

ACT ICH

SECTION 7; 3(a)

RULE _____

PUBLIC
AVAILABILITY 9/3/99

PUBLIC

September 3, 1999
Our Ref. No. 99-459
HOLDERS
File No. 3-321

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT**

Your letter dated September 3, 1999 requests our assurance that we would not recommend enforcement action to the Commission under Section 7 of the Investment Company Act of 1940 (the "1940 Act") against Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), the Trust, or the Trustee (described below) if a depositary receipts program (the "HOLDERS Program") is implemented without registration of the Trust as an investment company under the 1940 Act.

You state that the HOLDERS Program is intended, and will be marketed as a means, to provide investors with a less costly way of purchasing, holding, and transferring equity securities issued by U.S. and non-U.S. entities within a particular industry, sector, or other group (each a "Sector"), and not as an investment company. You state that the HOLDERS Program is intended to allow investors to: (a) hold a single, exchange-listed instrument (a "HOLDER") representing the investors' beneficial ownership of the deposited securities; (b) maintain an ownership interest in each of the deposited securities represented by the HOLDERS; (c) cancel their HOLDERS to receive each of the deposited securities represented by the HOLDERS; and (d) trade the HOLDERS at a lower cost than the cost of trading each of the deposited securities separately.

You state that Merrill Lynch, serving as initial depositor, will establish a trust (the "Trust") that will hold, on behalf of the investors in the HOLDERS Program, shares of common stock representing a Sector.¹ The Trust will issue receipts, HOLDERS, that are registered under the Securities Act of 1933, and will represent the investors' discrete, identifiable, and undivided beneficial ownership interest in specified underlying securities. You represent that the Trust will be a single-purpose trust, and will not engage in any business or activity other than holding the deposited securities, issuing and canceling HOLDERS, distributing dividends and shareholder communications, and other activities incidental and necessary to carry on these duties as specifically enumerated in the depositary trust agreement. You state that investors may acquire HOLDERS by purchasing them in the initial placement for cash, making an in-kind deposit of the required securities with the Trustee, or purchasing HOLDERS with cash in the secondary market. You represent that the Trust will issue and cancel HOLDERS on a continuous basis as the designated securities are deposited into or withdrawn from the Trust. You represent that purchases and sales of HOLDERS through the Trust are subject to only minimal administrative charges.

¹ You state that the Trust will be formed under a depositary trust agreement among Merrill Lynch, as initial depositor, a state-chartered U.S. bank that is a member of the Federal Reserve System and meets the standards as specified in Section 26(a)(1) of the 1940 Act (the "Trustee"), and all holders and beneficial owners of the HOLDERS.

You represent that the securities to be included in a particular HOLDRs Program will be selected in the following manner. Merrill Lynch will select a Sector, determine the objective standard used to select the companies that will be included within a particular HOLDRs Program,² identify through those standards the particular companies within that Sector to be included in that Program, and determine the number of securities of each of the selected companies that will make up that Program.³ You represent that once the criteria are determined, Merrill Lynch intends for the actual selection process to operate in a mechanical manner. The shares of each company deposited within a HOLDRs Program will be equity securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act"), and thus each company will be a public reporting company subject to the reporting, proxy, and other provisions of the Exchange Act.⁴ You also state that the deposited securities will be listed for trading on a national securities exchange or the NASDAQ National Market System.

You state that under no circumstances will a new company be added to the list of companies included in a HOLDRs Program after that particular HOLDRs Program has been established. You also state that a company will be removed from a HOLDRs Program only under one of the reconstitution events described in your letter. For instance, you state that if a company terminates its reporting obligations, its securities will be distributed to the receipt holders and will be removed from the list of securities eligible for deposit within the HOLDRs Program. You represent that following Merrill Lynch's initial identification of the number of shares of each company that will be included in a HOLDRs Program, Merrill Lynch will take no action to change the number of shares of each company included in that Program.⁵

You represent that investors may only create, buy, sell, cancel, or trade in the secondary market HOLDRs in a round-lot amount of 100 HOLDRs, or integral multiples thereof, and the

² You state that Merrill Lynch intends to use criteria based on measurements that investors and analysts generally use in evaluating the investment opportunities of companies within a particular Sector.

³ You state that the relative weighting of the selected securities in a HOLDRs Program will be determined by objective measures such as market capitalization or near equal weightings.

⁴ You represent that no HOLDRs Program will include securities that could not be purchased by beneficial owners of HOLDRs in open-market transactions outside of the Program. Telephone conversation on September 3, 1999 among Abby Arms, of Shearman & Sterling, and Alison Fuller and Veena Jain, of the staff.

⁵ You state that the amount of each company's securities included in a HOLDRs Program will change only upon the occurrence of an issuer-related event such as the payment of stock dividends, stock splits, business reorganizations, or similar events.

transfer agent will not be permitted to transfer HOLDRs in less than round-lot amounts.⁶ An owner will have the right to withdraw the deposited securities represented by his or her HOLDRs upon request at any time by delivering a round-lot of 100 HOLDRs, and integral multiples thereof, to the Trustee during the Trustee's business hours, and paying moderate transaction fees, consisting of the Trustee's fees and withdrawal expenses. You assert that because HOLDRs will be issued and transferred only in the round-lot amounts, no owner is expected to receive a partial interest in any deposited security.⁷

You maintain that the Trust should not have to register as an investment company under the 1940 Act because the Trust will function essentially as a pass-through mechanism by which investors may enjoy the convenience of holding and trading deposited securities through HOLDRs. You assert that the Trust will hold securities only in a depositary capacity, and each round-lot of 100 HOLDRs will represent an entire and undivided ownership interest in each of the deposited securities held by the Trust for the benefit of the owners. You represent that each owner will have all of the same rights and privileges as if the owner held the deposited securities outside of the HOLDRs Program.

You state that these rights and privileges include, among other things: (a) the right of an owner to attend shareholder meetings, or instruct the Trustee to vote the shares represented by a HOLDR according to the owner's instructions; (b) the right to receive copies of communications, proxy statements, and other materials relating to the deposited shares; and (c) the right at any time to withdraw the deposited securities and bring an action against an issuer of deposited securities. You also state that for the purposes of the federal tax laws, a receipt holder will be treated in the same manner as if the holder held the deposited securities directly. In addition, you represent that owners also have the right to receive any dividends or other distributions that are paid on the deposited shares. You state that pursuant to the terms of the depositary trust agreement, the Trustee will pass through to the receipt holders all distributions it receives on the deposited securities as promptly as practicable (generally within three days after the Trust's receipt of the distributions). You represent that the Trustee will use its best efforts to ensure that, to the extent practicable, the record date set by the Trust, with respect to the payment of distributions, is the same as the record date set by the issuer of the deposited securities.

On the basis of the facts and representations contained in your letter, we would not recommend enforcement action to the Commission under Section 7 of the 1940 Act against

⁶ You state that the Trustee will act as transfer agent with respect to transfers of the HOLDRs.

⁷ You state that a receipt holder could receive a partial interest in a security only under very limited circumstances, such as when the issuer of a deposited security distributes fractional interests on a whole share to all holders of its shares.

Merrill Lynch, the Trust, or the Trustee if the HOLDRs Program described in your letter is implemented without registration of the Trust as an investment company. This conclusion is based in particular on your representations that: (a) each round-lot of 100 HOLDRs will represent a discrete, identifiable, and undivided beneficial ownership interest in specified securities held by the Trust; (b) each record owner's ownership interest in particular underlying securities will be identified and recorded by the Trustee; (c) beneficial owners of HOLDRs will be permitted to withdraw the deposited securities from the Trust at any time, by paying a moderate transaction fee; (d) in the event that a claim arises against an issuer of deposited securities, each beneficial owner of HOLDRs will have the right to proceed against the issuer to the same extent as if the beneficial owner had purchased or held the issuer's securities outside of the HOLDRs Program, and will not be required to act in concert with other beneficial owners or the Trustee;⁸ (e) the Trustee will perform only clerical or ministerial services in connection with the HOLDRs Program, and the Trust's assets will not be otherwise actively managed; (f) the Trustee will pass through to the beneficial owners, as promptly as practicable after the Trustee's or its agent's receipt, copies of all communications, proxy statements, and other materials that it receives from the issuers of the deposited securities;⁹ (g) the Trustee will pass through to the beneficial owners all distributions received from the issuers of the deposited securities as promptly as practicable, and the Trustee will use its best efforts to ensure that, to the extent practicable, the record date set by the Trust is the same as the record date set by the issuer of the deposited securities;¹⁰ (h) the Trustee will be a state-chartered U.S. bank that meets the standards as specified in Section 26(a)(1) of the 1940 Act; (i) the deposited securities will not be considered to be the assets of the Trustee or Merrill Lynch, and as a result, would not be subject to any third-party claims against the Trustee or Merrill Lynch (except to the extent that the Trustee or Merrill Lynch is itself a beneficial owner of HOLDRs); (j) the HOLDRs Program will be marketed as a less costly way of purchasing, holding, and transferring equity securities, and

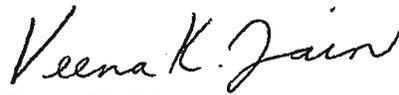
⁸ Telephone conversation on September 3, 1999 among Sarah Wagman and Abby Arms, of Shearman & Sterling, and Veena Jain, Alison Fuller, and Ken Berman, of the staff.

⁹ You represent that to the extent that the HOLDRs are held in street name, the Trustee will deliver these communications, proxy statements, and other materials to the record owners of the HOLDRs who will in turn deliver them to the beneficial owners of the HOLDRs. Telephone conversation on September 3, 1999 among Sarah Wagman and Abby Arms, of Shearman & Sterling, and Veena Jain, Alison Fuller, and Ken Berman, of the staff.

¹⁰ You represent that to the extent that the HOLDRs are held in street name, the Trustee will make these distributions, generally within three days after the Trust's receipt of the distributions, to the record owners of the HOLDRs who will in turn deliver the distributions to the beneficial owners of the HOLDRs. Telephone conversation on September 3, 1999 among Sarah Wagman and Abby Arms, of Shearman & Sterling, and Veena Jain, Alison Fuller, and Ken Berman, of the staff.

not as an investment company; (k) the deposited securities will be equity securities registered under Section 12 of the Exchange Act, and will be listed for trading on a national securities exchange or the NASDAQ National Market System; and (l) purchases and sales of HOLDRs through the Trust will be subject to only minimal administrative charges.¹¹

Because our position is based on the facts and representations in your letter, you should note that any different facts or representations may require a different conclusion. Further, we emphasize that this response expresses the Division's position on enforcement action only, and does not purport to express any legal conclusions on the questions presented.



Veena K. Jain
Staff Attorney

¹¹ Cf. Robertson, Stephens & Company (pub. avail. Mar. 13, 1993); CRT Government Securities, Ltd. (pub. avail. Aug. 4, 1992).

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September 3, 1999

VIA MESSENGER

Douglas J. Scheidt, Esq.
Associate Director (Chief Counsel)
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Stop 5-6
Washington, DC 20549

Re: Request for No-Action Relief Regarding HOLDRSSM Depositary Receipts Program

Dear Mr. Scheidt:

We are writing on behalf of our client Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") with respect to a proposed depositary receipts program called HOLDRSSM.¹ We respectfully request that you confirm that the Division will not recommend that the Commission take any enforcement action under Section 7 of the Investment Company Act of 1940 (the "Investment Company Act") against Merrill Lynch, the trust, or the trustee if the HOLDRSSM program is implemented without registration of the trust as an investment company under the Investment Company Act. Merrill Lynch, as depositor, has filed a registration statement with the Commission registering the offer and sale of the receipts on Form S-1 under the Securities Act of 1933 (the "Securities Act").

1 "HOLDRSSM" is a service mark owned by Merrill Lynch & Co.

Product Description

The HOLDRsSM program is intended to, and will be marketed as a means to, provide investors with a less costly way of purchasing, holding and transferring equity securities issued by U.S. and non-U.S. entities within a particular industry, sector or other group (each a "Sector"), and not as an investment company. Specifically, the program is intended to allow investors to: (i) hold a single, exchange-listed instrument representing the investors' beneficial ownership of the deposited securities; (ii) maintain an ownership interest in each of the deposited securities represented by the HOLDRsSM receipts, and cancel their HOLDRsSM receipts to receive each of the deposited securities represented by the receipts; and (iii) trade the HOLDRsSM receipts at a lower cost than the cost of trading each of the deposited securities separately.

Merrill Lynch, serving as initial depositor, will establish a trust (the "trust") that will hold, on behalf of investors in the HOLDRsSM program, shares of common stock representing a Sector, and will issue receipts to investors that represent the investors' discrete, identifiable, and undivided beneficial ownership interest in specified underlying shares of common stock, and are registered under the Securities Act. Investors may acquire receipts by either purchasing HOLDRsSM in the initial placement for cash, making an in-kind deposit of the required number of shares of common stock of the underlying issuers with the trustee, or purchasing HOLDRsSM with a cash payment in the secondary market. Purchases and sales of HOLDRsSM through the trust are subject to only minimal administrative charges. As described in more detail below, investors may cancel their receipts and withdraw the underlying securities by delivering to the trustee a round-lot of HOLDRsSM and paying a moderate cancellation fee.

The underlying securities to be included in a particular HOLDRsSM program will be selected in the following manner. From time to time, Merrill Lynch will select a Sector, identify through objective standards the particular companies within that Sector to be included in that Sector HOLDRsSM program, and determine the number of securities of each of the selected companies that will make up that Sector HOLDRsSM program. The securities will be equity securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act"), and will be listed for trading on a national securities exchange or the NASDAQ National Market System. The relative weighting of the selected securities in a HOLDRsSM program will be determined by objective measures such as market capitalization or near equal weightings.

Merrill Lynch will determine the objective standard used to select the securities of issuers that will be included within a particular HOLDRsSM program. Merrill Lynch intends

to use criteria based on measurements that investors and analysts generally use in evaluating the investment opportunities of companies within a particular Sector. Depending on the particular Sector, the financial measures could include such items as market capitalization; cash flow; earnings per share; earnings before interest, taxes, depreciation and amortization; return on capital; securities ratings by a nationally recognized statistical rating organization; price/earnings ratio; or other objective measures. Once the criteria are determined, Merrill Lynch intends for the actual selection process to operate in a mechanical manner.

As stated above, the shares of each company deposited within a program will be registered under Section 12 of the Exchange Act, and thus each company will be a public reporting company subject to the reporting, proxy and other provisions of the Exchange Act. If a company terminates its reporting obligations, its securities will be distributed to receipt holders and will be removed from the list of securities eligible for deposit within the program. No program will include securities that could not be purchased by a receipt holder in open-market transactions outside of the program. In addition, under no circumstances will a new company be added to the list of companies included in a program after that receipt program has been established. A company will be removed from a program only under one of the reconstitution events described below. The amount of each company's securities included in a program will change only upon the occurrence of an issuer-related event such as the payment of stock dividends, stock splits, business reorganizations, or similar events. Following Merrill Lynch's initial identification of the number of shares of each company that will be included in a program, Merrill Lynch will take no action to change the number of shares of each company included in that program.

An investor who decides to invest in a specified Sector may either directly purchase, hold and transfer each of the Sector securities outside of the program or may acquire **HOLDERSSM** that represent a holder's interest in those Sector securities.

Under the program, investors may only create, buy, sell, cancel, or trade in the secondary market **HOLDERSSM** in a round-lot amount or integral multiples thereof. Like common stock, 100 **HOLDERSSM** will equal a round-lot number of **HOLDERS**. The transfer agent will not be permitted to transfer **HOLDERSSM** in less than round-lot amounts. ² Each round-lot of 100 **HOLDERSSM** will represent a discrete, identifiable and undivided beneficial ownership interest in specified deposited securities. The securities will be deposited into a trust to be formed under a depositary trust agreement among Merrill Lynch, as initial depositor, a state-chartered U.S. bank that is a member of the Federal Reserve system and

2 The trustee will act as transfer agent with respect to transfers of the **HOLDERSSM**.

meets the standards of Section 26(a)(1) of the Investment Company Act as trustee, and all holders and beneficial owners of the HOLDRsSM. The trust will be a single-purpose trust and will not engage in any business or activity other than holding the underlying securities, issuing and canceling receipts, distributing dividends and shareholder communications, and other activities incidental and necessary to carry on these duties as specifically enumerated in the depositary trust agreement. The trust will issue receipts in one or more global certificates that the trustee will deposit with the Depositary Trust Company. The trust will issue and cancel receipts on a continuous basis as designated securities are deposited into or withdrawn from the trust.

Pursuant to the terms of the depositary trust agreement, the trustee will pass through to receipt holders all distributions it receives on the underlying securities as promptly as practicable (generally within three days after the trust's receipt of the distributions). In accordance with the terms of the depositary trust agreement, the trustee will use its best efforts to ensure that, to the extent practicable, the record date set by the trust with respect to the payment of distributions is the same as the record date set by the issuer of the deposited securities. Distributions will include any dividend payments and other cash or non-cash distributions that the trust receives from the issuers of the underlying securities, as well as other distributions in connection with mergers or other significant corporate transactions relating to the underlying securities. The trustee will not invest the distributions before passing them on to receipt holders. Further, the depositary trust agreement provides that the trustee can only vote the underlying securities in accordance with voting instructions received from the receipt holders. The depositary trust agreement provides that the trustee will forward to receipt holders copies of all shareholder communications that the trust receives from issuers of the underlying securities. Additionally, receipt holders have the right under the depositary trust agreement to withdraw the underlying securities at any time. These rights provide receipt holders with the same benefits to which they would be entitled if they held the underlying securities outside of the HOLDRsSM program.

As stated above, under the terms of the program a beneficial owner of a round-lot of 100 HOLDRsSM will have the right to request delivery of the owner's deposited securities from the trustee. In addition, each program will distribute deposited securities under the following circumstances (each, a "reconstitution event"):

- A. If an issuer of underlying securities represented by a round-lot of 100 HOLDRsSM no longer has a class of common stock registered under section 12 of the Exchange Act, then its securities will no longer be eligible as deposited securities and the trustee will distribute the securities of that company to the owners of the HOLDRsSM.

- B. If the SEC finds that an issuer of underlying securities represented by a round-lot of 100 HOLDRSSM is a company that should be registered as an investment company under the Investment Company Act, and the trustee has actual knowledge of the SEC finding, then the trustee will distribute the securities of that company to the owners of the receipts.
- C. If underlying securities of an issuer represented by a round-lot of 100 HOLDRSSM are no longer outstanding as a result of a merger, consolidation, or other corporate event, the trustee will distribute the consideration paid by and received from the acquiring company to the beneficial owners of HOLDRSSM, unless the acquiring company already is included in the receipt and the consideration paid is additional underlying securities. In this case, the additional underlying securities will be deposited into the trust.
- D. If an issuer's underlying securities are delisted from trading on a national securities exchange or NASDAQ and are not listed for trading on another national securities exchange or through NASDAQ within 5 business days from the date the such securities are delisted.

If the trustee removes a deposited security from the trust due to the occurrence of a reconstitution event, the trustee will deliver the deposited security to the receipt holder as promptly as practicable following the occurrence of a reconstitution event.

In addition to the above reconstitution events, the trustee will distribute to owners of HOLDRSSM deposited securities upon the occurrence of a termination event. A termination event will occur when:

- A. The receipts of a particular receipt program are delisted from the national securities exchange upon which they are listed and are not listed for trading on another national securities exchange or through NASDAQ within 5 business days from the date the HOLDRSSM are delisted.
- B. The trustee resigns and no successor trustee is appointed within 60 days from the date the trustee provides notice of its intent to resign to the owners of the receipts.
- C. 75% of the owners of outstanding HOLDRSSM vote to dissolve and liquidate the trust.

If a termination event occurs, the trustee will distribute the deposited securities to the receipt holder as promptly as practicable following the occurrence of the termination event.

Legal Analysis

In a series of no-action and interpretive letters involving custody-type arrangements substantially similar to the HOLDRsSM program, the staff has looked to whether investors holding receipts in the program have interests or rights that differ from the interests or rights associated with holding the underlying securities directly.³ In these letters, the staff has generally considered the following factors, all of which are met by the HOLDRsSM program:

(1) The receipt holders will have all the rights and privileges of owners of the underlying securities. Each beneficial owner of the receipts will have all of the same rights and privileges as if the owner beneficially held the deposited securities outside the program. A HOLDRSM represents only a convenience to the investor who wants to own selected securities within a particular industry, group, or sector. Holding securities through a HOLDRsSM receipt is not intended to change the owner's beneficial ownership interest in the individual securities represented by a receipt. For example, an owner will have the right to instruct the trustee to vote the shares represented by a receipt, or may himself attend shareholder meetings. An owner also will receive dividends and other distributions on deposited shares, if any are declared and paid to the trustee by an issuer of a deposited security. The trustee will provide any dividends or other distributions to owners as promptly as practicable following the trustee's receipt of the distribution. An owner will receive copies of all communications, proxy statements, and other materials received by the trustee or its agent that the owner would receive if it held the underlying securities directly. These materials will be provided by the trustee or its agent to the owners as promptly as practicable following the trustee's or its agent's receipt of such materials. For purposes of the federal income tax laws, a U.S. receipt holder will be treated as directly owning the deposited securities. But for the convenience provided by holding the deposited securities

3 See, e.g., Indosuez Asset Management Asia Limited, SEC No-Action Letter (Feb. 14, 1997); Commonwealth Bank of Australia, SEC No-Action Letter (Sept. 23, 1996); Robertson, Stephens & Company, SEC No-Action Letter (March 13, 1993); CRT Government Securities, Ltd., SEC No-Action Letter (Aug. 4, 1992); Bear, Stearns & Co., SEC No-Action Letter (Jan. 28, 1992); Merrill Lynch, Pierce, Fenner & Smith Incorporated, SEC No-Action Letter (Sept. 6, 1990); Financial Security Assurance Inc., SEC No-Action Letter (Mar. 30, 1988).

by means of the receipt, an owner's rights with respect to the deposited securities will not change.

(2) Each receipt represents the entire interest in the underlying security or securities, and holders of receipts will be permitted to withdraw the underlying securities from the receipt program at any time subject to no more than a moderate transaction fee.

HOLDRSSM may only be issued, held, traded and surrendered in a round-lot amount of 100 receipts and integral multiples thereof. A round-lot of HOLDRSSM will represent an entire and undivided ownership interest in each of the deposited securities held by the trust for the benefit of the owners. Because HOLDRSSM will be issued and transferred only in the round-lot amounts, no owner of a HOLDRSSM is expected to receive a partial interest in any deposited security.⁴ The trustee will maintain a record of the particular securities represented by each HOLDRSSM. An owner will have the right to withdraw the deposited securities represented by his or her HOLDRSSM receipts upon request at any time by delivering a round-lot of 100 HOLDRSSM, and integral multiples thereof, to the trustee, during the trustee's business hours and paying moderate transaction fees, consisting of the trustee's fees and withdrawal expenses, which are specified in the HOLDRSSM registration statement.

(3) Each receipt holder's ownership interest in particular underlying securities will be identified and recorded by the trustee. As stated above, the trustee will hold the securities for the benefit of the owners of the HOLDRSSM and will maintain a record of the record owner of each round-lot of 100 HOLDRSSM and a record of the securities underlying those outstanding HOLDRSSM. By maintaining these records, each record owner's ownership interest in particular underlying securities will be identified and recorded by the trustee.

(4) Each receipt holder, as beneficial owner of the underlying securities, will have the right to bring an action against an issuer of the underlying securities, and will not be required to act in concert with other receipt holders or the trustee. In the event that a claim arises against an issuer of a deposited security, a receipt holder will have the right to proceed against the issuer to the same extent as if the holder had purchased or held the issuer's securities outside of the HOLDRSSM program. A receipt holder will have the right to withdraw the securities from the HOLDRSSM program at any time and bring an action

4 A receipt holder could receive a partial interest in a security only under very limited circumstances, such as when the issuer of a security represented by the receipts distributes fractional interests on a whole share to all holders of its shares.

against the issuer of the security to the same extent as if the holder held the issuer's securities directly. The holder will not be required to act in concert with other HOLDRsSM owners or the trustee.

(5) *The trustee performs only clerical or ministerial services on behalf of the receipt holders.* The trustee will perform only clerical and administrative functions, and will not make any investment decisions regarding the securities represented by a HOLDRsSM. In effect, the trustee's activities will be akin to a bailee for hire. The trust will not be actively managed. The principal role of the trustee will be to hold the securities for the benefit of the owners of HOLDRsSM and to maintain a record of the record owners of the HOLDRsSM and of the securities underlying the outstanding HOLDRsSM. In addition, the trustee will act as transfer agent with respect to transfers of the HOLDRsSM. All of these tasks are nondiscretionary and ministerial.

(6) *The trustee undertakes to notify receipt holders in the event of a default of an issuer of underlying securities, and will forward to the receipt holders copies of all communications from the issuers of the underlying securities.* The trustee or its agent will transmit to receipt owners as promptly as practicable after the trustee's or its agent's receipt copies of all communications, proxy statements and other materials that it receives from the issuers of the deposited securities.

(7) *The underlying securities will not be considered assets of the sponsoring firm or trustee bank.* The deposited securities and HOLDRsSM will not be considered the assets of the trustee or Merrill Lynch, except to the extent that the trustee or Merrill Lynch is itself a holder of certain HOLDRsSM receipts, and thereby is the beneficial owner of the particular securities underlying those receipts. As a result, the deposited securities and HOLDRsSM (other than those receipts beneficially owned by the trustee or Merrill Lynch) would not be subject to any third-party claims against the trustee or Merrill Lynch.

(8) *The trustee will be a bank.* The trustee will be a state-chartered U.S. bank that is a member of the Federal Reserve system and meets the standards for a trustee specified in Section 26(a)(1) of the Investment Company Act.

(9) *Neither the trustee nor the sponsor additionally will guarantee or otherwise enhance the creditworthiness of the underlying securities.* The deposited securities, as well as the HOLDRsSM, will trade in the public markets in regular way secondary trading transactions on the floor of a national securities exchange (or NASDAQ) through the floor specialist (or NASDAQ market maker). No owner of a HOLDRsSM will depend solely, or even primarily, upon anyone other than the specialist (or NASDAQ market maker) for trade,

execution, or market liquidity. In addition, no party to a HOLDRsSM program will guarantee or otherwise enhance the creditworthiness of any deposited security or HOLDRsSM.

(10) Other factors are not present, such as remarketing agreements, that would require the investors to rely on the sponsor to obtain the benefit of their investment. No such factors are present in the HOLDRsSM program.

In the absence of active management, and provided that a receipt holder has an undivided ownership interest in the underlying security or securities, as well as all of the rights and benefits that he would have if he held the underlying security or securities directly (as established by the factors discussed above), it does not matter whether the receipt represents a single security, several securities of the same issuer, or several securities of different issuers.⁵ The HOLDRsSM program is consistent with this analysis because the program is intended merely to offer a more convenient way for investors to purchase, hold, and transfer the underlying securities. There is nothing resembling active management in the HOLDRsSM program. The particular stocks to be included are selected based on objective criteria that are intended to identify securities of a particular industry, group, or sector and do not reflect an analysis of the merits of the securities as an investment.

In summary, we believe that the trust should not have to register as an investment company under the Investment Company Act because the trust will function essentially as a pass-through mechanism by which investors may enjoy the convenience of holding and trading deposited securities through HOLDRsSM receipts. The trust will hold securities only in a depository capacity, and each round-lot of 100 HOLDRsSM receipts will represent an entire and undivided ownership interest in each of the deposited securities held by the trust for the benefit of the owners. An owner may withdraw the deposited securities at any time during the trustee's business hours by delivering to the trustee a round-lot of 100 HOLDRsSM and paying a moderate cancellation fee. An owner of HOLDRsSM receipts will have all of the same rights and privileges as if the owner held the deposited securities outside of the program. These rights and privileges include, among other things: (i) the right of an owner to attend shareholder meetings, or instruct the trustee to vote the shares represented by a receipt according to the owner's instructions; (ii) the right to receive any dividends or other distributions that are paid on deposited shares; (iii) the right to receive copies of communications, proxy statements, and other materials relating to the deposited

⁵ Compare Robertson, Stephens & Company, SEC No-Action Letter (March 13, 1993) with CRT Government Securities, Ltd., SEC No-Action Letter (Aug. 4, 1992).

shares; and (iv) the right at any time to withdraw the deposited securities and bring an action against an issuer of deposited securities. For purposes of the federal tax laws, an owner will be treated in the same manner as if the owner held the deposited securities directly. The trust will not be actively managed and, as explained in detail above, the trustee will perform only clerical and administrative functions with respect to the trust.

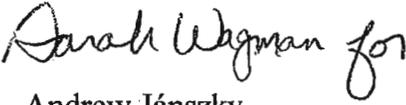
Conclusion

For the reasons discussed above, we believe that the trust should not have to register as an investment company under the Investment Company Act.

If you determine that you are unable to render the advice that we have requested, we would appreciate the opportunity to discuss our request with the staff prior to the issuance of a written response to this letter. We are available at your convenience to meet in person or by telephone for this purpose.

If you have any questions, please direct them to Abbie Arms, Esq. at (202) 508-8025, Sarah Wagman, Esq. at (202) 508-8058, or Andrew Jánosky, Esq. at (212) 848-7076.

Very truly yours,


Andrew Jánosky

cc: Alison Fuller, Esq.
Veena Jain, Esq.