

# ALBERTA SECURITIES COMMISSION

## ORDER

Citation: **Re Merrill Lynch International, 2017 ABASC 7**

Date: **20170120**

### **Merrill Lynch International and Merrill Lynch, Pierce, Fenner & Smith, Incorporated**

#### **Background**

1. Merrill Lynch International (**Merrill Lynch UK**) and Merrill Lynch, Pierce, Fenner & Smith, Incorporated (**Merrill Lynch US**) (the **Filers**) are subject to an Alberta Securities Commission (the **Commission**) order (*Re Merrill Lynch International*, 2012 ABASC 546 as varied by further order cited as *Re Merrill Lynch International*, 2016 ABASC 302, and, as so varied, referred to herein as the **2012 Exemption Order**) exempting the Filers from the dealer registration requirement of section 75(1)(a) of the Act in respect of the provision of trading services for commodity futures contracts, commodity futures options, exchange traded equity options and foreign exchange contracts (collectively **Derivatives**) and exchange contracts to clients in Alberta, each of which is a “qualified party” as defined in Commission Blanket Order 91-506 Over-the-Counter Trades in Derivatives (**Qualified Parties**).
2. The 2012 Exemption Order is set to expire on January 20, 2017.
3. The Filers have applied to the Commission for a further order under section 144 of the Act exempting the Filers from the dealer registration requirement of section 75(1)(a) of the Act (the **Exemption Sought**) in respect of the provision of trading services for Derivatives to Qualified Parties in Alberta.

#### **Interpretation**

4. Terms defined in National Instrument 14-101 *Definitions* or in the Act have the same meaning in this decision unless otherwise defined herein.

#### **Representations**

5. This decision is based on the following representations made by the Filers to the Commission:
  - (a) Merrill Lynch US is:
    - (i) a corporation formed under the laws of Delaware;
    - (ii) registered as a broker-dealer and an investment adviser with the United States (**US**) Securities and Exchange Commission (the **SEC**);

- (iii) registered as a futures commission merchant (an **FCM**) with the US Commodity Futures Trading Commission (the **CFTC**);
  - (iv) a member of the US National Futures Association (**NFA**);
  - (v) a member of the US Financial Industry Regulatory Authority (**FINRA**); and
  - (vi) a clearing member of the Chicago Board of Trade, the Chicago Mercantile Exchange, the New York Mercantile Exchange and other domestic US exchanges.
- (b) Merrill Lynch UK is:
- (i) a corporation formed under the laws of England and Wales;
  - (ii) authorized by the Prudential Regulation Authority (the **PRA**) and regulated by the United Kingdom Financial Conduct Authority (the **FCA**) and the PRA to deal in investments as agent or principal in the United Kingdom; and
  - (iii) a member of LCH.Clearnet Limited, LCH Clearnet S.A., Eurex AG, NYSE Euronext and other exchanges.
- (c) The Filers are not registered under the securities legislation of any jurisdiction of Canada except, in the case of Merrill Lynch US, as a portfolio manager in each of Alberta, Ontario, British Columbia and Québec.
- (d) Merrill Lynch UK relies on the international dealer exemption (the **International Dealer Exemption**) under section 8.18 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**) in Alberta, Ontario, British Columbia, Manitoba and Québec.
- (e) Merrill Lynch US relies on:
- (i) the International Dealer Exemption in Alberta, Ontario, British Columbia, Manitoba, Québec, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Prince Edward Island and Saskatchewan; and
  - (ii) the international adviser exemption under section 8.26 of NI 31-103 in Alberta, Ontario, British Columbia and Québec.

- (f) Each of the Filers is in compliance in all material respects with the securities laws of its home jurisdiction. The Filers are not in default of securities legislation in any jurisdiction of Canada.
- (g) The Filers propose to trade in Derivatives on behalf of Qualified Parties. Trades will be cleared through the Chicago branch of Merrill Lynch US.
- (h) The Filers will not advertise their services by television, radio, newspaper, internet or other media of general circulation originating in Canada, other than financial-industry publications.
- (i) The Filers will not maintain an office, sales force or place of business in Canada.
- (j) Derivatives will be traded by the Filers for Alberta clients only on exchanges located outside Canada (each a **Non-Canadian Exchange**).
- (k) All Derivatives traded by Merrill Lynch US on behalf of Qualified Parties will be subject to regulation by the CFTC or other similar regulatory authorities. Merrill Lynch US is required to adhere to CFTC regulations relating to an FCM and an NFA-registered member which, among other things, require the segregation and separate accounting of customer positions and money to protect customers in the event of the insolvency or financial instability of an FCM. This protection will extend to Alberta clients of Merrill Lynch US in respect of trades in Derivatives.
- (l) Merrill Lynch UK is bound by applicable FCA rules, including client asset rules which require a firm to arrange adequate protection for clients' assets when the firm is responsible for them, including the proper accounting and handling of client money. This protection will extend to Alberta clients of Merrill Lynch UK who expressly opt for such protections in respect of trades in Derivatives.

### **Decision**

6. The Commission, considering that it would not be prejudicial to the public interest to do so, orders under section 144 of the Act that the Exemption Sought is granted provided that and for so long as:
- (a) any trade by the Filers in Derivatives for Alberta clients is conducted only on behalf of a Qualified Party and on a Non-Canadian Exchange;
  - (b) Merrill Lynch UK maintains in good standing its authorization with the FCA and the PRA to deal in investments as agent or principal and Merrill Lynch US maintains in good standing with the CFTC its registration as an FCM and its memberships with FINRA and the NFA;

- (c) each Filer provides to each client when opening an account for the client:
    - (i) a statement that there may be difficulty in enforcing any legal rights against the Filer or any of its directors, officers, employees or agents because they are resident outside Alberta, and all or substantially all of their assets are situated outside Alberta;
    - (ii) a statement that the Filer is not registered under the Act and, accordingly, the protection available to clients of a dealer registered under the Act will not be available to clients of the Filer;
    - (iii) the name and address of the Filer's agent for service in Alberta; and
    - (iv) a disclosure statement providing risk disclosure substantially similar to that required under the Act for registered dealers trading in Derivatives; and
  - (d) the Commission is in receipt from each Filer of a completed Submission to Jurisdiction and Appointment of Agent for Service in the form attached as an Appendix to this decision.
7. This order will take effect upon the expiry of the 2012 Exemption Order and will expire on the earlier of:
- (a) five years from the date of this decision; and
  - (b) 180 days after the coming into force of any change to Alberta securities laws regarding over-the-counter derivatives transactions and registration of derivatives dealers.

**For the Commission:**

*“original signed by”*

---

Tom Cotter  
Vice-Chair

*“original signed by”*

---

Stephen Murison  
Vice-Chair

**Appendix**  
**Submission to Jurisdiction and Appointment of Agent for Service**

Name of person or company (“International Firm”):
If the International Firm was previously assigned an NRD number as a registered firm or an unregistered exempt international firm, provide the NRD number for the firm:
Jurisdiction of Incorporation for the International Firm:
Head office address of the International Firm:

The name, e-mail address, phone number and fax number of the International Firm’s individual(s) responsible for the supervisory procedure of the International Firm, its chief compliance officer, or equivalent.

Name:
E-mail address:
Phone:
Fax:

The International Firm is relying on an exemption order under section 144 of the *Securities Act* (Alberta) that is similar to the following exemption in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (the “Relief”):

- Section 8.18 [international dealer]  
 Section 8.26 [international adviser]  
 Other [specify]:

Name of agent for service of process (the “Agent for Service”):
Address for service of process on the Agent for Service:

The International Firm designates and appoints the Agent for Service at the address stated above as its agent upon whom may be served a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal or other proceeding (a "Proceeding") arising out of or relating to or concerning the International Firm's activities in the local jurisdiction and irrevocably waives any right to raise as a defence in any such Proceeding any alleged lack of jurisdiction to bring such Proceeding.

The International Firm irrevocably and unconditionally submits to the non-exclusive jurisdiction of the judicial, quasi-judicial and administrative tribunals of the local jurisdiction in any Proceeding arising out of or related to or concerning the International Firm's activities in the local jurisdiction.

Until 6 years after the International Firm ceases to rely on the Relief, the International Firm must submit to the regulator:

- a new Submission to Jurisdiction and Appointment of Agent for Service in this form no later than the 30<sup>th</sup> day before the date this Submission to Jurisdiction and Appointment of Agent for Service is terminated; and
- an amended Submission to Jurisdiction and Appointment of Agent for Service no later than the 30<sup>th</sup> day before any change in the name or above address of the Agent for Service.

This Submission to Jurisdiction and Appointment of Agent for Service is governed by and construed in accordance with the laws of the local jurisdiction.

Dated:
(Signature of the International Firm or authorized signatory)
(Name of Signatory)
(Title of Signatory)

The undersigned accepts the appointment as Agent for Service of *[Insert name of International Firm]* under the terms and conditions of the foregoing Submission to Jurisdiction and Appointment of Agent for Service.

Dated:
(Signature of the Agent for Service or authorized signatory)

(Name of Signatory)
(Title of Signatory)