



DIVISION OF  
CORPORATION FINANCE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

October 31, 2003

Mark Dorsey, Esq.  
Fried, Frank, Harris, Shriver & Jacobson  
1001 Pennsylvania Avenue, NW, Suite 800  
Washington, District of Columbia 20004-2505

**Re: Merrill Lynch, Pierce, Fenner & Smith, Incorporated – Waiver Request  
under Regulation A and Rule 505 of Regulation D**

Dear Mr. Dorsey:

This is in response to your letter dated October 31, 2003, written on behalf of Merrill Lynch, Pierce, Fenner & Smith, Incorporated (the "Firm") and constituting an application for relief under Rule 262 of Regulation A and Rule 505(b)(2)(iii)(C) of Regulation D under the Securities Act of 1933. You requested relief from disqualifications from exemptions available under Regulation A and Rule 505 of Regulation D that arise by virtue of the entry of the injunction included in the Final Judgment in *Securities and Exchange Commission v Merrill Lynch, Pierce, Fenner & Smith, Incorporated* (S.D.N.Y.) (the "Final Judgment").

For purposes of this letter, we have assumed as facts the representations set forth in your letter. We also have assumed that the Firm will comply with the Final Judgment.

On the basis of your letter, the Commission, pursuant to delegated authority, has determined that you have made a showing of good cause under Rule 262 and Rule 505(b)(2)(iii)(C) that it is not necessary under the circumstances to deny the exemptions available under Regulation A and Rule 505 of Regulation D by reason of the entry of the Final Judgment. Accordingly, the relief described above from the disqualifying provisions of Regulation A and Rule 505 of Regulation D is hereby granted.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mauri L. Osheroff".

Mauri L. Osheroff  
Associate Director, Regulatory Policy

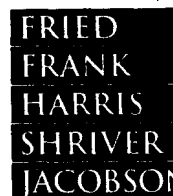
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October 31, 2003

**BY COURIER**

Mauri L. Osheroff, Esq.  
*Associate Director, Regulatory Policy*  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, D.C. 20549



**Re: Certain Analyst Conflicts of Interest (File No. HO-9479)**

Dear Ms. Osheroff:

On behalf of our client, Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("MLPFS"),<sup>1</sup> we hereby respectfully request, pursuant to Rule 262 of Regulation A and Rule 505(b)(2)(iii)(C) of Regulation D of the Securities Act of 1933 (the "Securities Act"), a waiver of any disqualification that may arise pursuant to Rule 262 or Rule 505 with respect to MLPFS, any of its affiliated issuers or any issuer identified in Rule 262(b) as a result of an injunctive action brought by the Securities and Exchange Commission ("Commission") against MLPFS. We respectfully request that these waivers be granted effective upon the entry of the final judgment described below (i.e., October 31, 2003). It is our understanding that the Division of Enforcement does not object to the grant of the requested waivers by the Division of Corporation Finance.

A Partnership  
Including  
Professional  
Corporations

New York  
Washington  
Los Angeles  
London  
Paris

<sup>1</sup> MLPFS is a registered broker-dealer engaged in a full-service securities business, including retail and institutional sales, investment banking services, trading and research.

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## **BACKGROUND**

MLPFS and the staffs of the Commission, the National Association of Securities Dealers, Inc. ("NASD") and the New York Stock Exchange, Inc. ("NYSE") have engaged in settlement discussions with respect to the above-referenced investigation, a joint federal investigation by all three regulators regarding research analyst conflicts of interest.<sup>2</sup> As a result of these discussions, MLPFS consented to the entry of a final judgment (the "Consent") enjoining MLPFS from violations of certain federal securities laws and rules of the NASD and the NYSE. Pursuant to the terms of the Consent, MLPFS, without admitting or denying the allegations in the Commission's complaint filed in connection therewith, consented to the entry of a final judgment enjoining MLPFS from certain violations of Section 15(c) of the Exchange Act and Rule 15c1-2 thereunder, as well as NASD Rules 2110, 2210 and 3010 and NYSE Rules 342, 401, 472 and 476 (the "Injunction").

In addition to consenting to the Injunction, MLPFS consented to an undertaking to, among other things, adopt policies reasonably designed to separate its research and investment banking services, to disclose any potential investment banking relationship in its research reports and to contract with independent research providers for five years for the purpose of making independent research available to its customers. MLPFS also agreed to a payment of: (i) \$100 million, which will be offset in its entirety by the

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<sup>2</sup> For purposes of this letter, we describe only those aspects of the settlement that involve the Commission.

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amount already paid by MLPFS in a related proceeding with the State of New York and other states; (ii) \$75 million to fund the provision of independent research to investors; and (iii) \$25 million to promote investor education.

## DISCUSSION

We understand that the Injunction may result in MLPFS, its affiliated issuers and issuers identified in Rule 262(b) being disqualified from relying on certain exemptions under Regulation A and Rule 505 of Regulation D insofar as the Injunction may be deemed to cause MLPFS to be disqualified pursuant to 17 C.F.R. § 230.262(a)(4) or (b)(2). *See also* 17 C.F.R. § 230.505(b). The Commission may waive these disqualifications upon a showing of good cause that it is not necessary under the circumstances that the exemptions be denied.<sup>3</sup> *See* 17 C.F.R. §§ 230.262;230.505(b). Accordingly, MLPFS hereby requests a waiver of any disqualifications that may arise under Regulation A and Rule 505 of Regulation D, effective upon the entry of the final judgment (i.e., October 31, 2003). For the reasons discussed below, we believe that it is not necessary under the circumstances that the exemption be denied.

The conduct alleged in the complaint does not relate to any offerings made under Regulations A or D. Rather, it is confined to research issued by MLPFS.

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<sup>3</sup> *See, e.g., Credit Suisse First Boston*, SEC No-Action Letter (pub. avail. Jan. 29, 2002); *Stephens, Inc.*, SEC No-Action Letter (pub. avail. Dec. 27, 2001); *Dain Rauscher, Inc.*, SEC No-Action Letter (pub. avail. Sept. 27, 2001); *Legg Mason Wood Walker, Inc.*, SEC No-Action Letter (June 11, 2001); *Prudential Securities, Inc.*, SEC No-Action Letter (pub. avail. Jan. 29, 2001); *Tucker Anthony, Inc.*, SEC No-Action Letter (pub. avail. Dec. 21, 2000).

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Further, none of the undertakings or requirements of the settlement would directly apply to offerings under Regulation A or D or to any activities that MLPFS might conduct in connection with such activities.

The disqualification of MLPFS from the exemptions under Regulation A or Rule 505 of Regulation D would be unduly and disproportionately severe, given that the violations alleged in the complaint are not related to the activities of MLPFS in connection with Regulations A or D, as noted above, and given the extent to which the disqualification could adversely affect the business operations of MLPFS. Such a disqualification would unfairly affect any MLPFS affiliate who might seek to rely on the exemptions insofar as the alleged misconduct is unrelated to Regulation A or D or to any conduct or activities on the part of such affiliate. Such a disqualification would, we believe, have an adverse impact on third parties that may retain MLPFS and its affiliates in connection with transactions that rely on these exemptions.

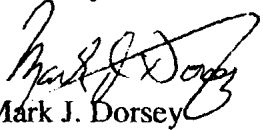
MLPFS has a strong record of compliance with the securities laws. MLPFS voluntarily and fully cooperated with the inquiry into this matter by the federal regulators, including the Division of Enforcement. In addition, MLPFS expects to undertake to implement various policies and procedures that are reasonably designed to help prevent the types of activities that were the subject of the injunction.

In light of the grounds for relief discussed above, we believe that disqualification is not necessary, in the public interest or for the protection of investors, and that MLPFS has shown good cause that relief should be granted. Accordingly, we

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respectfully urge the Commission, and the Division of Corporation Finance pursuant to its delegated authority, to waive, pursuant to Rule 262 and Rule 505(b)(2)(iii)(C), the disqualification provisions in Regulation A and Rule 505 of Regulation D to the extent that they may be applicable, as a result of the Injunction, to MLPFS, its affiliated issuers or any issuers identified in Rule 262(b).

Sincerely,



Mark J. Dorsey

cc: Anne Flannery, Esq.