UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97242 / April 3, 2023

INVESTMENT ADVISERS ACT OF 1940
Release No. 6271 / April 3, 2023

ADMINISTRATIVE PROCEEDING
File No. 3-21356

In the Matter of **Merrill Lynch, Pierce, Fenner & Smith Incorporated,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND 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**

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 Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill" or "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 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 Section 15(b) of the Securities Exchange Act of 1934 and 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 ("Order"), as set forth below.

III.

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

Summary

1. These proceedings arise out of undisclosed fees that Merrill charged its advisory clients for transfers of funds to or from their advisory accounts requiring foreign currency exchanges ("Foreign Currency Exchanges") from at least May 12, 2016 through June 29, 2020 (the "Relevant Period"). Specifically, Merrill offered these clients wrap fee programs in which clients paid Merrill a program fee based on a percentage of assets under management (the "wrap fee") in exchange for a range of investment advisory services, including foreign currency exchanges. As part of the client agreements and accompanying brochures for these advisory programs (collectively, the "Advisory Agreements"), Merrill disclosed additional fees and charges that were not covered by the wrap fee.

2. As it related to the additional fees for Foreign Currency Exchanges, Merrill materially misstated in the Advisory Agreements that it charged a markup or markdown on these transactions while not also disclosing that it charged an additional fee referred to as a production credit. For the vast majority, or over 80% of the relevant foreign currency transactions during the Relevant Period, this production credit was equal to or greater than the markup or markdown.

3. During the Relevant Period, Merrill charged its advisory clients approximately $4,134,610 in undisclosed production credits on over 15,000 separate Foreign Currency Exchanges in approximately 4,874 advisory client accounts. Merrill paid a percentage of these production credits to its financial advisors and, in fact, referred to this charge as a commission in internal documents.

4. As a result of Merrill's conduct, Merrill willfully[1] violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

[1] "Willfully," for purposes of imposing relief under Section 15(b) of the Exchange Act and Section 203(e) of the Advisers 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).

Respondent

5. Merrill, a wholly-owned subsidiary of Bank of America Corporation, is a Delaware company headquartered in New York, New York. Merrill has been registered with the Commission as an investment adviser since 1978 and as a broker-dealer since 1959.

Background

6. During the Relevant Period, Merrill's advisory clients that paid wrap fees ("wrap fee clients") could only hold currency in their advisory accounts in the form of U.S. dollars. As a result, whenever wrap fee clients transferred foreign currency requiring an exchange into U.S. dollars into their advisory accounts or transferred U.S. dollars from their advisory account requiring an exchange into a foreign currency to an account that could hold foreign currency, Merrill effected a foreign currency exchange, via its automated currency exchange platform.

7. Merrill's investment advisory representatives or financial advisors ("FAs") facilitated these Foreign Currency Exchanges for wrap fee clients. Merrill's FAs obtained a currency exchange rate from either its Foreign Exchange Desk or from an internal platform. Merrill calculated this rate to include two fees, a markup or markdown and a production credit.

8. For Foreign Currency Exchanges between Merrill accounts, Merrill charged wrap fee clients a maximum fee of 2% of the gross amount of currency exchanged or converted, inclusive of both fees. For Foreign Currency Exchanges from a Merrill account to an external (non-Merrill) account, Merrill charged wrap fee clients a maximum of 1.5% of the gross amount of currency exchanged or converted, inclusive of both fees. In both cases, Merrill had the discretion to waive either the markup or markdown, or production credits charged on Foreign Currency Exchanges.

9. Merrill's internal records list the markup or markdown and the production credit for each transaction as separate fees. Furthermore, Merrill's internal processing documents for Foreign Currency Exchanges addressed each fee separately and referred to the production credit as a commission.

Merrill's Disclosures

10. Pursuant to the Advisory Agreements, advisory clients paid a single "wrap fee" to cover a range of transactions and services for which Merrill would otherwise charge separate fees. This wrap fee represents an annualized rate applied to assets under management and charged on a monthly basis. The Advisory Agreements also set forth certain additional fees not covered by the wrap fee.

11. During the Relevant Period, Merrill materially misstated in the Advisory Agreements that it would charge a markup or markdown on Foreign Currency Exchanges, while not also disclosing that it would charge a separate production credit, let alone that the production credit would be equal to or greater than any markups or markdowns charged to a client.

12. After Merrill processed a Foreign Currency Exchange for a wrap fee client, it provided the client with a trade confirmation that did not identify the fees charged as part of the transaction. Instead, the confirmation incorporated the markup or markdown and production credit as part of the foreign exchange price that the client received. During the Relevant Period, Merrill did not specifically disclose how much it charged clients for Foreign Currency Exchanges, either on a percentage basis or otherwise.

13. During the Relevant Period, Merrill charged a production credit on over 80% of the 15,916 Foreign Currency Exchanges that Merrill processed on behalf of wrap fee clients.

14. Moreover, in 95% of the Foreign Currency Exchanges that Merrill processed during the Relevant Period, and for which production credits were charged, the undisclosed production credits were either equal to or greater than the disclosed markups or markdowns.

15. For example, on January 23, 2020, Merrill processed an outgoing international wire transfer of $19,342,946.07 involving an exchange from U.S. dollars to British pounds. For this exchange, Merrill charged the wrap fee client a total fee of $105,798.45, consisting of a markup of $9,524.79 and a production credit of $96,273.66.

16. In another example, on September 8, 2017, Merrill processed a transfer into a Merrill wrap fee account in the amount of $148,694.26 involving an exchange from British pounds into U.S. dollars. For this exchange, Merrill charged the wrap fee client a total fee of $1,502.77, consisting of a markup of $375.69 and a production credit of $1,127.08.

17. In total, Merrill charged its wrap fee clients $4,134,610 in undisclosed production credits during the Relevant Period.

Merrill Updates Its Disclosures

18. On June 30, 2020, pursuant to the Commission's newly implemented rules relating to registered investment advisers, Merrill provided new and existing clients with a copy of its Form CRS, which outlined various fees related to investment advisory accounts and provided links to new fee disclosure documents, including a document entitled Explanation of Fees. The Explanation of Fees document, for the first time, disclosed to wrap fee clients the maximum percentage amount that wrap fee clients could be charged for Foreign Currency Exchanges, inclusive of both Merrill's markup or markdown as well as the production credits that Merrill had been charging its wrap fee clients for these transactions. In March 2022, Merrill further enhanced its wrap fee program disclosure documents, disclosing specifically that the wrap program fee does not cover Foreign Currency Exchanges and providing a link to the Explanation of Fees document for a detailed description of the fees.

Policies and Procedures

19. Merrill failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act in connection with currency transfers requiring foreign currency exchanges that it processed for its wrap fee clients. In particular, Merrill failed to adopt policies and procedures reasonably designed to monitor and disseminate complete and accurate information related to currency transfers requiring foreign currency exchanges to ensure that its marketing and client communications relating to its wrap fee program were not misleading.

Violations

20. As a result of the conduct described above, Merrill willfully violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging in any transaction, practice or course of business that operates as a fraud or deceit upon a client or prospective client.

21. As a result of the conduct described above, Merrill willfully 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 thereunder by the adviser.

Disgorgement

22. The disgorgement and prejudgment interest ordered in paragraph IV.C is consistent with equitable principles and does not exceed Respondent's net profits from its violations, and will be distributed to harmed investors to the extent feasible pursuant to the respondent-administered distribution described in paragraph IV.C below. Upon approval of the distribution final accounting by the Commission, any amounts remaining that are infeasible to return to investors, and any amounts returned to the Commission in the future that are infeasible to return to investors, may be transferred to the general fund of the U.S. Treasury, subject to Section 21F(g)(3) of the Exchange Act.

IV.

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

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

A. Merrill cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

B. Merrill is censured.

C. Merrill shall pay disgorgement, prejudgment interest, and a civil penalty, totaling $9,694,714, as follows:

1. Respondent shall pay disgorgement of $4,134,610, prejudgment interest of $760,104, and a civil penalty of $4,800,000, consistent with the provisions of this Subsection C.

2. Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, a Fair Fund is created for the disgorgement, prejudgment interest, and penalties referenced in Subsection C(1) above. 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.

3. Within ten (10) days of the issuance of this Order, Respondent shall deposit the full amount of the disgorgement, prejudgment interest, and civil penalty (the "Fair Fund"), into an escrow account at a financial institution not unacceptable to the Commission staff and Respondent shall provide the Commission staff with evidence of such deposit in a form acceptable to the Commission staff. The account holding the assets of the Fair Fund shall bear the name and the taxpayer identification number of the Fair Fund. If timely payment into the escrow account is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 [17 C.F.R. § 201.600] and/or 31 U.S.C. § 3717.

4. Respondent shall be responsible for administering the Fair Fund and may hire a professional to assist it in the administration of the distribution. The costs and expenses of administering the Fair Fund, including any such

professional services, shall be borne by Respondent and shall not be paid out of the Fair Fund.

5. Respondent shall distribute from the Fair Fund to current and former clients an amount representing the financial harm incurred, with reasonable interest, resulting from the false or misleading statements referenced in the Order. The disbursement calculation (the "Calculation") will be submitted to, reviewed, and approved by the Commission staff in accordance with Paragraph (6) of this Subsection C. No portion of the Fair Fund shall be paid to any affected current or former client account in which Respondent, or any of its current or former officers or directors, has a financial interest.

6. Respondent shall, within ninety (90) days of the entry of this Order, submit a Calculation to the Commission staff for review and approval. At or around the time of submission of the proposed Calculation to the staff, Respondent shall make itself available, and shall require any third parties or professionals retained by Respondent to assist in formulating the methodology for its Calculation and/or administration of the distribution to be available for a conference call with the Commission staff to explain the methodology used in preparing the proposed Calculation and its implementation, and to provide the staff with an opportunity to ask questions. Respondent also shall provide the Commission staff such additional information and supporting documentation as the Commission staff may request for the purpose of its review. In the event of one or more objections by the Commission staff to Respondent's proposed Calculation or any of its information or supporting documentation, Respondent shall submit a revised Calculation for the review and approval of Commission staff or additional information or supporting documentation within twenty (20) days of the date that the Commission staff notifies Respondent of the objection. The revised Calculation shall be subject to all of the provisions of this Subsection C.

7. Respondent shall, within thirty (30) days of the written approval of the Calculation by the Commission staff, submit a payment file (the "Payment File") for review and acceptance by the Commission staff demonstrating the application of the methodology to each affected client and former client. The Payment File should identify, at a minimum: (a) the name of each affected client and former client; (b) the exact amount of the payment to be made; and (c) the amount of reasonable interest paid. The Respondent shall exclude from the Payment File all payments to payees that appear on the U.S. Treasury Department Specially Designated Nationals List.

8. Respondent shall disburse all amounts payable to affected clients and former clients within seventy-five (75) days of the date the Commission staff

accepts the Payment File unless such time period is extended as provided in Paragraph (12) of this Subsection C. Respondent shall notify the Commission staff of the date and the amount paid in the final distribution.

9. If Respondent is unable to distribute or return any portion of the Fair Fund for any reason, including an inability to locate an affected client or former client or a beneficial owner of an affected client or former client or any factors beyond Respondent's control, Respondent shall transfer any such undistributed funds to the Commission for transmittal to the United States Treasury in accordance with Section 21F(g)(3) of the Securities Exchange Act of 1934 once the distribution of funds is complete and before the final accounting provided for in Paragraph (11) of this Subsection C is submitted to the Commission staff. Payment must be made in one of the following ways:

   a. Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

   b. 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

   c. 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, Pierce, Fenner & Smith Incorporated 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 Sandeep Satwalekar, Assistant Regional Director, New York Regional Office, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100 New York, New York 10004-2616, or such other address as the Commission staff may provide.

10. A Fair Fund is a Qualified Settlement Fund ("QSF") under Section 468B(g) of the Internal Revenue Code ("IRC"), 26 U.S.C. §§ 1.468B.1-1.468B.5. Respondent agrees to be responsible for all tax compliance responsibilities

associated with the "Fair Fund's" status as a QSF. These responsibilities involve reporting and paying requirements of the Fund, including but not limited to: (1) tax returns for the Fair Fund; (2) information return reporting regarding the payments to investors, as required by applicable codes and regulations; and (3) obligations resulting from compliance with the Foreign Account Tax Compliance Act (FATCA). Respondent may retain any professional services necessary. The costs and expenses of tax compliance, including any such professional services, shall be borne by Respondent and shall not be paid out of the Fair Fund.

11. Within 30 days after Respondent completes the disbursement of all amounts payable to affected investors, Respondent shall return all undisbursed funds to the Commission pursuant to the instruction set forth in this Subsection C. Respondent shall then submit to the Commission staff a final accounting and certification of the disposition of the Fair Fund for Commission approval, which final accounting and certification shall include, but not be limited to: (1) the amount paid to each payee, with reasonable interest amount, if any, reported separately; (2) the date of each payment; (3) the check number or other identifier of the money transferred; (4) the amount of any returned payment and the date received; (5) a description of the efforts to locate any prospective payee whose payment was returned or to whom payment was not made for any reason; (6) the total amount, if any, to be forwarded to the Commission; and (7) an affirmation that Respondent has made payments from the Fair Fund to affected clients and former clients in accordance with the Calculation approved by the Commission staff. The final accounting and certification, together with proof and supporting documentation of such payment in a form acceptable to the Commission staff, shall be sent to Thomas P. Smith, Associate Regional Director, New York Regional Office, Securities and Exchange Commission, 100 Pearl Street, Suite 20-100, New York, New York 10004-2616, or such other address as the Commission staff may provide. Respondent shall provide any and all supporting documentation for the accounting and certification to the Commission staff upon its request, and shall cooperate with any additional requests by the Commission staff in connection with the accounting and certification.

12. The Commission staff may extend any of the procedural dates set forth in this Subsection C for good cause shown. Deadlines for dates relating to the Fair Fund shall be counted in calendar days, except if the last day falls on a weekend or federal holiday, the next business day shall be considered the last day.

By the Commission.

Vanessa A. Countryman
Secretary