

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (the “Settlement Agreement”) is made by and between plaintiff Abdullah Byanooni (“Plaintiff” or “Named Plaintiff”), individually and on behalf of the class of persons he seeks to represent, and defendants Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill Lynch”) and Bank of America Corporation (collectively “Defendants”) with reference to the following facts. The Plaintiff and Defendants are sometimes collectively referred to herein as the “Parties.”

### **RECITALS**

A. There is pending in the United States District Court for the Northern District of California, a civil action entitled *Abudllay Byanooni, et al. v. Merrill Lynch, Pierce, Fenner & Smith et al.*, Case No. 3:12-cv-05270-RS (“the Action”).

B. Plaintiff commenced the Action on August 17, 2012 against Defendants. The putative class action complaint asserts causes of action for (1) Unlawful Recording and Interception of Communications (Violation of California Penal Code § 632.7); and (2) Unlawful Recording of and Eavesdropping upon Confidential Communications (Violation of California Penal Code § 632). The complaint alleges that Defendants violated CIPA, California Penal Code, Section 630, *et seq.*, by recording and/or monitoring calls between Plaintiff and Merrill Lynch without obtaining Plaintiff’s consent to do so.

C. Defendants contend that Merrill Lynch had a policy and practice to disclose recording and/or monitoring through Interactive Voice Response on inbound calls and verbal disclosure on outbound calls, and in any event, Plaintiff had no reasonable expectation of privacy in his calls with Merrill Lynch given his previous experience in communicating with Merrill Lynch as well as the other circumstances of the subject calls.

D. For over a year, the Parties actively litigated the Action. Among other things, the Parties informally exchanged discovery and engaged in informal settlement discussions leading up to the mediation.

E. The Parties attended an all-day mediation with the Honorable Edward A. Infante (Ret.). Taking into account the burdens, uncertainty and risks inherent in this Action, the Parties have concluded that further prosecution and defense of the Action could be protracted, unduly burdensome, and expensive, and that it is desirable, fair, and beneficial to the class that the Action now be fully and finally compromised, settled and terminated in the manner and upon the terms and conditions set forth in this Settlement Agreement.

F. Defendants deny that they committed any wrongful act or violated any law or duty. Defendants also deny that Plaintiff, or the class he seeks to represent, is entitled to any form of damages or relief based on the conduct alleged in the Action. In addition, Defendants maintain that they have meritorious defenses to all claims alleged in the Action and they are prepared to defend the Action. This Settlement Agreement, and all related documents, shall not be construed as any admission or concession by Defendants, or any of the Released Parties (defined in Section 17 below), of any fault, liability, wrongdoing or damage whatsoever. Preliminary certification of the Settlement Class shall not be deemed a concession that certification of a litigation class is appropriate, nor would Defendants be precluded from challenging class certification in further proceedings in the Action or in any other action if the Settlement Agreement is not finalized or finally approved.

G. Plaintiff and his counsel believe that the claims asserted in the Action have merit. However, taking into account the risks of continued litigation, as well as the delays and

uncertainties inherent in such litigation and any subsequent appeal, Plaintiff and his counsel believe that it is desirable that the Action be fully and finally compromised, settled and terminated now with prejudice, and forever barred pursuant to the terms and conditions set forth in this Settlement Agreement. Plaintiff and his counsel have concluded that the terms and conditions of this Settlement Agreement are fair, reasonable and adequate to the proposed class, and that it is in the best interests of the proposed class to settle the Action.

WHEREFORE, in consideration of the promises, covenants, representations and warranties contained herein, and for good and valuable consideration given hereunder, the sufficiency of which is hereby acknowledged by the signatories to this Settlement Agreement, the Parties hereby agree as follows:

### **1. Proposed Class Definition**

For settlement purposes, the Parties have agreed to define the class as follows:

All customers of Merrill Lynch's Merrill Edge Advisory Center and self-directed online investment platform within the State of California who, on or after August 17, 2011 through the date of preliminary approval, received a telephone call from Merrill Lynch that was recorded and/or monitored.

Members of the class are referred to herein as "Class Members."

### **2. Preliminary Approval of Proposed Class Action Settlement**

2.1 The Parties desire and intend to seek Court approval of the settlement and a final judgment and order dismissing with prejudice the claims of Plaintiff and the Class Members as set forth in this Settlement Agreement. The Parties and their counsel agree to recommend approval of this settlement to the Court and to any regulatory authority responding to the notice of proposed settlement disseminated pursuant to the Class Action Fairness Act ("CAFA"), codified at 28 U.S.C. § 1715(b), *et seq.* The Parties agree to undertake all steps necessary to effectuate the purpose of the settlement, to secure the Court's approval of the settlement, and to oppose any interventions and objections to the settlement, including objections by any regulatory authority. Class Counsel (as defined in Section 2.2 below) reserves the right to appeal any award of attorneys' fees and costs that is less than, and Defendants' counsel reserves the right to appeal any award of attorneys' fees and costs that is more than, the amount the Parties agree to in Section 5 below.

2.2 Upon full execution of this Settlement Agreement, the Parties will file a Motion for Preliminary Approval of Class Action Settlement in accordance with the terms of this Settlement Agreement. The Motion for Preliminary Approval will seek an order that (a) preliminarily approves the settlement of the Action; (b) certifies a Class for settlement purposes as defined in Section 1 above; (c) approves and appoints Plaintiff as representatives of the Class; (d) approves and appoints Orshansky & Yeremian LLP as counsel for the Class ("Class Counsel"); (e) approves the form of the notice to be provided to the Class (the "Notice"); (f) approves the method of providing notice to the Class; and (g) sets deadlines for providing notice to the Class and for Class Members to submit requests for exclusion/opt-out, entry of an appearance, or objections to the proposed settlement. The Parties will thereafter seek final approval of the settlement and entry of a "Final Judgment" (as defined in Section 15.1 below).

### **3. The Settlement Fund**

Within 30 days following Final Judgment, Defendants will pay a non-reversionary "all-in" cash sum in the total amount of \$750,000.00 (the "Settlement Fund"). In no

event shall Defendants be obligated to make any additional payments under the terms of this Settlement Agreement aside from the non-reversionary “all in” cash sum of \$750,000.00 described above. Each Class Member shall share, pro rata, in the Settlement Fund, as set forth in Section 4 below, after reasonable attorney’s fees and costs as approved and awarded by the Court, the costs of notice and claims administration, and the incentive payment to the Named Plaintiff as set forth in Section 7 below are deducted from the Settlement Fund. The Settlement Fund shall constitute the exclusive recovery and relief for the Class.

#### **4. Recovery for the Class**

Class Members who submit a valid claim form will receive a pro rata share of the Settlement Fund (less any award of attorneys’ fees and costs, less any costs of notice and claims administration, and less the incentive payment to the Named Plaintiff as set forth in Section 7 below) in the form of a check.

#### **5. Attorney’s Fees and Costs for Class Counsel**

Class Counsel shall move the Court for an award of reasonable attorneys’ fees and costs, not to exceed \$187,500 incurred in connection with the Action. Defendants shall not object to or oppose such a motion so long as the amount requested by Class Counsel is not more than \$187,500 for attorneys’ fees and litigation costs. Any attorney’s fees and costs approved by the Court shall be paid to Class Counsel from the Settlement Fund within 60 days after Final Judgment. This Settlement Agreement is not conditioned on the Court’s approval of any attorney’s fees and costs sought by Class Counsel. No interest will accrue on any attorneys’ fees or costs awarded by the Court to Class Counsel. Class Counsel agrees to submit a completed W-9 form to counsel for Defendants.

#### **6. Third-Party Claims Administrator**

6.1 The costs and expenses related to notice and claims administration shall be paid from the Settlement Fund established by Defendants. Because the costs and expenses of notice and claims administration will affect the Class Member’s pro rata share of the Settlement Fund, such costs and expenses shall be overseen by Class Counsel. Defendants’ counsel may also oversee the claims administration process as they deem necessary. The Parties will use good faith efforts to minimize the costs of notice and claims administration.

6.2 Claims administration shall be by a third party administrator, The Garden City Group, Inc. (the “Claims Administrator”), which is located at 1985 Marcus Ave, Lake Success, NY 11042. The Claims Administrator’s telephone number is 808-327-3664.

6.3 Subject to the oversight of Class Counsel and Defendants’ counsel, the Claims Administrator shall be responsible for, among other things, the following: (a) providing notice to Class Members as set forth in Sections 9 below; (b) providing settlement checks to Class Members entitled to receive a settlement check pursuant to Section 4 above; (c) creating and maintaining a settlement website as set forth in Section 9.4 below; and (d) acting as a liaison between Class Members and the Parties regarding the settlement. The Claims Administrator shall be permitted to communicate without restriction with Class Counsel and Defendants’ counsel.

#### **7. Incentive Award for Named Plaintiff**

The Named Plaintiff will apply to the Court for an incentive award of up to \$5,000.00 for his service as the class representatives in the Action. Within 60 days of Final Judgment, and receipt by counsel for Defendants of a completed W-9 form from the Named Plaintiff, the

incentive award approved by the Court will be paid by the Claims Administrator to the Named Plaintiff from the Settlement Fund. The incentive award approved by the Court will be paid to the Named Plaintiff in the form of a check.

**8. Notice of Settlement and Right to Opt-Out, Enter an Appearance, or Object**

8.1 The Notice to the Class will be in the form of Exhibit “A” attached hereto.

8.2 The Notice will inform the Class Members of the basis of the claims raised in the Action, how to submit a claim form, and the potential payment under this settlement. The Notice will also advise Class Members about how to submit opt out/exclusion requests from the settlement and the deadline for filing any objections to the settlement with the Court. The Notice will also contain a statement that Class Members should direct questions about the Action or proposed settlement to Class Counsel. The Notice shall also inform Class Members of their right to appear in the Action through their own attorney.

**9. Notice to Class Members**

9.1 Timing of Notice

The Claims Administrator shall cause the Notice described in Sections 9.2 and 9.3 to be published and/or distributed as soon as reasonably practicable but no later than 95 days from the date the Court grants the Motion for Preliminary Approval of Settlement. The Claims Administrator will file a declaration with the Court, as part of the final approval papers, stating that these procedures were followed.

9.2 Electronic Mail Notice

For those Class Members for whom Defendants have a reasonably reliable email information (determined solely at the discretion of Defendants), the Claims Administrator shall send the Notice, substantially in the form attached hereto as Exhibit A, via electronic mail. The Claims Administrator shall use the Notice Database provided by Defendants to obtain each Class Member’s email address.

9.3 Publication Notice

The Claims Administrator shall cause a Notice, substantially in the form attached hereto as Exhibit A, to be published on a California-wide basis in *Parade* magazine and *USA Weekend* magazine, and to be published on the settlement website, as set forth in Section 9.4 below, on the same date, and retained on the website thereafter.

9.4 Settlement Website

The Claims Administrator shall create and maintain a settlement website for the Action containing the operative complaint in the Action, the Settlement Agreement and the Notice along with any other information the Parties deem proper.

**10. CAFA Notice**

Defendants shall be responsible for serving the Class Action Fairness Act (“CAFA”) notice required by 28 U.S.C. § 1715 within 10 days of the filing of the Joint Motion for Preliminary Approval of Class Settlement.

## **11. Claims Process**

### **11.1 Potential Claimants**

Each Class Member who does not timely and validly request exclusion from the settlement as required in this Settlement Agreement shall be a Class Member bound by this Settlement Agreement and the Final Judgment to be entered following the hearing for final approval of the settlement. Each Class Member shall be entitled to make only one claim regardless of the number of Class Member calls recorded.

### **11.2 Conditions for Claiming Settlement Award**

To make a claim, Class Members must submit a valid and timely claim form postmarked or submitted online on or before the date specified in the Notice, which is 95 days from the completion of notice by publication. The claim form shall contain the information set forth in Exhibit B hereto, including: (a) the Class Member's full name; (b) confirmation that the Class Member, on or after August 17, 2011, was a customer of Merrill Lynch's Merrill Edge Advisory Center and/or self-directed online investment platform and received a telephone call from Merrill Lynch while within the State of California and was not informed that the call would be recorded and/or monitored; (c) the approximate date of, and telephone number used to receive each such telephone call; (d) for mailed claim forms, the Class Member's signature; and (e) for Claim Forms submitted via a web form, the Class Member's electronic signature. Defendants shall have the right to review the submitted claim forms and deny claims if Defendants have a good faith belief that such claims are improper or fraudulent. If a Class Member fails to fully complete a claim form, the claim form will be invalid.

## **12. Right to Opt Out of Settlement**

12.1 Class Members have the right to opt out and exclude themselves from the settlement by mailing an exclusion request ("Exclusion Request") to the Claims Administrator. The Exclusion Request must be postmarked on or before the date specified in the Notice, which is 95 days from the completion of notice by publication. The Claims Administrator will provide copies of such exclusion requests to Class Counsel and counsel for Defendants.

12.2 The Exclusion Request shall be in writing and include the name and number of the Action, the Class Member's name, address, and telephone number and must be signed by the Class Member.

12.3 Except for those Class Members who have properly and timely mailed an Exclusion Request, all Class Members will be bound by this Settlement Agreement and the Final Judgment to be entered following the hearing for final approval of the settlement.

12.4 If 1,000 or more Class Members opt-out of the Settlement Agreement by timely submitting an Exclusion Request, then Defendants, in their sole discretion, shall have the right to terminate the settlement. In the event that the settlement is terminated pursuant to this Section, the Parties will be returned to the status quo ante as if no settlement had been negotiated or entered into as set forth in Section 18 below.

## **13. Right to Object to Settlement**

13.1 Any Class Member who intends to object to this Settlement Agreement must file his or her objections with the Court ("Objection") and submit a copy of the Objection to the Claims Administrator. The Objection must be filed with the Court and postmarked on or before the date specified in the Notice, which is 95 days from the completion of notice by

publication. Only Class Members who have not submitted a valid Exclusion Request may object to the settlement.

13.2 Any Objection filed with the Court and submitted to the Claims Administrator must set forth the name and case number of this matter, Class Member's name, address, telephone number and all arguments, citations and evidence supporting the Objection, and a statement of whether the objecting Class Member intends to appear at the hearing for final approval of the class action settlement, and whether the objecting Class Member intends to appear at the hearing with or without counsel. The Claims Administrator will provide copies of such Objections to Class Counsel and Defendants' counsel.

13.3 Any Class Member who fails to file a timely Objection pursuant to this Section and as detailed in the Notice shall have waived any right to object to the Settlement Agreement and shall not be permitted to object to this Settlement Agreement at the Final Approval Hearing, and shall be foreclosed from seeking any review of this Settlement Agreement by appeal or other means.

13.4 Any Class Member who files an Objection pursuant to this Section and his or her Objection is overruled will not receive a settlement award unless he or she has submitted a valid and timely claim form pursuant to Section 11.2 above.

#### **14. Right To Enter An Appearance**

On or before the date specified in the Notice, which is 95 days from the completion of notice by publication, a Class Member may enter an appearance through an attorney if he or she so desires. The Class Member is solely responsible for any fees, costs or expenses of his or her attorney.

#### **15. Final Judgment**

15.1 As used herein, "Final Judgment" shall mean the entry by the Court of a judgment finally approving the settlement of the Action pursuant to the terms of this Settlement Agreement and that judgment shall have become final either by expiration of time for appeal or if a Class Member objects to the settlement and files an appeal, by either a dismissal of said appeal or final appellate court decision in favor of, and affirming, the judgment and the Settlement Agreement in all material respects.

15.2 Defendants shall not be obligated to pay any sum pursuant to this Settlement Agreement except upon Final Judgment.

15.3 By entering Final Judgment, the Court shall:

15.3.1 Approve the Settlement Agreement and the proposed settlement as fair, reasonable and adequate as to, and in the best interests of, the Class Members; direct the Parties and their counsel to implement and consummate the Settlement Agreement, to the extent the Parties have not done so already, according to its terms and provisions; and declare the Settlement Agreement to be binding on, and have res judicata and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of the Named Plaintiff and all other Class Members, as well as their heirs, executors and administrators, successors and assigns;

15.3.2 Certify the Class for settlement purposes only;

15.3.3 Find that the Notice implemented pursuant to the Settlement Agreement (a) constitutes the best practicable notice, (b) constitutes notice that is reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action, their right to accept, object to or exclude themselves from the proposed settlement and to appear at the fairness hearing, (c) constitutes reasonable, due, adequate and sufficient notice to all persons entitled to receive notice, and (d) meets all applicable requirements of the Federal Rules of Civil Procedure, the Due Process Clause of the United States Constitution and any Rules of the Court;

15.3.4 Find that Class Counsel and the Named Plaintiff adequately represented the Class for purposes of entering into and implementing the settlement;

15.3.5 Incorporate the Release set forth in Section 17 below, make the Release effective as of the date of Final Judgment, and forever discharge the Released Parties from any claims or liabilities arising from or related to the facts, circumstances, or subject matter of the Action;

15.3.6 Bar and enjoin the Named Plaintiff and all Class Members who have not been excluded from the Class from (a) filing, commencing, prosecuting, intervening in, promoting, or participating (as Class Members or otherwise) in, any lawsuit in any jurisdiction based on or arising out of the claims and causes of action, or the facts and circumstances relating thereto, in this Action and (b) organizing Class Members who have not been excluded from the Class into a separate class for purposes of pursuing as a purported class action any lawsuit (including by seeking to amend a pending complaint to include class allegations, or seeking class certification in a pending action) based on or relating to the claims and causes of action, or the facts and circumstances relating thereto, in the Action.

## **16. Payments Upon Final Judgment**

16.1 Within 60 days after Final Judgment, the Claims Administrator shall pay to Class Counsel, from the Settlement Fund, any reasonable attorney's fees and costs awarded by the Court.

16.2 Within 60 days after Final Judgment, the Claims Administrator shall pay to the Named Plaintiff, from the Settlement Fund, the incentive payment pursuant to Section 7 above, as approved by the Court.

16.3 Within 60 days after Final Judgment, and after all attorney's fees and costs awarded to Class Counsel, all costs of notice and claims administration, and the incentive payment to the Named Plaintiff have been paid out of the Settlement Fund, the Claims Administrator shall mail to each Class Member who is entitled to receive a settlement check pursuant to Section 4 and Section 11 above his or her pro rata share of the Settlement Fund. The settlement checks to Class Members shall state on their face that the check will expire and become void if not cashed within 90 days of the date of the check. Each Class Member's entitlement to payment under this Settlement Agreement is contingent upon (1) submission of a valid and timely claim form; and (2) cashing the settlement check within 90 days from the date of issuance of the check.

16.4 If there are any unclaimed funds or any funds from uncashed settlement checks, Class Counsel will file a brief in support and recommendation of one or more cy pres recipients, as agreed to by the Parties, which will then require approval by the Court.

## **17. Release Upon Final Judgment**

17.1. The Named Plaintiff and each Class Member (other than those persons who have timely and properly filed an Exclusion Request), on behalf of themselves and their agents, administrators, servants, employees, representatives, assigns, heirs, executors, trustees, joint venturers, partners, successors, predecessors and attorneys, and each of them (collectively the "Releasing Persons"), hereby jointly and severally release and discharge defendants Merrill Lynch, Pierce, Fenner & Smith Inc. and Bank of America Corporation and all of their former, present and future direct and indirect parents, affiliates, subsidiaries, successors and predecessors and all of their respective former, present and future officers, directors, shareholders, managers, general partners, limited partners, employees, servants, agents, principals, attorneys, representatives, insurers, reinsurers, predecessors, successors, divisions, joint ventures, assigns, independent contractors and vendors (collectively the "Released Parties") from any and all actions, causes of action, obligations, costs, expenses, damages, losses, claims, liabilities, and demands, of whatever character, known or unknown, arising out of, relating to, or in connection with, the operative complaint in the Action, the claims asserted in the Action, the Released Parties' recording and/or monitoring of calls, and the administration of this settlement.

17.2. The Named Plaintiff and each Class Member (other than those persons who have timely and properly filed an Exclusion Request) acknowledges that it/he/she may hereafter discover facts different from, or in addition to, those which it/he/she now claims or believes to be true with respect to the claims released herein, and agrees that this Settlement Agreement shall remain effective in all respects notwithstanding the discovery of such different, additional or unknown facts. The Named Plaintiff and each Class Member (other than those persons who have timely and properly filed an Exclusion Request) hereby expressly waive any rights it/he/she may have under California Civil code Section 1542 or any other similar statute of any other state with respect to the claims released herein. This Section constitutes a waiver with respect to such claims, without limitation as to any other applicable law, of Section 1542 of the California Civil Code, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

17.3. In entering into this Settlement Agreement, each party assumes the risk of any misrepresentation, concealment or mistake. If any party should discover subsequent to Final Judgment that any fact relied upon by it/him/her in entering into this Settlement Agreement was untrue, or that any fact was concealed from it/him/her, or that its/his/her understanding of the facts or of the law was incorrect, such party shall not be entitled to any relief in connection therewith, including without limitation, any alleged right or claim to set aside or rescind this Settlement Agreement. This Settlement Agreement is intended to be, and is final and binding between the Parties hereto, regardless of any claims of misrepresentation, promise made without the intention to perform, concealment of fact, mistake of fact or law, or any other circumstance whatsoever.

## **18. Effect of Court's Denial of Preliminary or Final Approval of Settlement**

There is no settlement if the Court does not preliminarily approve the settlement and finally approve the settlement in substantially the same form as set forth herein, or if the settlement is appealed, or if the judgment approving the settlement is appealed, and if the settlement or the judgment approving the settlement is not approved on appeal in substantially

the same form as set forth herein. In such event, (a) this Settlement Agreement is terminated and is of no force and effect and no party shall be bound by any of its terms; (b) to the extent applicable, any preliminary order approving the settlement, certifying the Class, approving the Notice, and providing notice to the Class shall be vacated; (c) the Settlement Agreement and all of its provisions and all negotiations, statements, and proceedings relating to the Settlement Agreement shall be without prejudice to the rights of any of the Parties; (d) each of the Parties shall be restored to their respective positions as of the date this Settlement Agreement was fully executed; and (e) neither the settlement nor any of its provisions or the fact that this Settlement Agreement has been made shall be admissible in the Action or in any other action for any purpose whatsoever.

## **19. Representations and Warranties**

Each of the parties to this Settlement Agreement represent, warrant and agree as follows:

### **19.1. Assignment of Claims**

No party has hereto assigned, transferred or granted, or purported to assign, transfer, or grant, any of the claims, demands and cause(s) of action disposed of by this Settlement Agreement.

### **19.2. Legal Advice**

The Parties hereto acknowledge that they have had the opportunity to consult with independent legal counsel with respect to the advisability of making the settlement provided for herein and of executing this Settlement Agreement and all other matters contained herein, including the waiver of rights under California Civil Code section 1542 or any other similar statute of any other state.

### **19.3 Investigation**

The Parties hereto acknowledge that they have either been represented in the negotiations for, and in preparation of, this Settlement Agreement by counsel of their choice; that they have read this Settlement Agreement and have had it fully explained to them by such counsel; and that they are fully aware of the contents of this Settlement Agreement and of the legal effect of each and every provision thereof. Each party to this Settlement Agreement has made such investigation of the facts pertaining to this Settlement Agreement and of all of the matters pertaining thereto as it deems necessary.

### **19.4. Authority and Capacity to Execute Settlement Agreement**

The Parties hereto represent and warrant to each other that the person executing this Settlement Agreement on their behalf has full authority and capacity to execute this Settlement Agreement and to give the releases and other promises contained herein.

## **20. No Admission of Liability**

This Settlement Agreement affects the settlement of claims which are denied and contested, and nothing contained herein shall be construed as an admission by Defendants of any liability of any kind. Defendants deny any liability in connection with any such claims and intend merely to avoid further litigation of the Action.

## **21. Return of Confidential Documents**

Within 30 days of Final Judgment, the original and all copies of all confidential or highly confidential documents and/or information subject to any Protective Order entered in the Action shall be returned to the designating party with a certification that no copies have been retained by the receiving party, or Class Counsel will certify that all documents in their possession, subject to a Protective Order, have been destroyed.

## **22. No Publicity Beyond Notice Procedure**

Neither Class Counsel nor the Named Plaintiff will issue any press releases or make other public statements regarding the settlement, unless Defendants agree to such press release or public statement in advance. Neither Class Counsel nor the Named Plaintiff will make any formal public statements of any kind to any third party regarding the settlement prior to applying for preliminary approval, with the exception of communications with the Claims Administrator. The Parties may make public statements to the Court as necessary to obtain preliminary or final approval of the settlement. This provision shall not prohibit Class Counsel from communicating with any Class Member regarding the Action or the settlement; provided, however, that Class Counsel must comply with all confidentiality agreements and any Protective Order in the Action in communicating with Class Members and will not disclose information that is not a part of the public record. The Parties and all counsel shall refrain from disparaging any of the Released Parties or taking any action designed or reasonably foreseeable to cause harm to the public perception of any of the Released Parties regarding any issue related in any way to the Action or the settlement.

## **23. Choice of Law and Jurisdiction**

This Settlement Agreement is being executed in the State of California, and it shall be deemed to be made under, and shall be interpreted in accordance with, the internal laws of the State of California.

## **24. Construction of Agreement**

Each party has participated in the drafting and preparation of this Settlement Agreement. Hence, in construing this Settlement Agreement, none of the Parties hereto shall have any term or provision, or any uncertainty or ambiguity as to any term or provision herein, construed against such party solely by reason of such party having drafted the same, as a result of the manner of the preparation of this Settlement Agreement, or otherwise. Each term and provision of this Settlement Agreement shall be construed and interpreted so as to render it enforceable. In the event any provision of this Settlement Agreement is held to be illegal or unenforceable, the remainder of this Settlement Agreement shall be binding and enforceable.

## **25. Headings or Pronouns**

Headings or captions contained in this Settlement Agreement are solely for the convenience of the Parties, are not a part of this Settlement Agreement, and shall not be used for the interpretation of, or determination of the validity of, this Settlement Agreement or any provision hereof. Whenever the context may so require, the masculine gender shall be deemed to refer to and include the feminine and neuter, and the singular shall be deemed to refer to and include the plural, and vice versa.

**26. Entire Agreement**

This Settlement Agreement contains the entire agreement and understanding between the Parties concerning the subject matter hereof, and any and all prior oral or written agreements or understandings between the Parties related hereto are superseded. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Settlement Agreement, have been made by any party hereto.

**27. Waiver, Modification and Amendment**

No provision of this Settlement Agreement may be waived unless in writing signed by all Parties hereto. Waiver of any one provision shall not be deemed to be a waiver of any other provision hereof. This Settlement Agreement may not be altered, amended or otherwise changed or modified, except in writing signed by all Parties.

**28. Successors and Assigns**

This Settlement Agreement is binding upon, and shall inure to the benefit of, the Parties hereto and their respective successors, assigns, heirs, agents, employees, attorneys, representatives, officers, parents, affiliates, and subsidiaries.

**29. Execution in Counterparts**

This Settlement Agreement may be executed in counterparts and all of said counterparts shall collectively constitute one agreement binding on all Parties.

**30. Further Cooperation**

The Parties hereto agree to execute all such further and additional documents and instruments, as shall be necessary or expedient to carry out the provisions of this Settlement Agreement, and shall promptly and in good faith undertake all reasonable acts to effectuate the provisions of this Settlement Agreement.

**31. Notices**

All letters, notices, requests, demands and other communication required or permitted to be given to the Parties pursuant to this Settlement Agreement, excluding communications directed to Class Members, shall be in writing and addressed as follows:

For the Named Plaintiff and the Class:      Anthony J. Orshansky, Esq.  
Orshansky & Yeremian LLP  
9301 Wilshire Blvd., Suite 650  
Beverly Hills, CA 90210  
Telephone (818) 205-1212  
anthony@oyllp.com

For Defendants:                                      Marc Lackner, Esq.  
Reed Smith LLP  
101 Second Street, Suite 1800  
San Francisco, CA 94105-3659  
Telephone: (415) 543-8700  
mlackner@reedsmith.com

*[remainder of page intentionally left blank]*

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed as of the dates set forth below.

DATED: \_\_\_\_\_

\_\_\_\_\_  
ABDULLAH BYANOONI, as an Individual  
and as a Proposed Class Representative

DATED: \_\_\_\_\_

DEFENDANTS MERRILL LYNCH, PIERCE,  
FENNER & SMITH INC. and  
BANK OF AMERICA CORPORATION

By \_\_\_\_\_  
Name:  
Title:

APPROVED AS TO FORM AND CONTENT

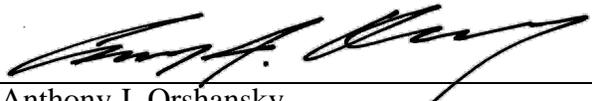
DATED: \_\_\_\_\_

REED SMITH LLP

By \_\_\_\_\_  
Marc A. Lackner  
Attorneys for Defendants  
Merrill Lynch, Pierce, Fenner & Smith Inc.;  
Bank of America Corporation

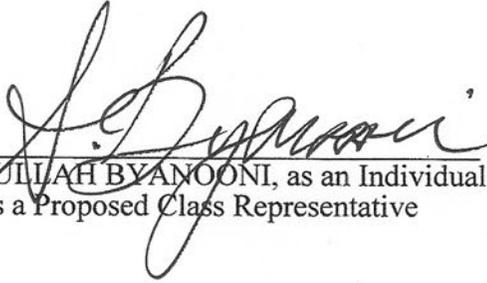
DATED: June 13, 2014

ORSHANSKY & YEREMIAN LLP

By   
\_\_\_\_\_  
Anthony J. Orshansky  
Attorneys for Plaintiff  
Abdullah Byanooni

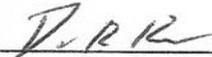
IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed as of the dates set forth below.

DATED: 6/13/2014

  
ABDULLAH BYANOONI, as an Individual  
and as a Proposed Class Representative

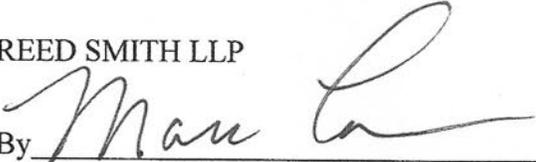
DATED: 6/4/14

DEFENDANTS MERRILL LYNCH, PIERCE,  
FENNER & SMITH INC. and  
BANK OF AMERICA CORPORATION

By   
Name: David Poole  
Title: Managing Director, Client Services

APPROVED AS TO FORM AND CONTENT

DATED: 6/11/2014

REED SMITH LLP  
By   
Marc A. Lackner  
Attorneys for Defendants  
Merrill Lynch, Pierce, Fenner & Smith Inc.;  
Bank of America Corporation

DATED: \_\_\_\_\_

ORSHANSKY & YEREMIAN LLP  
By \_\_\_\_\_  
Anthony J. Orshansky  
Attorneys for Plaintiff  
Abdullah Byanooni

# EXHIBIT A

## NOTICE OF CLASS ACTION SETTLEMENT

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

ABDULLAH BYANOONI  
individually and on behalf of a class  
and subclass of similarly situated  
individuals,

Plaintiff,

vs.

MERRILL LYNCH, PIERCE,  
FENNER, & SMITH; BANK OF  
AMERICA CORPORATION; and  
DOES 1 through 10, inclusive,

Defendants.

Case No. 3:12-cv-05270-RS

### NOTICE OF CLASS ACTION SETTLEMENT

#### ***1. Why Should You Read This Notice?***

You should read this notice because you may be eligible to claim money from a class action settlement if you are a member of the class as defined below:

All customers of Merrill Lynch's Merrill Edge Advisory Center and self-directed online investment platform within the State of California who, on or after August 17, 2011 through [date of preliminary approval], received a telephone call from Merrill Lynch that was recorded and/or monitored.

The class is referred to in this Notice as the "Settlement Class," and members of the Settlement Class are referred to as "Settlement Class Members."

#### ***2. What is the Case About?***

On August 17, 2012, a class action was filed by Plaintiff Abdullah Byanooni ("Plaintiff") in the Superior Court of California, County of San Francisco, Case

No. CGC-12-523355. The case was removed to the United States District Court, Northern District of California, Case No. 3:12-cv-05270-RS (the “Action”). The complaint in the Action alleges that defendants Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill Lynch”) and Bank of America Corporation (collectively “Defendants”) violated California’s Invasion of Privacy Act (“CIPA”), Penal Code section 630 et seq. (“CIPA”), by recording and/or monitoring calls between Plaintiff and Merrill Lynch without obtaining consent to do so. The complaint asserts claims for (1) Unlawful Recording and Interception of Communications (Violation of California Penal Code § 632.7); and (2) Unlawful Recording of and Eavesdropping upon Confidential Communications (Violation of California Penal Code § 632).

Defendants deny any liability or wrongdoing of any kind associated with the claims alleged in the Action, and further deny that the Action is appropriate for class treatment for any purpose other than this settlement. Defendants contend, among other things, that they have complied at all times with CIPA, as Merrill Lynch has a policy and practice to disclose recording and/or monitoring through Interactive Voice Response on inbound calls and verbal disclosure on outbound calls, and in any event, the reasonable expectation of privacy requirement for the CIPA claims asserted by Plaintiff was not met by Plaintiff.

The Court has made no findings regarding the above claims of Plaintiff or Defendants.

### ***3. The Proposed Settlement.***

Without admitting any wrongdoing and to avoid litigating these claims, Defendants in the Action have agreed to pay \$750,000.00 (“Settlement Fund”), which includes: (a) up to \$187,000.00 for Plaintiff’s counsel for attorneys’ fees and costs; (b) up to \$5,000.00 for an incentive payment to Plaintiff; (c) costs of administering the class settlement and notice; and (d) payments to the Settlement Class Members (Settlement Class Members will receive a pro rata share of the Total Settlement Amount less any award of attorneys’ fees and costs, less any costs of notice and claims administration (estimated to be \$140,000), and less the incentive payment to Plaintiff ). Class Counsel’s attorneys’ fees and costs and Plaintiff’s incentive payments remain subject to Court approval. Payments will be distributed to Settlement Class Members who submit timely, valid Claim Forms.

#### ***4. What Do I Need To Do To Collect Money?***

To get money from the Settlement, you **must** complete the enclosed Claim Form, **sign it**, and mail it (postmarked) to the Claims Administrator on or before **[date]** or submit the Claim Form online at [www.CAcallrecordingclassaction.com](http://www.CAcallrecordingclassaction.com) on or before **[date]**.

The Claim Form will include (a) the Settlement Class Member's full name; (b) confirmation that the Class Member, on or after August 17, 2011 through **[date]**, (1) received a telephone call from Merrill Lynch while within the State of California, and (2) that at the time such call was received, the Class Member was a customer of Merrill Lynch's Merrill Edge Advisory Center and/or self-directed online investment platform; (c) the approximate date of, and telephone number used to receive each such telephone call; (d) for mailed claim forms, the Class Member's signature; and (e) for Claim Forms submitted via a web form, the Class Member's electronic signature.

#### ***5. What Happens If I Do Nothing?***

**If you do nothing, you will not receive any money.** You will still be deemed part of the Class Action, and you will be releasing all claims you may have related to the allegations in the case.

#### ***6. What Do I Need To Do If I Want To Request Exclusion From The Settlement?***

You may request to be excluded from the Settlement. **Class Members who request to be excluded from the Settlement will NOT receive any money, nor will they have released their claims.** To request to be excluded from the Settlement, you **must** prepare and submit a written exclusion request ("Exclusion Request") with your name and address to the Claims Administrator. The Exclusion Request shall be in writing and include the name and number of the Action, the Class Member's name, address, and telephone number and must be signed by the Class Member. The request must be mailed to the Claims Administrator (postmarked) on or before **[date]**.

#### ***7. What Do I Need To Do If I Want To Object To The Settlement?***

You can ask the Court to deny approval by filing an objection. You cannot ask the Court to order a larger settlement; the Court can only approve or deny the settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. If that is what you want to happen, you must object.

You may object to the proposed settlement in writing. You may also appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for paying that attorney.

Any Class Member who intends to object to the Settlement must object in writing, file his or her objections with the Court (“Objection”), and submit a copy of the Objection to the Claims Administrator. All written Objections, supporting papers and/or notices to the Court of intent to appear at the final fairness hearing must: (a) set forth the name and case number of the Action (*Byanooni v. Merrill Lynch, Pierce, Fenner, & Smith et al.*, Case Number 3:12-cv-05270-RS); (b) set forth the objecting Class Member’s name, address, telephone number; (c) set forth all arguments, citations and evidence supporting the Objection; (d) include a statement of whether the objecting Class Member intends to appear at the hearing for final approval of the class action settlement, and whether the objecting Class Member intends to appear at the hearing with or without counsel; (e) be submitted to the Court either by mailing (postmarked) them to the Class Action Clerk, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, or by filing them in person at any location of the United States District Court for the Northern District of California on or before [date]; and (f) be submitted to the Claims Administrator by mail (postmarked) on or before [date].

#### **8. What Am I Giving Up By Participating In the Settlement?**

Settlement Class Members (other than those who timely submit requests for exclusion) will be bound by a release of claims. The release discharges Defendants, and any of their former, present and future direct and indirect parents, affiliates, subsidiaries, successors and predecessors and all of their respective former, present and future officers, directors, shareholders, managers, general partners, limited partners, employees, servants, agents, principals, attorneys, representatives, insurers, reinsurers, predecessors, successors, divisions, joint ventures, assigns, independent contractors and vendors (“Released Parties”), from any and all actions, causes of action, obligations, costs, expenses, damages, losses, claims, liabilities, and demands, of whatever character, known or unknown, arising out of, relating to, or in connection with, the operative complaint in the Action, the

claims asserted in the Action, the Released Parties' recording and/or monitoring of calls, and the administration of this settlement.

As part of the release, each Settlement Class Member who does not timely submit a request for exclusion will waive all rights and benefits afforded by section 1542 of the California Civil Code as it relates to the released claims or any other similar statute of any other state with respect to the claims released, and will do so understanding the significance of that waiver. Section 1542 provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

By waiving Section 1542, each Settlement Class Member (other than those who have timely and properly submitted a request for exclusion) acknowledges that he or she may hereafter discover facts different from, or in addition to, those which he or she now claims or believes to be true with respect to the claims released, and agrees that the settlement shall remain effective in all respects notwithstanding the discovery of such different, additional or unknown facts. Each Settlement Class Member who does not submit a request for exclusion assumes the risk of any misrepresentation, concealment or mistake. If the Settlement Class Member should subsequently discover that any fact relied upon by him or her in deciding whether to participate in the settlement was untrue, or that any fact was concealed from him or her, or that his or her understanding of the facts or of the law was incorrect, he or she shall not be entitled to any relief in connection therewith, including without limitation, any alleged right or claim to set aside or rescind the settlement. This settlement is intended to be and is final and binding between the parties, regardless of any claims of misrepresentation, promise made without the intention to perform, concealment of fact, mistake of fact or law, or any other circumstance whatsoever.

### ***9. Background Of Settlement.***

Plaintiff and his counsel believe that the claims asserted in the Action have merit. However, Plaintiff's counsel recognizes the expense, length and uncertainty of continued litigation. Although Defendants deny that they committed any wrongdoing, they believe that further litigation would be protracted, expensive, and contrary to their best interests. Thus, the parties entered into settlement

negotiations which resulted in the settlement. The Honorable Richard Seeborg has determined on a preliminary basis that the settlement is fair, reasonable, and adequate and in the best interests of the Class.

***10. Who are the Attorneys and the Claims Administrator?***

Attorney for Plaintiff and the Class are:

Anthony J. Orshansky, Esq.  
Orshansky & Yeremian LLP  
9301 Wilshire Blvd., Suite 650  
Beverly Hills, CA 90210  
Telephone: (310) 277-9945  
anthony@oyllp.com

Attorneys for Defendants are:

Marc Lackner, Esq.  
Reed Smith LLP  
101 Second Street, Suite 1800  
San Francisco, CA 94105-3659  
Telephone: (415) 543-8700  
mlackner@reedsmith.com

The Claims Administrator is The Garden  
City Group, Inc.:

Byanooni v. Merrill Lynch  
c/o GCG  
P.O. Box 35121  
Seattle, WA 98124-5118  
Telephone: (877) 916-8380

***11. Notice of Hearing on Final Approval and Objections to Class Action Settlement.***

A Final Fairness Hearing will be held before the Honorable Richard Seeborg on [date] at [time] in Department 3 of the United States District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102, to determine whether the proposed Settlement is fair, reasonable, and adequate. You do not need to appear at this hearing. The hearing may be continued without further notice. Class members are advised to check the settlement website or the Court's PACER site to confirm that the hearing date has not been changed.

***12. Examination of Papers and Inquiries.***

This notice summarizes the proposed settlement. For the precise terms and conditions of the settlement, please see the settlement agreement available at [www.CAcallrecordingclassaction.com](http://www.CAcallrecordingclassaction.com); by contacting the Claims Administrator in writing at *Byanooni v. Merrill Lynch* c/o GCG, P.O. Box 35121, Seattle, WA 98124-5118, or by phone at (877) 916-8380; by accessing the Court docket in this case through the Court's Public Access to Court Electronic Records (PACER) system at <https://ecf.cand.uscourts.gov>; or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.

PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.

The operative complaint in the Action, Settlement Agreement, Claim Form, and this Notice may also be viewed at [www.CAcallrecordingclassaction.com](http://www.CAcallrecordingclassaction.com).

***If You Received A Telephone Call From Merrill Lynch, Pierce, Fenner & Smith Inc. While Within The State of California From August 17, 2011 Through [DATE] That Was Recorded And/Or Monitored Without Your Consent You Could Get A Settlement Payment From A Proposed Class Action Settlement***

**Legal Notice**

**SUMMARY NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION  
UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA**

*Abdullah Byanooni, individually and on behalf of a class and subclass of similarly situated individuals v. Merrill Lynch, Pierce, Fenner & Smith, and Bank of America Corporation,*

Civil Action Case No. 3:12-cv-05270-RS

**THE LITIGATION**

There is a proposed class action settlement involving Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill Lynch”) and Bank of America Corporation (collectively, “Defendants”). The lawsuit claim that Defendants recorded and/or monitored telephone calls between Merrill Lynch and its customers without consent to do so, from August 17, 2011 through [DATE]. Defendants contend that Merrill Lynch has a policy and practice to disclose recording and/or monitoring through Interactive Voice Response on inbound calls, and verbal disclosure on outbound calls, and deny any wrongdoing whatsoever. The case has been prosecuted and defended, but there has been no trial, and the court has not decided who is right, or whether the case should proceed to trial as a class action. The court also authorized this notice. The court will have a hearing to consider whether to approve the settlement so that the Settlement payments may be paid.

**WHO IS INCLUDED IN THE PROPOSED SETTLEMENT?**

All customers of Merrill Lynch’s Merrill Edge Advisory Center and self-directed online investment platform within the State of California who, on or after August 17, 2011 through **the date of preliminary approval** received a telephone call from Merrill Lynch that was recorded and/or monitored.

**WHAT DOES THIS PROPOSED SETTLEMENT PROVIDE?**

If the settlement is approved by the Court, the Defendants will pay \$750,000.00 to establish a Settlement Fund. From the Settlement Fund, Class Members who submit a valid claim form will receive a pro rata share of the Settlement Fund less any award of attorneys’ fees and costs not to exceed \$187,500.00; less any costs of notice and claims administration; and less the incentive payments to the named plaintiff, Abdullah Byanooni, not to exceed \$5,000.00.

**YOUR OPTIONS**

You may remain in the Settlement Class, exclude yourself from the settlement, or object to the settlement. If you remain in the settlement, and are eligible to submit a claim, your claim form

must be postmarked by [DATE] or submitted online by [DATE]. If you don't want to be legally bound by the Settlement, you must exclude yourself, and your request for exclusion must be postmarked by [DATE]. Any objection must be postmarked by [DATE]. Your rights and your options are fully explained in the detailed "Long Form Notice." If you would like a Long Form Notice or claim form, you can get one by writing to the Claims Administrator, The Garden City Group, Inc. at the following address: Byanooni v. Merrill Lynch c/o GCG, P.O. Box 35121, Seattle, WA 98124-5118, or at the website: [www.CAcallrecordingclassaction.com](http://www.CAcallrecordingclassaction.com).

### **HOW CAN I GET A PAYMENT?**

Mail in your completed claim form (postmarked) no later than [DATE] or submit a claim form online at the settlement website no later than [DATE].

### **THE FINAL APPROVAL HEARING**

The court will hold a Final Approval Hearing on [DATE] at [TIME] in Courtroom 3 of the United States District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California 94102 to determine whether the proposed Settlement should be approved and to consider Plaintiff's counsel's application for attorneys' fees and costs. You may attend and request to speak at the hearing but you do not have to do so.

### **COMPLETE NOTICE AND OTHER INFORMATION**

This notice is only a summary. For the precise terms and conditions of the settlement, please see the settlement agreement available at [www.CAcallrecordingclassaction.com](http://www.CAcallrecordingclassaction.com); by contacting the Claims Administrator in writing at Byanooni v. Merrill Lynch c/o GCG, P.O. Box 35121, Seattle, WA 98124-5118; by accessing the Court docket in this case through the Court's Public Access to Court Electronic Records (PACER) system at <https://ecf.cand.uscourts.gov>; or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.

**PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.**

# EXHIBIT B

**Claim Form**

*Abdullah Byanooni, individually and on behalf of a class and subclass of similarly situated individuals v. Merrill Lynch, Pierce, Fenner & Smith, and Bank of America Corporation,*

United States District Court, Northern District of California, Case No. 3:12-cv-05270-RS

**THIS CLAIM FORM MUST BE POSTMARKED BY [DATE] OR SUBMITTED ONLINE BY [DATE].**

IF YOU CONSENT TO JOIN THE SETTLEMENT, YOU MUST (1) COMPLETE ALL SECTIONS OF THIS FORM, (2) SIGN THIS FORM, AND (3) RETURN IT BY MAIL TO THE CLAIMS ADMINISTRATOR AT THE ADDRESS BELOW OR SUBMIT THE FORM VIA THE WEB FORM. TO BE EFFECTIVE BY MAIL THIS DOCUMENT MUST BE POSTMARKED NO LATER THAN [DATE], AND MAILED TO:

Byanooni v. Merrill Lynch  
c/o GCG  
P.O. Box 35121  
Seattle, WA 98124-5118  
(877) 916-8380

TO BE EFFECTIVE BY WEB FORM, THE WEB FORM MUST BE SUBMITTED ONLINE AT [www.CAcallrecordingclassaction.com](http://www.CAcallrecordingclassaction.com) NO LATER THAN [date].

Name (Printed): \_\_\_\_\_

Address: \_\_\_\_\_

Current Contact Telephone: \_\_\_\_\_

Approximate date on or after August 17, 2011 through [date] on which you received a telephone call from Merrill Lynch, Pierce, Fenner & Smith Inc. while within the State of California: \_\_\_\_\_

Telephone number used to receive each such telephone call listed above \_\_\_\_\_

***By signing below, you affirm that on or after August 17, 2011 through [date], you (1) received a telephone call from Merrill Lynch, Pierce, Fenner & Smith Inc. while within the State of California and (2) that at the time you received such phone call, you were a customer of Merrill Lynch's Merrill Edge Advisory Center and/or self-directed online investment platform.***

Dated: \_\_\_\_\_ Signature \_\_\_\_\_