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Merrill Lynch

January 31, 2005

By E-Mail to: rule-comments@sec.gov

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Attn: Jonathan G. Katz, Secretary

Re: Securities Offering Reform
Release Nos. 33-8501 and 34-50624 (File No. S7-38-04)

Ladies and Gentlemen:

This letter is submitted on behalf of Merrill Lynch & Co., Inc. ("ML&Co.") and its subsidiaries (collectively "Merrill Lynch"), including Merrill Lynch, Pierce, Fenner & Smith Incorporated. ML&Co. is a holding company that, through its subsidiaries and affiliates, provides investment, financing, advisory, insurance, banking, and related products and services on a global basis. Merrill Lynch provides these products and services to a wide array of clients, including individual investors, small businesses, corporations, governments, governmental agencies, and financial institutions. Merrill Lynch has an interest in the continued vitality of the United States capital markets in the increasingly global financial marketplace and believes that securities offering reform is necessary for the U.S. markets to maintain their leadership position.

Merrill Lynch has actively participated in the preparation of the letter submitted by the Federal Regulation and Capital Markets Committees of the Securities Industry Association ("SIA") in response to the Securities and Exchange Commission's (the "SEC" or the "Commission") proposed rule (the "Proposal") on Securities Offering Reform (Release Nos. 33-8501 and 34-50624 (the "Release")). Merrill Lynch concurs in the SIA's strong support of the proposals in the Release and agrees with the SIA's suggestions to enable it to better achieve its objectives, all of which we enthusiastically applaud.

Merrill Lynch would like to emphasize certain suggestions in the SIA letter and raise other matters that it believes should be considered by the staff of the SEC and the Commission prior to adoption of final rules on Securities Offering Reform.

Access Equals Delivery. Merrill Lynch supports the concept in the Proposal that access to a prospectus will equal delivery for purposes of compliance with Sections 5(b)(1) and 5(b)(2) of the Securities Act of 1933 (the "Securities Act") and Rules 153 and 174 thereunder. We believe that this not only reflects reality in the financial marketplace today, but will result in investors actually receiving information more efficiently. However, we do suggest modifications to the Commission's "access equals delivery" proposal in certain respects in order for market participants to take full advantage of the Commission's proposal.

Rule 172 is conditioned upon (i) the registration statement being effective and not being the subject of any pending proceeding or examination under Section 8(d) or 8(e) of the Securities Act, (ii) neither the issuer, nor any underwriter or participating dealer being the subject of a pending proceeding under Section 8A of the Securities Act in connection with the offering, and (iii) the issuer having filed, or filing within the required time, a prospectus that satisfies the requirement of Section 10(a). We suggest that this formulation presents conditions that underwriters and dealers do not control and might not be able to independently verify unless the rule is modified. For example, we suggest that an underwriter or dealer relying upon Rule 172 should be able to determine from EDGAR that a registration statement is effective (which would require the indication on EDGAR of the issuance of an effectiveness order) and also should be able to presume (absent knowledge to the contrary, of course) that (i) the registration statement is not subject to any proceeding or examination by the SEC unless the SEC has given public notice thereof, (ii) there is no Section 8A proceeding not publicly announced, and (iii) the prospectus on file complies with Section 10(a). We also suggest that conditioning the use of Rule 172 upon a timely filing under Rule 424(b) creates potential rescission rights under Section 12(a)(1) in the event an issuer inadvertently fails to file within the prescribed time period. Our experience has been that late filings are infrequent and are generally inadvertent or due to technology issues. Therefore, we recommend that the requirement of timely filing the prospectus be eliminated or, at a minimum, that the Commission provide a cure provision.

We also suggest that EDGAR should be expanded to include CUSIP numbers to facilitate the location of the correct prospectus by investors and dealers. Currently, EDGAR identifies prospectuses filed by an issuer by the date they are filed, the applicable registration statement's file number and the applicable subsection under Rule 424(b) that the prospectus is filed under. Frequent issuers may have multiple prospectus supplements filed on any given day. In addition, a timely filed prospectus under Rule 424(b) may be filed up to five days after its first use. The Rule 424(b) subsection and the registration statement file number will most likely be unknown to a dealer or investor seeking to find the prospectus relating to a given security. However, the dealer and investor will normally know the CUSIP number of the relevant security and, therefore, this expansion of the EDGAR identification system will facilitate the access to prospectuses on file with the Commission.

We encourage the Commission to extend the “access equals delivery” concept to the obligation in Rule 15c2-8 under the Securities Exchange Act of 1934 (the “Exchange Act”) to deliver preliminary prospectuses. If the Commission is unwilling to fully extend the “access equals delivery” theory to Rule 15c2-8 at this time, we believe that the Commission should extend it to Rule 15c2-8 at least so far as to provide that the sending by a broker-dealer of an e-mail to its client containing a hyper-link to a preliminary prospectus will satisfy delivery of that prospectus for purposes of Rule 15c2-8, regardless of whether the customer has consented to electronic delivery of the prospectus.

We also request the staff to clarify in the adopting release that a decision not to rely upon Rule 172 (e.g., a decision to deliver hard copies of prospectuses covering an initial offering of a complex security) should not create any adverse inference about the suitability of a security for a customer or prevent the reliance on Rule 172 in subsequent offerings of that security or in other offerings of other securities sold to the same customer.

Written v. Oral Communications. Merrill Lynch requests the Commission to reconsider how it has drawn the distinction between “written” and “oral” communications in the offering process. First, we suggest that the Commission should not follow its suggestion that “oral” communications be further limited, i.e., to face-to-face and interactive telephone conversations. Given that telephone conversations may now take place over the Internet, the proposed definition in Rule 405 of “graphic communication” does not even assure that one-on-one “live” telephone conversations are excluded from the definition. Second, the Commission should consider reversing its course on broadly defining electronic communications as “written.” The distinction drawn in 1933 between oral and written communications has been obsolete for years as applied to electronic communications. The Commission should recognize that technology will continue to supersede its attempts to preserve an obsolete distinction and that the only principled course of action is to deregulate all electronic communications except those that consist of registration statements and prospectuses. Anything less will fail to accomplish the Commission’s expressed goal of modernizing the registration, communications and offering processes under the Securities Act.

If the Commission does not wish to reconsider its position with respect to the regulation of electronic communications in general, we ask the Commission to reconsider, at least, its position that all road shows transmitted to audiences electronically necessarily are written communications that would constitute free-writing prospectuses (“FWPs”). The use of electronic medium to communicate should not be determinative as to whether a communication is written or oral. Rather the permanence or transient nature of the communication should be considered. If a communication is essentially a transient communication, it should be considered an “oral” communication. Thus, the electronic presentation to investors of a road show, where the recipient is advised that it may not be retained in any form (hard copy or electronically), should be considered oral (regardless of whether or not the presentation is live). The Proposal’s position that all electronic road shows should be deemed written communications constituting FWPs would potentially dissuade issuers and underwriters from utilizing electronic road shows to avoid any potential incremental liability from the electronic presentation. Thus, categorizing all electronic road shows as written communications could very well have the effect of deterring, as opposed to promoting, the Commission's goals of more efficient dissemination of information to a larger, more diverse group of investors.

Time of Sale. Under the interpretation provided by proposed Rule 159, the "time of sale" would be established as the appropriate time for evaluating liability under Section 12(a)(2) and Section 17(a)(2). We ask the Commission to clarify that the determination of the time of sale should be made by reference to state contractual law. The time of sale should be when there is a contract of sale for the offered securities under state law. The parties should be free to determine when the time of sale occurs. This is especially important in today's fast paced and highly volatile market place. An underwriter and a buyer should be able to agree that there will be a binding contract of sale upon the buyer's subsequent action or inaction. For instance, in today's highly fluid market it would not be uncommon for an underwriter and buyer to agree that there will be a binding contract of sale if the buyer fails to object within a specified time after the receipt of a subsequent communication of information. Under this arrangement, if the underwriter sends the subsequent information and the buyer then fails to act within the prescribed time, the time of sale should be deemed to be at the end of the prescribed time and, accordingly, the underwriter's Section 12(a)(2) liability should be based on the information conveyed at that latter time, not as of the earlier time. We believe our suggested revision is entirely consistent with the Release, which at footnote 247, expressly contemplates that if the underwriter and buyer revise a contract of sale in light of new subsequent disclosure and enter into a second contract of sale, the time of sale for Section 12(a)(2) purposes would be the time of the second contract of sale.

At a minimum, the Commission should revise Rule 159 to clarify that the time of sale is when a contract for sale exists and not before. It is apparent from the Release and the precedent cited in the Release (see footnote 240 of the Release) that this is what the Commission intended. However, at various places in the Release, the Commission uses the phrase "at the time of sale (including a contract of sale)." In fact Rule 159 itself uses the phrase "at the time of sale (including, without limitation, a contract of sale)." See proposed Rule 159 (emphasis added). This phraseology creates confusion and seems to imply that there could be a sale without a contract of sale. We believe that the time of sale, like the term "commitment" discussed by the Second Circuit in Radiation Dynamics, Inc. v Goldmuntz, "is a simple and direct way of designating the point at which, in the classical contractual sense, there was a meeting of the minds of the parties; it marks the point at which the parties obligated themselves to perform what they had agreed to perform even if the formal performance of their agreement is to be after a lapse of time." Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 891 (2d Cir. 1972). The Commission should clarify, including through a revision to proposed Rule 159, that what it intends as the time of sale is "the time when the parties to the transaction are committed to one another" (i.e., the time of the contract of sale). See Release at footnote 240 (citing and quoting Radiation Dynamics at 891).

In addition to clarifying when the "time of sale" occurs, we ask the Commission to provide guidance as to what information will be deemed to be "conveyed to an investor at or prior to the time of sale." The Release provides that whether or not information has been conveyed to an investor at or prior to the time of the contract of sale is a facts and circumstances determination. Obviously, any information directly conveyed to the investor would be included. We ask that the SEC confirm that all information incorporated by reference into the registration statement or otherwise on file with the Commission prior to the time of sale also would be included.

Underwriters' Due Diligence. While we applaud the reforms presented by the Proposal, we note that one result of the Proposals would be to speed up the registered offering process (which process has already quickened exponentially over the past 20 years) while increasing the potential liability under both Section 11 and Section 12(a)(2) for both issuers and underwriters. In this regard, we ask the Commission for additional guidance with respect to how underwriters may satisfy their due diligence obligations under both Section 11 and Section 12(a)(2) in this era of increasingly expedited offerings. The Commission's 1998 proposals with respect to Securities Act reform (the "Aircraft Carrier Release") did contain a discussion on the subject and proposed certain revisions to Rule 176 in connection therewith. We ask the Commission to address the issue of how underwriters may satisfy their due diligence defense under both Section 11 and Section 12(a)(2) under the Proposal. In so doing, we ask that the Commission acknowledge that circumstances in the highly competitive financial market place have evolved. The offering process for seasoned issuers has increased dramatically and, in light of the Proposal, will increase even further. At the same time, there is increased competition in the financial market place. The underwriting relationship has transitioned from one based on long-term relationships between issuers and underwriters to transactional investment banking. As the speed of the offering process has increased, the ability of underwriters to act as a gatekeeper in this process has changed in certain cases. In this environment and in light of the potential increase in liability for underwriters presented by the Proposal, we believe financial markets participants would benefit from SEC clarification as to what constitutes "reasonable care" within the meaning of Section 12(a)(2) and "reasonable investigation" within the meaning of Section 11. Among other things, we ask the Commission to provide further guidance as to how issuers and underwriters would satisfy the reasonable care standard as applied to e-mails, press communications and other written communications that are classified as FWPs subject to Section 12(a)(2).

Free-Writing Prospectuses. We suggest that proposed Rule 163 include the ability to use incorporation by reference in FWPs to avoid situations where a FWP might not be used for fear of the "omissions" that might be found absent an ability to incorporate the prospectus by reference. We strongly support the SIA's suggested clarifications of the terms "good faith and reasonable effort," "unintentional" and "discovery" used in proposed Rule 163. In particular, the SEC should confirm that the adoption by an organization of procedures reasonably designed to result in compliance with the Rule would constitute a good faith reasonable effort and that a deviation from such procedure by an employee would not result in the exemption being unavailable. We also support "cure" provisions of filing and legend requirements and suggest that the prohibition on use of "inconsistent" information and "inappropriate" disclaimers not be conditions to the Section 5 exemption.

We also believe that free writing-prospectuses should be permitted to be used with "pink" herrings, that is preliminary prospectuses that do not contain the price range of an initial public offering. As we have said above, the extreme volatility of securities markets, the consequences of initial price ranges that have to be lowered and the length of the SEC registration and comment resolution process make the use of preliminary prospectuses without a price range a necessary part of preliminary marketing to determine investor interest and to establish the appropriate offering price level. To not permit the use of FWPs during this period would seriously limit the otherwise helpful benefits of Securities Offering Reform. We believe that the preliminary prospectus delivery requirements of Rule 15c2-8 remove any concern the Commission might have about investors not receiving adequate notice of the price range at the time they are making their investment decision.

Rule 134. Merrill Lynch suggests that Rule 134 be expanded to permit additional terms of fixed income securities be transmitted to investors in offerings of such securities. One of the purposes of a Rule 134 communication is to provide a potential investor with sufficient information to allow the investor to decide whether the offering is potentially within the investor's investment objectives. To allow an investor to make this decision, Rule 134 permits certain basic terms of the security to be offered to be conveyed to the potential investor. For fixed income securities at least, we do not believe that Rule 134, even amended as proposed, allows sufficient description of the terms of the security to be offered to all potential investors to make an informed decision as to whether an offering would be of interest. We propose that Rule 134 be further expanded to permit the disclosure of (i) the anticipated spread over specified U.S. Treasuries or other benchmark securities, (ii) the ranking of the securities, (iii) the presence of any put, call or change-in-control feature, (iv) the nature of any collateral, (v) the identity of any guarantors, (vi) significant covenants and (vii) transfer restrictions. We do not suggest that detailed information with respect to any of these provisions be included but would only suggest that basic terms be permitted to allow a fixed-income investor to determine if an offering was potentially of interest to him or her.

We also believe that conditioning the use of Rule 134 upon having on file a preliminary prospectus containing the IPO price range unnecessarily limits the effectiveness of the Rule. Given the significant delays experienced in the SEC review and comment resolution process and the extremely volatile securities markets, and the negative consequences of commencing marketing with an unrealistically high price range, most preliminary prospectuses for initial public offerings do not contain a price range until shortly before marketing commences. We suggest that as proposed this aspect of Rule 134 would result in severe restrictions that are not present in current Rule 134.

We also note that the Release states in footnote 126 that a broker or dealer could inform investors of the procedural aspects of a directed share program; we request the staff to expand on this in the adopting release to indicate that this would allow the inclusion of information on matters such as enrollment, allocation, payment, delivery and account opening.

Rule 405 (ix) and (x) – Ineligible Issuer Definition. Merrill Lynch believes that as proposed the definition of ineligible issuer is much too broad and, unless applied prospectively only, would result in many broker-dealers and financial institutions being unable to avail themselves of Well-Known Seasoned Issuer ("WKSI") status. We suggest that the definition should not include issuers who have merely entered into settlements with a government agency involving allegations of federal securities laws or regulations, and should include Section 8 or Section 8A proceedings only where the SEC gives public notice to such effect. We also believe that excluding from WKSI status all issuers that are the subject of any judicial or administrative decree or order prohibiting "certain conduct or activities regarding, including future violations of, the federal securities laws" or requiring "the person cease and desist from violating any provision of the federal securities law" is overly broad. Merrill Lynch respectfully requests that the Commission review the definition and suggests that the Commission consider whether the provisions of Section 27A of the Securities Act, which disqualify certain issuers from relying on the safe harbor for forward looking statements provided by such Section, would not be a more appropriate basis for depriving an issuer of the significant benefits of WKSI status.

Rules 138 and 139. Merrill Lynch suggests that Rules 138 and 139 retain the concept in the present rules of "information, opinions or recommendations" rather than adopt the concept of "research reports." New Rules 138 and 139 only include written communications, and the definition of research reports might not include a short "flash" on a specific industry or issuer development – or the reiteration of an underwriter's own or an independent provider's rating – because it does not "include an analysis of a security of an issuer" and "provide information reasonably sufficient upon which to base an investment decision" or include "similar information" as in previous reports. The concept of "research reports" does not reflect the reality of today's marketplace in which investors demand and receive 'real-time' investment information, opinions and recommendation much more frequently than they receive lengthy written reports on a particular issuer or industry. The proposed rules also do not encompass quantitative and technical research which have no risk of conditioning the market, but would require the artificial removal of companies from quantitative and technical screens and portfolios. In this area, the Proposal would reduce the flexibility currently available, and restrict the flow of research information to investors, something that would be inconsistent with the Commission's goal of securities offering modernization.

We also question the provision of amended Rules 138 and 139 that would condition their use on an issuer being current in its Exchange Act periodic reports. We do not believe that the currency of reporting should impact the ability of a dealer to be able to inform its customers of news or views about an issuer. We suggest that the proposed conditions are unnecessarily broad, as a research provider would not necessarily know if an issuer had failed to file a current report on Form 8-K concerning an event that otherwise went undisclosed. We suggest that if this concept is retained that it be limited to filings of annual and quarterly reports only. If the Commission continues to believe that reporting must be current, the SEC should include a notice on EDGAR when an issuer is delinquent. We also do not believe that a dealer should have the burden of identifying non-eligible issuers (blank check companies, etc.). Again, if this concept is to be retained, we suggest that the SEC should identify non-eligible issuers on EDGAR, or require non-eligible issuers to identify themselves on EDGAR.

We support the proposed codification of the Commission's staff position that the publication or distribution of research meeting the conditions of Rules 138 and 139 in connection with a registered securities offering shall not constitute a proxy solicitation subject to the proxy rules. We recommend, however, that the Commission extend this position further to situations where the proxy rules may apply but that do not constitute "a transaction registered under the Securities Act" (i.e., an all cash merger). There seems to be no valid regulatory purpose to distinguish between an exchange offer or merger in which part of the consideration may be securities and an all cash merger. If the research meets the conditions of Rule 138 and 139 it should be permitted under the proxy rules irrespective of whether the transaction is subject to registration under the Securities Act. Therefore, proposed Rule 14a-2(b)(5) should be revised accordingly.

We support the elimination of the "reasonable regularity" requirement of current Rule 139 but ask that the Commission clarify, in light of the use of the plural term "reports" in proposed Rule 139(a)(2)(v), that only a single research report need to have been previously issued to satisfy the Rule.

We support the expansion of Rules 138 and 139 to offerings pursuant to Rule 144A and Regulation S, but request the Commission further extend the safe harbors to include all exempt offerings. We also request the Commission revise Rule 137 to provide that the publication of research by a non-participating dealer is not a transaction for purposes of Section 4(3) of the Securities Act. In addition, it should be made clear that under Section 4(3)(A) a broker-dealer would not be deemed to be a dealer in respect of offerings other than offerings that are registered in the United States.

We also suggest that the application of Rules 138 and 139 be extended to exchange traded funds ("ETFs") and other seasoned open-end and closed-end investment companies. For this purpose, we suggest that one year of operation and a float of at least $75 million would be an appropriate standard to measure seasoning. We also request that the Commission confirm that the exemption provided by Rules 138 and 139 should be available for research by broker-dealers on seasoned investment companies that may be managed by affiliates of the broker-dealer, assuming appropriate informational barriers (i.e., Chinese walls) are in place.

<u>Information on an Issuer's Website</u>. Proposed Rule 433(e) would make clear that an offer of an issuer's securities that is contained on an issuer's web site would be considered a written offer of such securities and, unless otherwise exempt, would constitute a FWP of the issuer. Proposed Rule 433(e)(2) provides that "[h]istorical issuer information that is identified as such and located in a separate section of the issuer website containing historical issuer information" will generally not be a FWP. The Release notes that the separate section of the issuer's web site is "sometimes known as archives." In order to avoid an issuer inadvertently having material on its web site being deemed to be FWPs, we request that the Commission provide additional guidance as to the operation of Rule 433(e)(2). Among the items the Commission may address, we

would appreciate guidance with respect to the following questions: Would dating the information be sufficient to identify the material as historical? Must the information be included in a section of the web site labeled "Archived" or have some similar designation? Would it be sufficient that when a viewer enters the section of the web site a general statement appears to the effect that the information is dated, not modified in connection with the offering, and not incorporated, included or used in connection with the offering?

Use of Market-Making Prospectuses. We request clarification on the status of market-making prospectuses under the Proposal. Footnote 360 of the Proposal provides that "[i]n addition, as a result of the operation of proposed Rule 172 and Rule 173, if a current final prospectus has been filed with us, final prospectuses would no longer be required to be delivered in connection with market making transactions by dealers affiliated with issuers." This would not appear to eliminate the need to have a current prospectus that covers market-making on file with the Commission. We believe that market-making transactions should be exempt from the registration requirements entirely, as recommended by the SEC's Task Force on Disclosure Simplification in 1996. In November 1998 in the Aircraft Carrier Release, the Commission recognized the burden related to prospectus delivery in market-making transactions and requested comment on exempting all market-making transactions from prospectus delivery requirements or exempting certain market-making transactions from the Securities Act registration requirements entirely. We believe that the time is right for the Commission to reconsider this issue. We believe maintaining the requirement to maintain current market-making prospectuses on file with the Commission imposes a burden on issuers with affiliated broker-dealers with no commensurate benefit to investors. To impose the significant cost and burden of maintaining a current prospectus in secondary market transactions that provide no additional proceeds to an issuer is unwarranted in light of the information that will be available to investors in the secondary market. As noted by the Commission in the Aircraft Carrier Release, we believe most buyers make their investment decisions before contact with the market-maker. Furthermore, market-making activities are undertaken by firms' trading personnel who are walled off from any non-public information about the issuer. Finally, most broker-dealers are prohibited from trading their own equity securities by NYSE Rule 312(g). Accordingly, the market-making prospectuses are generally used only for debt securities, which are affected more by ratings and interest rates than day-to-day corporate events.

Regulation FD. The Proposal narrows the current exemption in Regulation FD to registered offerings for "capital formation". We do not believe there is any evidence that the current exemption in Regulation FD has resulted in any abuses that should be prohibited and suggest that adding a concept of "capital formation" would only add unnecessary uncertainty without any compensating investor protection.

Disclosure of Unresolved SEC Staff Comments. While Merrill Lynch questions the necessity of requiring the disclosure of any unresolved SEC Staff comments, if the proposal is to be implemented, we believe it should be applicable only in the case of unresolved "second round" comments and that the measurement period should be from the most recent Staff comment following the initial comment and the issuer response.

We also agree that the issuer is the appropriate party to assess the materiality of the comment, and that disclosure should be on an annual, not a quarterly basis.

Application of Well-Known Seasoned Issuer to Foreign Sovereign Issuers. Merrill Lynch suggests that the final rule address foreign sovereign issuers that register their securities on Schedule B. We believe that these issuers should be offered the benefits of WKSI status to sovereign issuers that had registered an offering of at least $250 million within the past three years.

Asset-Backed Securities. Merrill Lynch has also participated in the preparation of the comment letter submitted by The Bond Market Association (the "TBMA") and concurs in the TBMA's position that the offering process for asset-backed securities differs from fixed income securities and should therefore require different treatment.

We hope these comments will be helpful to the staff and the Commission. We would be pleased to meet with the staff if that would be of assistance in your deliberations. If you would like to discuss further any aspect of our response, please do not hesitate to contact Christine Walsh (212-449-6991) or Robert Innocentin (212-449-8437).

Respectfully submitted,

/s/ Christine Walsh

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