

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

Securities Act of 1933
Release No. 9004 / January 30, 2009

Administrative Proceeding
File No. 3-13357

In the Matter of

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

Respondent.

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

Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill Lynch”) has submitted a letter, dated January 15, 2009, 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.

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 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 for the securities to be offered is subject to an order of the Commission entered pursuant to 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).

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