



**Paul S. Gottlieb**  
First Vice President

Office of General Counsel

101 Hudson Street  
9th Floor  
Jersey City, New Jersey 07302-3997  
201 557 2033 Direct  
FAX 201 557 0559  
paul\_gottlieb@ml.com

May 16, 2008

Ms. Nancy M. Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: Proposed Amendments to Form ADV, File No. S7-10-00, Release No. 2711

Dear Ms. Morris:

Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) respectfully submits this comment letter regarding the reproposal of Form ADV amendments by the Securities and Exchange Commission (“Commission”).<sup>1</sup> Merrill Lynch supports the Commission’s commendable efforts to help clients obtain more useful and relevant information about their investment advisers and their advisory services. The revision of Form ADV offers an opportunity to help clients better understand both the services available to them and the services that they receive. We agree that changes to current disclosure requirements should be made. The proposed narrative, plain English format is a step in the right direction, and it will require firms to draft clear, understandable disclosures for their clients.

However, in a long awaited report delivered earlier this year at the direction of the Commission entitled *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers* (the “RAND Report”), the Rand Institute for Civil Justice, a division of the RAND Corporation (together, “RAND”), found that while clients are generally satisfied with their financial service providers, current disclosures are not easily understandable and are often not read.<sup>2</sup> We believe that this report should be a significant reference and guide, perhaps even a turning point, for future regulation and disclosure. Yet many of the Commission’s proposals do not address the concerns raised in the RAND Report and will not provide useful or concise disclosure.

In particular, the proposed brochure supplement and annual delivery requirement provide very limited new or helpful information to clients and impose significant additional costs and administrative burdens. This is particularly true for large advisers such as Merrill Lynch which would, under the proposal, need to create thousands of supplemental brochures as well as send hundreds of thousands of firm brochures annually to clients. Given that much of the proposed supplement information already is available to clients, that the firm brochure is already provided

---

<sup>1</sup> *Amendments to Form ADV; Proposed Rule*, 73 F.R. 13958, Release No. IA-2711 (Mar. 14, 2008) (“Release”).

<sup>2</sup> Angela A. Hung et al., *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, xviii, 19, 21 (RAND Corp. ed., 2008).

to clients when they enroll in advisory programs, and further that both the brochure supplement and annual delivery proposals are inconsistent with other Commission initiatives to shorten and simplify disclosure, we urge the Commission not to impose such additional and unnecessary disclosure requirements, but rather to take the opportunity to address the concerns reflected in the RAND Report. In our view, as described below, a better approach would focus on the delivery of summary disclosure to better serve client needs, with the ability to obtain additional materials or information, electronically or otherwise, as needed.

#### I. Brochure Supplement

The brochure supplement, containing information about each individual providing investment advice, at best provides limited additional or useful information for clients. Merrill Lynch clients and the investing public already have access to much of this information pursuant to Financial Industry Regulatory Authority rules. Items not currently available, while not necessarily helpful in our view, could be generally described in the firm brochure.

Most advisory representatives of dually registered firms are registered broker-dealer representatives and provide much of the proposed supplement information on Form U-4, including their disciplinary history, other registrations and designations, employment history, and other business activities. The public can access the information provided in each representative's Form U-4 through BrokerCheck, and so, a brochure supplement for these representatives is largely redundant. A more appropriate course of action would be to require firms to inform advisory clients about BrokerCheck and how to access its information. In addition, for advisers that are not dual registrants, the Commission could require all advisory representatives to file a Form U-4 (or its equivalent) that is publicly available through BrokerCheck or the IARD.<sup>3</sup>

While some clients may consider information about supervision and compensation relevant to their decision to enroll in an advisory program, these topics are governed by firm-wide policies. If the Commission deems such information to be necessary, those topics could be added to the Form U-4. Alternatively, each firm's policies on these topics could be described in its own ADV disclosure. It should be noted that the educational background of key investment professionals is already provided in the ADV brochure. To the extent that the educational background of an individual representative would be useful to a particular client, the client, having a personal relationship with the individual representative, can easily inquire directly.

Given the findings in the RAND Report, we believe that additional client disclosures should not be lightly mandated, and there must be a clear and specific client need to be met. Yet the Commission has not cited any evidence that clients desire or would read the additional supplemental brochures that would accompany the firm brochure. Of course, clients with more than one type of managed account would need to receive multiple supplements. Increasing the

---

<sup>3</sup> Many advisory representatives currently file Form U-4 to be licensed with certain states, but this information is not publicly available on BrokerCheck.

amount of disclosures clients receive further reduces the likelihood that clients will read any disclosures, and would only magnify the investor confusion identified by the RAND Report.

Finally, while Merrill Lynch appreciates that the Commission has sought to make the supplement a somewhat less burdensome requirement from past proposals, large firms would still be required to maintain and deliver the supplement for thousands of representatives at or before the time that they begin to provide advisory services. Preparing and monitoring the delivery of the supplements would be an enormous undertaking. Merrill Lynch itself would have to deliver supplements to over 400,000 advisory clients for approximately 14,000 Financial Advisors and others who meet the proposed criteria.<sup>4</sup>

Although the Commission “appreciate[s] the different costs that small versus large firms may experience,” and notes that large firms would have to deliver supplements for thousands of employees, the Release discounts the impact of this burden on the industry.<sup>5</sup> The Release cites that nearly 82 percent of the 10,817 registered advisers have 10 or fewer employees performing advisory functions,<sup>6</sup> over 67 percent have five or fewer employees performing these functions<sup>7</sup> and less than one third of one percent have more than 1,000 employees.<sup>8</sup> Therefore, the Commission argues that the average initial burden of 22.25 hours is an accurate illustration of the burden on the industry.<sup>9</sup>

We believe the Commission’s use of an average burden statistic is flawed and simply does not reflect the magnitude of the effort that would be required. The Commission estimates the average initial annual burden to be as much as 3,300 hours for large advisers.<sup>10</sup> In fact, we believe that it is very difficult to estimate the scope of the effort to create, deliver and maintain a supplemental brochure for large numbers of Financial Advisors located in numerous locations across the country, if not world-wide, and it would depend upon the methodology used for information access, document creation, maintenance of accuracy and supervisory control. Our initial out-of-pocket cost estimates for the delivery of the supplements range from almost \$2,000,000 to over twice that amount. However, these amounts would be dwarfed by the human effort necessary to fully implement, verify, maintain and oversee such an ongoing process firm-wide -- a process that could approach or exceed 45,000 hours. Regardless of the hourly rate

---

<sup>4</sup> These individuals would be Merrill Lynch’s officers, partners, directors, employees, or other persons providing investment advice on Merrill Lynch’s behalf and subject to Merrill Lynch’s supervision or control who: (1) formulate investment advice for clients and have direct client contact, or (2) have discretionary authority over a client’s assets.

<sup>5</sup> Release, 13978.

<sup>6</sup> *Id.*

<sup>7</sup> Release, n. 176.

<sup>8</sup> Release, 13978.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

utilized to estimate total costs, this amount of time translates, quite simply, into a massive expenditure.

One way to consider the potential dimensions of the Commission's proposal is simply to start with the number of Merrill Lynch Financial Advisors who would be impacted. These 14,000 individuals would need to be educated and trained with regard to the brochure supplement. They would then need to fill out and complete a template or form. Of course, there would need to be a supervisory process to review, verify and approve this information. The forms could then be converted into the actual supplements. Distribution of the document would follow, along with the necessary retention, on-going maintenance and any applicable revisions of the brochures. To attribute an average of three hours of preparation for each supplement to encompass all these activities hardly seems inordinate. Indeed, our estimate of 45,000 hours may ultimately prove to be substantially too low.

For all the above reasons, we urge the Commission not adopt the proposed brochure supplement requirement, or at a minimum, exempt representatives of dual registrants who have filed a Form U-4.

## II. Annual Delivery Requirements

For similar reasons, we believe that mandating the annual delivery of brochures to existing clients will not further protect or inform clients, does not address the issues discussed in the RAND Report, and is overly burdensome. Instead, in addition to the initial delivery of a disclosure brochure, firms should make an electronic copy of the current brochure available to clients on the firm's website, provide a hard copy upon request, and inform clients when a material change is made.

Merrill Lynch clients already receive our narrative Form ADV disclosure statement before or at the time of enrolling in an advisory program. In Merrill Lynch's experience, and as noted by other commenters, few clients subsequently request a copy of the disclosure document.<sup>11</sup> The lack of requests strongly suggests that clients do not want to receive them. Clients already receive much additional information, which can include contracts, trade confirmations, monthly statements, performance measurement reports, proxy materials, and other firm communications, as well as communicate with their Financial Advisor. If material changes in fees or services affect clients, firms will inform clients through a required amendment to the client agreement or other notice. Since clients already receive this information and clearly do not want to receive repetitive annual brochures, we believe this aspect of the proposal to be counterproductive.

Sending annual copies of the disclosure document will not make the disclosures more understandable and certainly does not increase the likelihood that they will be read. Indeed, the

---

<sup>11</sup> See, e.g., Comment Letter of K. Habegger (May 5, 2008); Comment Letter of A. Day (Mar. 28, 2008); Comment Letter of S. Kruus (Mar. 20, 2008); Comment Letter of J. Vineyard (Mar. 18, 2008).

RAND Report finds that clients are not reading the disclosures that they now receive.<sup>12</sup> Additional long disclosure documents received annually will further reduce that likelihood.

Finally, the cost to firms to deliver the brochure each year far exceeds the Commission's estimates. Merrill Lynch would be required to deliver the applicable disclosure brochure annually to clients enrolled in each of its multiple advisory programs. We currently have in excess of 400,000 such clients, relatively few of whom have consented to electronic delivery, with a total of approximately one million managed accounts. Depending upon how the brochure is delivered, we estimate that the annual printing and mailing costs alone could range from \$1,500,000 to over \$3,000,000, probably closer to the higher amount.

Merrill Lynch agrees that it is important for clients to know about material changes to fees and services. We believe that we meet these obligations currently. If the Commission believes that some additional communication is necessary, firms could be required to inform clients of material changes that impact them and remind clients how to request a hard copy or find an electronic copy of the full brochure on the firm's website. The notice could be provided in account statements or in a separate mailing to clients, and could include a summary of the material changes. Clients would then be able to focus on this information, which would not be lost within the entire document, and they would be more likely to understand any changes that had been implemented.

### III. Improving Disclosure

Merrill Lynch fully supports providing clients with disclosures that cover a broad range of topics<sup>13</sup> so that clients can obtain all the information that they need when making investment decisions. Merrill Lynch suggests, however, that the Commission consider revising its approach to disclosure generally, particularly in light of the RAND Report and its own reform initiatives, in order to enhance those disclosures and increase the likelihood that clients will read and use disclosure materials effectively.

We would therefore suggest that the Commission consider adopting a layered approach to advisory disclosures. Firms should be required to provide a short-form disclosure document to clients that would highlight the most important facts of an advisory service before their enrollment in the service. The Commission also should allow firms to make the full brochure available electronically and provide a copy upon request.

#### A. Delivery of Summary Brochure

The Commission's disclosure proposal does not address the findings of the RAND Report. Requiring a plain English, narrative format to make already lengthy disclosures more understandable is a first step, but it is not sufficient to remedy the underlying problem. Indeed,

---

<sup>12</sup> RAND Report, 19.

<sup>13</sup> This does not mean, however, that we endorse all of the information being required. For example, we do not believe that disciplinary information should include arbitration awards, settlements or claims. Many of these awards, settlements and claims are not public information and do not include findings of facts or misconduct.

as noted above, the proposed adding of more information and more mailings will increase the difficulties that clients will face in reading and understanding the disclosures they are provided.

Focusing disclosure efforts on one long, narrative disclosure document also is directly inconsistent with another major reform initiative undertaken by the Commission. The firm brochure as proposed would be akin to current mutual fund prospectuses. Yet the Commission recently proposed significant prospectus changes, noting that current prospectuses are long and complicated, and do not enable investors to compare their investment choices efficiently.<sup>14</sup> The release notes that key information is difficult for investors to extract from current prospectuses, investors prefer information that is provided in concise, user-friendly formats, and it is very important to provide investors with access to key data in a format that is shorter and easier to understand.<sup>15</sup> The Commission proposed requiring funds to deliver a summary prospectus, written in plain English, describing the key information about the fund in three to four pages.<sup>16</sup> The full prospectus would be provided on a website and would be delivered by email or in hard copy upon an investor's request.<sup>17</sup>

The Commission should propose similar requirements for investment advisers. Firms should deliver a summary brochure, written in plain English, detailing the fees, services provided, the capacity in which the firm and representative are acting, conflicts of interest, and material relationships with other parties related to the client's account. This information is essential for clients to make a decision about hiring an adviser or choosing an advisory service, and should be the focus of a summary document. With this structure, the most important information would not be lost among many other disclosures, and clients could easily choose to review more detailed information in the full brochure. A summary brochure clearly describing the most important facts would be much more readable and would increase the probability that clients would read and understand the disclosures they are given.

#### B. Availability of Full Brochure

In conjunction with the summary brochure, firms should be required to make the full brochure available electronically and upon request. Advisory firms could send the brochure by email, inform clients how to access filed copies of Form ADV on the IARD system or information about individual representatives on the BrokerCheck system, and post the brochure on the firm's website. Firms also should annually remind clients about the brochure and explain how they can obtain a copy of it.

Permitting advisory firms to make the brochure available electronically without obtaining prior client consent is consistent with the proposed reforms for mutual fund prospectuses, which

---

<sup>14</sup> *Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies; Proposed Rule*, 72 F.R. 67790, Release No. 33-8861 (Nov. 30, 2007) ("Prospectus Release").

<sup>15</sup> Prospectus Release, 67791.

<sup>16</sup> *Id.* at 67792, 67794-67798, 67800.

<sup>17</sup> *Id.* at 67792, 67798, 67802-67803.

would enable funds to make full prospectuses available on a website in this fashion and to provide a paper copy or a copy via email only upon an investor's request.<sup>18</sup> The Commission proposed these changes to take advantage of the increased use of the Internet, to provide investors with information that is easier to use and is more accessible, and to maintain the comprehensive information available to investors.<sup>19</sup>

This approach also is consistent with the Commission's "access equals delivery model" for final prospectus delivery under the Securities Act of 1933, and similarly modernizes the delivery of disclosures while continuing to protect clients.<sup>20</sup> The model presumes that investors have access to the Internet and the Commission stated that Internet usage has increased sufficiently to adopt a model that relies on timely access to filed information and documents.<sup>21</sup> The Commission noted that "Computers, sophisticated financial software, electronic mail, teleconferencing, videoconferencing, webcasting, and other technologies available today have replaced, to a large extent, paper, pencils, typewriters, adding machines, carbon paper, paper mail, travel, and face-to-face meetings relied on previously."<sup>22</sup> The reforms the Commission adopted "reflect[ed] the increased importance of electronic dissemination of information, including the use of the Internet,"<sup>23</sup> and sought "to recognize the integral role that technology plays in timely informing the markets and investors about important corporate information and developments."<sup>24</sup>

\*\*\*

Merrill Lynch appreciates the Commission's consideration of these comments and urges it not to adopt an approach mandating the creation and distribution of an enormous number of additional documents to clients. We believe our recommendations, on the other hand, would create a more consistent, symmetrical and ultimately effective approach to disclosure. If you have any questions, or would like to discuss these matters in greater detail, please contact me at 201-557-2033.

Sincerely,



Paul S. Gottlieb

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 67792, 67798.

<sup>20</sup> *Securities Offering Reform*, Release No. 33-8591, 70 F.R. 44722 (Aug. 3, 2005) ("Offering Reform Release"). Companies and intermediaries may satisfy their prospectus delivery obligations by filing the final prospectus with the Commission as part of the registration statement within the required timeframe. Offering Reform Release, 44783. If a final prospectus is not delivered to investors, underwriters and dealers participating in the registered offering must disclose that the sale was made pursuant to a registration statement or in a transaction in which a final prospectus would have been required to have been delivered. *Id.* at 44784.

<sup>21</sup> *Id.* at 44783.

<sup>22</sup> *Id.* at 44726.

<sup>23</sup> *Id.* at 44725.

<sup>24</sup> *Id.* at 44726.