January 17, 2025**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-22433**

**In the Matter of**

**MERRILL LYNCH, PIERCE,  
FENNER & SMITH  
INCORPORATED,**

**Respondent.**

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

**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(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) and Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”), against Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Respondent” or “Merrill Lynch”).

**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 it 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 Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 and Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds:

#### **Summary**

1. These proceedings arise out of registered investment adviser Merrill Lynch, Pierce, Fenner & Smith Incorporated's ("Merrill Lynch") failure to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules thereunder relating to its cash sweep program, specifically its use of the Merrill Lynch Bank Deposit Program ("MLBD Program").

2. From January 2022 through April 2024 (the "Relevant Period"), MLBD Program was the only cash sweep option for most advisory clients at Merrill Lynch. Merrill Lynch's affiliated banking entities, with input from Merrill Lynch, set the interest rates for the MLBD Program and received significant financial benefits from advisory client cash. Merrill Lynch made disclosures to its clients concerning its and its affiliates' financial benefits. When market interest rates increased during the Relevant Period, the yields advisory clients received from the MLBD Program were often significantly lower than the yields clients could have received had Merrill Lynch made other options available as part of the cash sweep program.

3. During the Relevant Period, Merrill Lynch failed to adopt and implement reasonably designed written policies and procedures (i) to consider the best interests of clients when evaluating and selecting which cash sweep program options to make available, including during periods of rising interest rates; and (ii) concerning the duties of Merrill Lynch financial advisors in managing client cash in advisory accounts. As a result of this conduct, Merrill Lynch willfully violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. Nevertheless, as described below, during the Relevant Period, Merrill Lynch took steps designed to consider the best interests of its clients in operating its cash sweep program and managing client cash in advisory accounts.

#### **Respondent**

4. Merrill Lynch is a Delaware corporation with its principal place of business in New York, New York. It is a wholly owned subsidiary of Bank of America Corporation and has been registered with the Commission as a broker-dealer since 1959 and an investment adviser since 1978. Merrill Lynch has over \$1 trillion in regulatory assets under management.

#### **Facts**

##### **Merrill Lynch's Bank Deposit Sweep Program Was the Only Cash Sweep Program Option for Most Advisory Clients**

5. Merrill Lynch offers advisory services through the Merrill Lynch Investment Advisory Program ("IAP"). Merrill Lynch provides IAP clients access to a program pursuant to

which they earn a return on uninvested cash balances in their accounts until the cash is invested or otherwise used to satisfy obligations. Outside of the cash sweep program, Merrill Lynch also offers money market funds, treasuries, CDs, and other cash products, in which client cash could have been invested for other investment objectives or returns. Merrill Lynch charges an advisory fee on cash held in the cash sweep program and invested in other cash alternatives, which was disclosed to its clients.

6. In the MLBD Program, Merrill Lynch automatically sweeps advisory clients' uninvested cash holdings into interest-bearing accounts subject to Federal Deposit Insurance Corporation insurance at one or more banking affiliates. Merrill Lynch's affiliated banking entities set the interest rate offered in the MLBD Program. During the Relevant Period, the rate differential between the yields in the MLBD Program and other cash product options varied. At times the differences were almost 400 basis points and at other times were minimal, but the disparity grew as interest rates rose.

7. During the Relevant Period, Merrill Lynch swept billions of dollars in client cash into its MLBD Program annually. Merrill Lynch and affiliated banking entities benefited financially from advisory clients' cash balances held in the MLBD Program. Merrill Lynch earned advisory fees on MLBD Program assets and was credited with revenue from affiliated banking entities based in part on the spread earned by banking affiliates on the MLBD Program. Merrill Lynch's banking affiliates earned significant net interest income on the MLBD Program deposits during the Relevant Period. Merrill Lynch disclosed these financial benefits in its Form ADV and other documents.

Merrill Lynch Failed to Adopt and Implement Reasonably Designed Written Policies  
and Procedures Concerning its Cash Sweep Program

8. Section 206(4) of the Advisers Act and Rule 206(4)-7(a) thereunder require a registered investment adviser to adopt and implement written policies and procedures reasonably designed to prevent violations by the adviser and its supervised persons of the Advisers Act and the rules adopted thereunder. During the Relevant Period, Merrill Lynch failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations by the adviser and its supervised persons of the Advisers Act and the rules adopted thereunder relating to the cash sweep program.

9. First, Merrill Lynch failed to adopt and implement written policies and procedures reasonably designed to consider the best interests of clients when evaluating and selecting which cash sweep program options to make available to clients. Merrill Lynch determined to place cash sweep assets for IAP clients in the FDIC-insured MLBD Program. While Merrill Lynch regularly considered what options and yields should be provided to IAP clients in the MLBD Program, including whether selecting a sweep option with higher yields would be appropriate, the individuals and committees that considered cash sweep program options and yields were not governed by reasonably designed written policies and procedures to evaluate whether their decisions were in the best interests of clients.

10. Second, Merrill Lynch failed to adopt and implement sufficient written policies and procedures concerning the duties of Merrill Lynch financial advisors in managing client cash. Merrill Lynch's written policies and procedures failed to adequately address whether IAP cash was reviewed and appropriately allocated on a timely basis according to a client's goals and objectives.

11. That said, Merrill Lynch did implement certain remedial measures during the Relevant Period as summarized below.

### **Violations**

12. As a result of the conduct described above, Merrill Lynch willfully<sup>1</sup> violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder which require, among other things, that a registered investment adviser adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules adopted thereunder.

### **Remedial Efforts and Cooperation**

13. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Merrill Lynch and cooperation afforded the Commission staff. During the Relevant Period, Merrill Lynch's MLBD Program increased the rates paid to advisory clients, and Merrill Lynch adopted and implemented enhanced supervisory procedures targeted at a subset of IAP accounts with significant cash holdings and lowered the minimum thresholds for investing cash in certain money market funds. Merrill Lynch also provided detailed narrative responses on numerous topics which expedited the Commission staff's investigation.

## **IV.**

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

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

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<sup>1</sup> "Willfully," for purposes of imposing relief under Section 203(e) of the Advisers Act and Section 15(b) of the Exchange Act, "means no more than that the person charged with the duty 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)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term "willfully" for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has "willfully omit[ted]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

A. Merrill Lynch cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

B. Merrill Lynch is censured.

C. Merrill Lynch shall, within 10 days of entry of this Order, pay a civil money penalty of \$25 million to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Section 21F(g)(3) of the Securities Exchange Act of 1934. 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) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent 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) Respondent 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 Lynch as a Respondent in these proceedings, and the file number of these proceedings. A copy of the cover letter and the check or money order must be sent to Reid A. Muoio, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street NE Washington DC 20549.

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, Respondent 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 Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent 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 Respondent 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