

**STATE OF VERMONT
DEPARTMENT OF FINANCIAL REGULATION**

IN RE:)
Merrill Lynch, Pierce, Fenner & Smith)
Incorporated (CRD# 7691), and)
Lawrence K. Barber (CRD #2932803))

DOCKET NO. 18-011-5

STIPULATION AND CONSENT AGREEMENT

The Securities Division of the Vermont Department of Financial Regulation (the "Department"), Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") and Lawrence K. Barber ("Barber") hereby stipulate and agree as follows:

1. Pursuant to the authority contained in 8 V.S.A. §§ 10-13 and Title 9 V.S.A. Chapter 150, the Commissioner of the Department is charged with administering and enforcing the Vermont Uniform Securities Act (the "Act").
2. Respondents Merrill Lynch and Barber (collectively "Respondents") acknowledge and admit the jurisdiction of the Commissioner over the subject matter of this Stipulation and Consent Agreement set forth herein.
3. Merrill Lynch is a Broker-Dealer and an Investment Adviser registered with the U.S. Securities and Exchange Commission, and maintains its headquarters at One Bryant Park, New York, NY 10036.
4. Barber is a registered agent of Merrill Lynch licensed by the Department with a business address of 60 Lake Street, Burlington, VT 05401.
5. On May 25, 2015, a Vermont-resident individual who is a client of Merrill Lynch ("Client") filed a complaint with the Department's Securities Division against Merrill Lynch, following which the Department opened an investigation into the matters described in the complaint.

6. Based on the Department's investigation, the Department makes the Findings of Fact and Conclusions of Law set forth herein.

7. Merrill Lynch and Barber neither admit nor deny the Findings of Fact and Conclusions of Law set forth herein.

8. The parties all desire to avoid the expense and uncertainty of litigation, and accordingly agree to settle this matter on the terms set forth herein.

FINDINGS OF FACT

9. Client is a client of Merrill Lynch and was a client of Barber.

10. In or around April 2014, Client met with Barber to review her account. At that time, according to Respondents, Client was displeased with the performance in her account. Barber recommended that Client transfer to a fee-based account in the Merrill Lynch Investment Advisory Program ("MLIAP").

11. MLIAP accounts offered options of "client discretion," meaning that Client would have to authorize each transaction in the account, or "advisor investment and trading authority," meaning that Client authorized Merrill Lynch to make transactions in the account.

12. At the time Client opened an MLIAP account, Client completed the paperwork for her MLIAP account to have advisor investment and trading authority. However, despite formally authorizing advisor investment and trading authority, Client discussed with Barber that her MLIAP account would initially be opened as a "Personalized Strategy" with Client Discretion, and ML sent her paperwork confirming that the account would operate with Client Discretion.

13. Per Merrill Lynch's Investment Advisory Program Wrap Fee Program Brochure, with the Personalized Strategy with Client Discretion account, Barber could assist in recommending investments and asset allocations, but any transaction that changed investments, asset allocation, or rebalancing required Client's prior authorization.

14. Prior to selecting the Personalized Strategy with Client Discretion, Client and Barber discussed that a mutual fund and certain equity positions with large unrealized capital gains would not be sold so that Client would not incur capital gains tax liability.

15. Client told Barber that income from capital gains would put Client at risk of losing certain benefits and services that depended upon Client's annual income being below certain levels.

16. During the ensuing months, according to Barber, he had difficulty reaching Client. As a result, Barber was not always able to obtain Client's instructions to effect transactions necessary for Client's accounts to remain in accord with Client's selected strategy and target asset allocation.

17. In or around December 2014, following months of Barber experiencing difficulty in reaching Client during market hours, Barber transferred Client's accounts to a "Managed Strategy" with advisor investment and trading authority – *i.e.*, permitting Merrill Lynch to exercise discretion in effecting transactions in Client's accounts without the need for Barber to speak to Client in advance of every transaction.

18. Contrary to Merrill Lynch's Investment Advisory Program Wrap Fee Program Brochure, Barber did not obtain Client's prior authorization for this change.

19. Barber asserts that he believed that this strategy with advisor investment and trading authority was more suitable for Client, and would better protect Client's assets in a

downward market than Client's personalized strategy because the Managed Strategy would enable Merrill Lynch to automatically rebalance Client's portfolio consistent with Client's selected objectives and target asset allocation, thereby overcoming the challenges in reaching Client.

20. When Barber switched Client from the Personalized Strategy to a Managed Strategy with investment and trading authority, he effectively took control of Client's account without her consent.

21. Barber's asserted challenges in communicating with Client during market hours or any supposed advantages to Client of adviser discretion do not justify Barber taking control of Client's accounts without her consent.

22. Contemporaneous with this change, Barber asserts that he notified Client of the change by leaving a message for her about the change, but did not receive a response from Client. In addition, Merrill Lynch delivered to Client notices reflecting the update to her MLIAP strategy. These notifications do not justify or mitigate Barber taking control of client's account without her consent.

23. In unilaterally transitioning Client's accounts to the Managed Strategy on Merrill Lynch's systems, Barber inadvertently failed to segregate Client's mutual fund and equity positions with large unrealized capital gains from sale during periodic automatic rebalancing transactions.

24. The failure to segregate assets was due to Barber's inadvertent error using a recently introduced Merrill Lynch trading platform.

25. As a result of this change to the Managed Strategy with investment and trading authority, the mutual fund and equity positions were automatically sold in order to align Client's

accounts with the Managed Strategy. Barber could have, but did not, prevent the unauthorized sale of the designated securities when he switched Client's accounts to the Managed Strategy.

26. The designated securities were sold on December 5, 2014 and resulted in capital gains for 2014, which Client had previously instructed Barber to avoid.

27. Barber's failure to continue the segregation of Client's previously-segregated assets during the transition to the Managed Strategy was a violation of Merrill Lynch's policies and procedures to the extent that it was inconsistent with Client's instructions.

28. Barber was unaware that the December 2014 sales had included the designated securities until Client contacted him in February 2015, prompting Barber to review those sales.

29. In or around February 2015, following inquiries from Client, Client and Barber reviewed Client's accounts, at which point Barber recognized that Client's previously segregated holdings had mistakenly been sold, that Client had incurred an increased capital gains tax liability for the year 2014, and that Client was therefore at risk of no longer qualifying for the state income-based benefits.

30. In or around March 2015, Barber assisted Client in analyzing the impact of his mistake on Client's capital gains tax liability for the year 2014.

31. While doing so, Barber used his Merrill Lynch email account and his personal electronic device(s) to communicate with Client.

32. During those communications, Barber requested Client's password to access her Merrill Lynch online account in order to obtain her 2014 account information, so that he could more easily assess the tax consequences of the error.

33. Merrill Lynch's written supervisory procedures ("WSP's") require associated persons to use only approved email addresses for electronic correspondence, to allow the

designated surveillance system to monitor and retain the electronic communication in accordance with FINRA Rules.

34. Barber's email request for Client's password, and his subsequent access of Client's online account information using that password, violated Merrill Lynch's policies and procedures.

35. One of Barber's emails requesting Client's password was flagged by Merrill Lynch's email review system, which is designed to identify, among other things, emails requesting passwords from clients.

36. According to Merrill Lynch, this email was reviewed by a designated person in Merrill Lynch's supervision area.

37. According to Merrill Lynch, its records indicate that that email was reviewed by that person, closed, but was not escalated for further action as required by the firm's policies and procedures.

38. In response to Barber's email request, Client sent her account password to Barber's personal communication device.

39. In violation of Merrill Lynch's policies and procedures, Barber received and used the account password to access Client's Merrill Lynch account information so he could calculate the impact of his mistake on Client's capital gains tax liability using tax preparation software. Barber then provided the tax-consequence information to Client.

40. Client subsequently complained to both Merrill Lynch and the Department concerning the above facts.

41. In addition, Client sought reimbursement from Merrill Lynch regarding the losses incurred due to having to pay unwanted capital gains taxes, her potential loss of government assistance, and her tax preparation and filing costs.

42. The Department recognizes that Merrill Lynch, in responding to Client's complaint, fully reimbursed Client for her increased capital gains tax liability and the costs of filing an amended tax return, as well as other costs and fees that were caused by the events described above.

43. Following Client's complaint, Merrill Lynch issued a letter of reprimand to Barber noting that he acted inconsistently with firm policies and instructing him to review the applicable sections of the firm's policies and procedures manual. Merrill Lynch did not comprehensively or proactively search through Barber's electronic communications, impose heightened supervision over such communications, or require Barber to undergo additional training.

44. In addition, by failing to escalate the improper email for further review, Merrill Lynch did not follow FINRA supervisory requirements to carry out its own supervisory policies and procedures for monitoring electronic communications with regard to Barber.

CONCLUSIONS OF LAW

Barber

45. 9 V.S.A. § 5412(c) provides that, where the Commissioner of the Department finds that the order is in the public interest, and where 9 V.S.A. § 5412(d)(1) - (6), (8), (9), (10), (12), or (13) authorizes the action, the Commissioner may censure, impose a bar on, or impose a civil penalty on a registrant and recover the costs of the investigation from the registrant.

46. 9 V.S.A. § 5412(d)(13) provides that a person may be disciplined under § 5412(a) - (c) if the person “has engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance, or insurance business within the previous 10 years.”

47. The Department’s Order 06-43-S, Exhibit 6.1, provides that violating any provision of the Rules of Fair Practice of the NASD (now FINRA) or any applicable fair practice or ethical standard promulgated by the SEC, the CFTC, or an SRO approved by either the SEC or the CFTC constitutes unethical practices as used in § 5412(d)(13) of the Act.

48. Exhibit 6.1 to Order 06-43-S also requires that agents shall “observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business.”

49. § 3.05 of Exhibit 6.1 to Order 06-43-S states that “[r]ecommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer’s . . . investment objectives, financial situation and needs and any other relevant information known by the broker-dealer or agent,” constitutes an “unethical or dishonest practice[.]” under § 5412(d)(13) of the Act.

50. FINRA Rule 2111 requires, in part, that an associated person “have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the . . . associated person to ascertain the customer’s investment profile.” Among other characteristics, a customer’s investment profile would include the customer’s financial situation and needs, and tax status.

51. In addition, a broker handling an account in which the broker has discretion to make transactions without client approval becomes the fiduciary of his customer. Among other duties, such a broker must manage the account in a manner directly comporting with the needs and objectives of the customer; keep the customer informed as to each completed transaction; and clearly explain the practical impact and potential risks of the course of dealing in which the broker is engaged.

52. The Department's Order 06-43-S, Exhibit 6.5, enumerates acts or practices that constitute unethical or dishonest practices of investment adviser representatives.

53. Given that Barber both took control of Client's assets and failed to inform Client and obtain her consent before initiating the automatic rebalancing, however necessary he felt these actions to be, by law Barber is deemed to have recommended to Client an unsuitable strategy (i.e., one that included automatic rebalancing and did not segregate the designated assets as per Client's instructions). Barber thereby violated 9 VSA § 5412(d)(13).

54. By improperly using his personal device and email address to communicate with Client, as well as by requesting and receiving Client's password, Barber violated both the WSP's and FINRA rules for communication with clients and records retention, and therefore violated 9 V.S.A. § 5412(d)(13).

55. Barber violated 9 V.S.A. § 5502(a)(3) by improperly effecting transactions without authority to do so, by exercising discretionary power without first obtaining authority, by effecting an unsuitable sale, by failing to segregate securities held in safekeeping, by requesting and receiving customer account passwords, and by accessing customer accounts with the passwords.

Merrill Lynch

56. 9 V.S.A. § 5412(c) provides that, where the Commissioner of the Department finds that the order is in the public interest, and where 9 V.S.A. § 5412(d)(9) authorizes the action, the Commissioner may censure, impose a bar on, or impose a civil penalty on a registrant and recover the costs of the investigation from the registrant.

57. It is a failure to supervise reasonably under § 5412(d)(9) when a firm: “has failed to supervise reasonably an agent, investment adviser representative, or other individual, if the agent, investment adviser representative, or other individual was subject to the person’s supervision and committed a violation of this chapter ... or a rule adopted or order issued under this chapter within the previous 10 years.”

58. FINRA Rule 3110 requires a member firm to establish and maintain a system to supervise the activities of its associated persons that is reasonably designed to achieve compliance with the applicable securities laws and regulations and FINRA rules.

59. Although investment advisers are not subject to Exchange Act and FINRA rules in their role as advisers, an investment adviser’s duty to supervise its employees is comparable to the duty to supervise imposed on broker-dealers. See § 203(e)(6) of the Advisers Act and § 15(b)(4)(E) of the Exchange Act.

60. Merrill Lynch violated 9 V.S.A. § 5412(d)(9) by (a) failing to escalate for further supervisory review Barber’s email requesting his Client’s Merrill Lynch password; and (b) failing to supervise reasonably in connection with Barber’s unauthorized sale of the designated securities.

61. The Commissioner finds the following relief appropriate and in the public interest.

62. **NOW THEREFORE**, Respondents have agreed to enter into this Stipulation and Consent Agreement with the Department on the terms and conditions hereinafter set forth in lieu of proceeding with a hearing.

63. In consideration of the mutual covenants contained herein, the Department and Respondents stipulate and agree as follows:

UNDERTAKINGS

1. Barber shall make a payment to the Vermont Department of Financial Regulation within ten (10) business days of the execution of this Stipulation and Consent Agreement in the amount of twenty thousand dollars (\$20,000.00) which shall comprise the following two payments:

- a. An administrative penalty in the amount of eighteen thousand dollars (\$18,000.00);
- b. A payment to the Vermont Department of Financial Regulation Financial Services Education & Training Special Fund in the amount of two thousand dollars (\$2,000.00).

2. Merrill Lynch shall make a payment to the Vermont Department of Financial Regulation within ten (10) business days of the execution of this Stipulation and Consent Agreement in the amount of one hundred and twenty thousand dollars (\$120,000.00) which shall comprise the following three payments:

- a. An administrative penalty of eighty thousand dollars (\$80,000.00) to the State of Vermont;

- b. A reimbursement to the Department for investigative and other expenses, in the sum of thirty thousand dollars (\$30,000.00); and
 - c. A ten thousand dollar (\$10,000.00) payment to the Vermont Department of Financial Regulation Financial Services Education & Training Special Fund.
3. Merrill Lynch and Barber hereby waive their statutory rights to notice and a hearing before the Commissioner of the Department, or his designated appointee.
4. Merrill Lynch and Barber acknowledge and agree to enter into this Stipulation and Consent Agreement freely and voluntarily, and that except as set forth herein, no promise was made to induce either to enter into it.
5. Merrill Lynch and Barber acknowledge their understanding of the terms, conditions, undertakings, and obligations contained in this Stipulation and Consent Agreement.
6. Merrill Lynch and Barber each acknowledge they have consulted with their respective attorneys in this matter.
7. Merrill Lynch and Barber acknowledge that noncompliance with any of the terms of this Stipulation and Consent Agreement may constitute a separate violation of the securities laws of the State of Vermont and may subject it or him to sanctions.
8. Merrill Lynch and Barber acknowledge that this Stipulation and Consent Agreement constitutes a valid agreement duly rendered by the Commissioner and agree to be fully bound by it.
9. Merrill Lynch and Barber further acknowledge that the Commissioner retains jurisdiction over this matter for the purposes of enforcing this Stipulation and Consent Agreement.

10. This Stipulation and Consent Agreement is not intended to subject Barber, Merrill Lynch, or any of their affiliates to any disqualification under Vermont laws, or rules or regulations thereunder, federal securities laws, or rules and regulations thereunder, the rules and regulations of self-regulatory organizations or various states or U.S. Territories, including any disqualification from relying upon the registration exemptions or safe harbor provisions to which Barber, Merrill Lynch, or any of their affiliates may be subject. Nothing in this Stipulation and Consent Agreement is intended in any way to subject Barber, Merrill Lynch, or any of their affiliates to any statutory disqualification by FINRA in any way.

11. This Stipulation and Consent Agreement is not, and shall not be deemed to be, a final order of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct.

12. Any acts performed or documents executed in further of this Stipulation and Consent Agreement: (a) may not be deemed or used as an admission of, or evidence of, the validity of any alleged wrongdoing, liability or lack of any wrongdoing or liability; or (b) may not be deemed or used as an admission of, or evidence of any such alleged fault or omission of Merrill Lynch or Barber in any civil, criminal, arbitration, or administrative proceeding in any court, administrative agency or other tribunal.

13. The terms set forth in this Stipulation and Consent Agreement represent the complete agreement between the parties as to its subject matter.

14. The undersigned representative of Merrill Lynch affirms that he has taken all necessary steps to obtain the authority to bind Merrill Lynch to the obligations stated herein and has the authority to bind Merrill Lynch to the obligations stated herein.

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

By: Mark L. Keene Date: 2/16/2018
Mark L. Keene, Esq.
Merrill Lynch, Pierce, Fenner & Smith Incorporated

LAWRENCE K. BARBER,

[Signature] Date: 2.16.18

By: Nicolee L. Torrey Dated this ___ day of February, 2018.

(Print Name: Nicolee L. Torrey)

STATE OF Vermont) SS

COUNTY OF Chittenden

On the 16th day of February, 2018, personally appeared Lawrence K. Barber, being the signer of the foregoing Stipulation and Consent Agreement and acknowledged the same to be his/her free act and deed.

Before me, Nicolee L. Torrey
Notary Public
My commission expires 2/10/19

DIVISION OF SECURITIES,
VERMONT DEPARTMENT OF FINANCIAL REGULATION,

By: William Carrigan Date: 2/21/18
William Carrigan
Deputy Commissioner of Securities
Vermont Department of Financial Regulation

CONSENT ORDER

IT IS HEREBY ORDERED:

1. Each of the Respondents shall comply with all agreements, stipulations, and undertakings as recited above.
2. Nothing contained in this Order shall restrain or limit the Department in responding and addressing any consumer complaint about one or both Respondents filed with the Department or shall preclude the Department from pursuing any other violation of law.

Entered at Montpelier, Vermont, this 21st day of February, 2018.



Michael Pieciak, Commissioner
Vermont Department of Financial Regulation