

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

**Securities Act of 1933**  
**Release No. 9003 / January 30, 2009**

**Securities Exchange Act of 1934**  
**Release No. 59330 / January 30, 2009**

**Administrative Proceeding**  
**File No. 3-13357**

**In the Matter of**

**Merrill Lynch, Pierce,  
Fenner & Smith Inc.,**

**Respondent.**

**ORDER UNDER SECTION 27A(b) OF THE  
SECURITIES ACT OF 1933, AND SECTION  
21E(b) OF THE SECURITIES EXCHANGE ACT  
OF 1934, GRANTING WAIVERS OF THE  
DISQUALIFICATION PROVISIONS OF  
SECTION 27A(b)(1)(A)(ii) OF THE SECURITIES  
ACT OF 1933 AND SECTION 21E(b)(1)(A)(ii) OF  
THE SECURITIES EXCHANGE ACT OF 1934**

Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill Lynch”) has submitted a letter, dated January 15, 2009, requesting a waiver of the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act of 1933 (“Securities Act”) and Section 21E(b)(1)(A)(ii) of the Securities Exchange Act of 1934 (“Exchange Act”) arising from the settlement of an administrative proceeding with the Commission. On January 30, 2009, pursuant to Merrill Lynch’s Offer of Settlement, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order As to Merrill Lynch, Pierce, Fenner & Smith Inc.

Under the Order, the Commission found that Merrill Lynch willfully violated Sections 204 and 206(2) of the Investment Advisers Act of 1940 by breaching its fiduciary duty to certain of the firm’s pension fund clients and prospective clients by misrepresenting and omitting to disclose material information to its clients, failing reasonably to supervise its investment adviser representatives in its Ponte Vedra South office with respect to the provision of advisory services to its advisory clients, and failing

to maintain records of the offer and delivery of disclosure statements to its clients. In the Order, the Commission ordered that Merrill Lynch be censured, cease and desist from committing or causing any violations and any future violations of Sections 204 and 206(2) of the Advisers Act, and Rule 204-2(a)(14) thereunder, and pay a civil money penalty of \$1 million to the United States Treasury.

The safe harbor provisions of Section 27A(c) of the Securities Act and Section 21E(c) of the Exchange Act are not available for any forward-looking statement that is “made with respect to the business or operations of the issuer, if the issuer . . . during the 3-year period preceding the date on which the statement was first made . . . has been made the subject of a judicial or administrative decree or order arising out of a governmental action that (I) prohibits future violations of the antifraud provisions of the securities laws; (II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or (III) determines that the issuer violated the antifraud provisions of the securities laws[.]” Section 27A(b)(1)(A)(ii) of the Securities Act; Section 21E(b)(1)(A)(ii) of the Exchange Act. The disqualifications may be waived “to the extent otherwise specifically provided by rule, regulation, or order of the Commission.” Section 27A(b) of the Securities Act; Section 21E(b) of the Exchange Act.

Based on the representations set forth in Merrill Lynch’s January 15, 2009, request letter, the Commission has determined that, under the circumstances, the request for a waiver of the disqualifications resulting from the issuance of the Commission’s Order Instituting Administrative and Cease-and-Desist Proceedings is appropriate and should be granted.

Accordingly, **IT IS ORDERED**, pursuant to Section 27A(b) of the Securities Act and Section 21E(b) of the Exchange Act, that a waiver from the disqualification provisions of Section 27A(b)(1)(A)(ii) of the Securities Act, and Section 21E(b)(1)(A)(ii) of the Exchange Act as to Merrill Lynch resulting from the Commission’s Order Instituting Administrative and Cease-and-Desist Proceedings is hereby granted.

By the Commission.

Elizabeth M. Murphy  
Secretary