

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9016 / March 16, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13407

In the Matter of

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

Respondent.

**ORDER UNDER RULE 602(e) OF THE
SECURITIES ACT OF 1933 GRANTING A
WAIVER OF THE RULE 602(c)(3)
DISQUALIFICATION PROVISION**

I.

Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) has submitted a letter, dated November 3, 2008, requesting a waiver of the Rule 602(c)(3) disqualification from the exemption from registration under Regulation E arising from Merrill Lynch’s settlement of an administrative proceeding commenced by the Commission.

II.

On March 11, 2009, pursuant to Merrill Lynch’s Offer of Settlement, the Commission issued an Order Instituting Proceedings Pursuant to Sections 15(b)(4) and 21C 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 a Cease-and-Desist Orders, Penalties, and Other Relief. Under the Order, the Commission found that Merrill Lynch violated Section 15(f) of the Securities Exchange Act of 1934 (“Exchange Act”) and Section 204A of the Investment Advisers Act of 1940 (“Advisers Act”) by lacking written policies or procedures to limit access to the equity order information of its institutional customers communicated over Merrill Lynch’s equity squawk box, to track which employees had access to the equity squawk box, or to monitor employees’ use of the equity squawk box. Consequently, retail brokers received access to equity squawk boxes despite the absence of any bona fide need for the information, such as demonstrating any ability to fill block orders; Merrill Lynch was unable to identify which employees had equity squawk boxes; and several retail brokers were able to provide equity squawk box information to day traders simply by placing their telephone receiver next to the equity squawk box for the entire trading day. In the Order, the Commission

censured Merrill Lynch and ordered Merrill Lynch to cease and desist from committing or causing any violations and any future violations, of Section 15(f) of the Exchange Act and Section 204(A) of the Advisers Act; pay a civil money penalty in the aggregate amount of \$7,000,000; and comply with remedial undertakings.

III.

The Regulation E exemption is unavailable for the securities of small business investment company issuers or business development company issuers if, among other things, any investment adviser or underwriter of the securities to be offered, or any partner, director or officer of such investment adviser or underwriter is “subject to an order of the Commission entered pursuant to Section 15(b) or 15A(1) of the Securities Exchange Act of 1934 or Section 203(d) or (e) of the Investment Advisers Act of 1940” Rule 602(e) of the Securities Act of 1933 (“Securities Act”) provides, however, that the disqualification “shall not apply . . . if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied.” 17 C.F.R. § 230.602(e).

IV.

Based upon the representations set forth in Merrill Lynch’s request, the Commission has determined that pursuant to Rule 602(e) under the Securities Act a showing of good cause has been made that it is not necessary under the circumstances that the exemption be denied as a result of the Order.

Accordingly, **IT IS ORDERED**, pursuant to Rule 602(e) under the Securities Act, that a waiver from the application of the disqualification provision of Rule 602(c)(3) under the Securities Act resulting from the entry of the Order is hereby granted.

By the Commission.

Elizabeth M. Murphy
Secretary