

"Applicants")<sup>1</sup> have received a temporary order exempting them from section 9(a) of the Act with respect to an injunction entered on March 17, 2003 by the U.S. District Court for the Southern District of Texas (the "Injunction"), until the Commission takes final action on an application for a permanent order. Applicants also have requested a permanent order.

**FILING DATE:** The application was filed on March 17, 2003.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 11, 2003, and should be accompanied by proof of service on Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants: MLIM, FAM, FAMD, 800 Scudders Mill Road, Princeton, NJ 08536; MLAM UK and MLIMIL, 33 King William Street, London England EC4R 9AS; MLPF&S, Mezzanine, KECALP, Taurus and Ventures, 4 World Financial Center, New York, NY 10080; Roszel, 1300 Merrill Lynch Drive, Pennington, NJ 08534.

**FOR FURTHER INFORMATION CONTACT:** Todd F. Kuehl, Branch Chief, at (202) 942-0610 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a temporary order and a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (tel. (202) 942-8090).

### Applicants' Representations

1. MLIM and FAM, registered as investment advisers under the Investment Advisers Act of 1940 (the

"Advisers Act"), are limited partnerships of which Merrill Lynch & Co., Inc. ("ML&Co.") is the limited partner and Princeton Services, Inc. ("Princeton Services") is the general partner. Princeton Services is an indirect wholly owned subsidiary of ML&Co. The Advisers and Roszel serve as investment advisers to numerous registered investment companies (the "Registered Companies"), with assets under management of approximately \$210 billion. MLAM UK and MLIMIL, each a wholly owned indirect subsidiary of ML&Co., are registered as investment advisers under the Advisers Act and provide investment advisory services to certain Registered Companies. Mezzanine, KECALP, Taurus and Ventures serve as investment advisers to certain business development companies ("BDCs") and employee securities' companies ("ESCs") and with BDCs and Registered Companies, the "Funds"). FAMD, an indirect wholly owned subsidiary of ML&Co., is registered as a broker-dealer under the Securities Exchange Act of 1934 (the "1934 Act") and acts as the principal underwriter for certain of the Registered Companies. MLPF&S, a wholly owned subsidiary of ML&Co., is a global investment banking firm and a registered broker-dealer, investment adviser and futures commission merchant. It serves as the principal underwriter for certain Registered Companies (including registered unit investment trusts) and as the depositor of 765 registered unit investment trusts with approximately \$4.7 billion in assets as of December 31, 2002. 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. ML&Co. and its direct and indirect subsidiaries are sometimes referred to as "Merrill Lynch."

2. On March 17, 2003, the U.S. District Court for the Southern District of Texas entered the Injunction in a matter brought by the Commission.<sup>2</sup> The Commission alleged that ML&Co. aided and abetted certain violations by Enron Corp. ("Enron") of sections 10(b) and 13(b)(5) of the 1934 Act and rules 10b-5 and 13b2-1 thereunder and certain other provisions of the federal securities laws. The alleged violations occurred in connection with Enron's recording of revenue in its Form 10-K for the fiscal year ended 1999 in connection with a Nigerian barge transaction and two

energy trades between Merrill Lynch and Enron in December 1999. Without admitting or denying the allegations in the Commission's complaint, ML&Co. consented to the entry of the Injunction as well as the payment of disgorgement and civil penalties.

### Applicants' Legal Analysis

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered unit investment trust, or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines affiliated person to include any person directly or indirectly controlling, controlled by, or under common control, with the other person. Because the Applicants are all subsidiaries of the same ultimate parent company, Applicants state that they are under common control, and as such are affiliated persons of ML&Co. within the meaning of section 2(a)(3) of the Act. Applicants state that, as a result of the Injunction, they may be subject to the prohibitions of section 9(a).

2. Section 9(c) of the Act provides that the Commission shall grant an application for an exemption from the disqualification provisions of section 9(a) if it is established that these provisions, as applied to the Applicants, are unduly or disproportionately severe or that the Applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the application. Applicants have filed an application pursuant to section 9(c) of the Act seeking temporary and permanent orders exempting them from the provisions of section 9(a) of the Act.

3. Applicants believe that they meet the standards for exemption specified in section 9(c). Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of Applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicants state that none of their current or former officers or employees who are engaged in the provision of investment advisory or principal

<sup>1</sup> Applicants request that any relief granted pursuant to the application also apply to any other company of which Merrill Lynch & Co., Inc. is or hereafter becomes an affiliated person (included in the term "Applicants").

<sup>2</sup> *Securities and Exchange Commission v. Merrill Lynch & Co., Inc.*, No. H-03-0946 (S.D.Tx., filed Mar. 17, 2003).