

directors (including a majority of the non-interested directors); (b) the compensation to be paid under the new contract does not exceed the compensation which would have been paid under the contract most recently approved by shareholders of the investment company; and (c) neither the adviser nor any controlling person of the investment adviser "directly or indirectly receives money or other benefit" in connection with the transaction. Applicants state that they may not rely on rule 15a-4 because the Adviser and its affiliates may be deemed to receive a benefit in connection with the Merger.

3. Section 6(c) provides that the SEC may exempt any person, security, or transaction from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants state that the requested relief satisfies this standard.

4. Applicants assert that the terms and timing of the Merger were determined by Hilliard-Lyons and PNC in response to a number of factors beyond the scope of the Act and unrelated to the Funds and the Adviser. Applicants state that a proxy solicitation is a time consuming task, and that it is possible that an insufficient number of votes will have been received by the Meeting, and it may be necessary to adjourn for a period to permit additional shareholders to vote their shares by proxy.

5. Applicants state that the requested relief will allow continuity in investment management services to the Funds during the Interim Period. Applicants state that, during the Interim Period, the Funds would receive the same advisory services, provided in the same manner and at the same fee levels, by substantially the same personnel as they received before the Merger.

Applicant's Conditions

Applicants agree that the requested order will be subject to the following conditions:

1. The New Advisory Agreements will have the same terms and conditions as the Existing Advisory Agreements, except for the effective dates, termination dates, and escrow provisions.

2. Advisory fees earned by the Adviser during the Interim Period will be maintained in an interest-bearing escrow account, and amounts in the account, (including interest earned on such amounts), will be paid (a) to the Adviser in accordance with the relevant

New Advisory Agreement, after the requisite shareholder approval is obtained, or (b) to the relevant Fund, in the absence of such approval with respect to such Fund.

3. The Government Fund and the Growth Fund will hold meetings of shareholders to vote on approval of the New Advisory Agreements on November 6, 1998, and November 19, 1998, respectively, or within the 60-day period following the commencement of the Interim Period (but in no event later than January 31, 1999).

4. The Funds will not bear the costs of preparing and filing the application, or any costs relating to the solicitation of shareholder approval necessitated by the consummation of the Merger.

5. The Adviser will take all appropriate steps to ensure that the scope and quality of advisory and other services provided to the Funds during the Interim Period will be at least equivalent, in the judgment of the Board, including a majority of the Independent Directors, to the scope and quality of services provided under the Existing Advisory Agreement. In the event of any material change in personnel providing services pursuant to the New Advisory Agreements, the Adviser will apprise and consult with the Boards to assure that the Boards, including a majority of the Independent Directors, are satisfied that the services provided will not be diminished in scope or quality.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98-29469 Filed 11-3-98; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 23510; 812-11146]

Merrill Lynch Private Equity Trust I, et al.; Notice of Application

October 29, 1998.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application under section 6(c) of the Investment Company Act of 1940 (the "Act") requesting an exemption from section 17(e) of the Act and under rule 17d-1 under the Act to permit certain joint transactions in accordance with section 17(d) and rule 17d-1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain

registered closed-end investment companies to co-invest with other investment vehicles managed by the same investment adviser, and the investment adviser to receive certain compensation in connection with these transactions.

APPLICANTS: ML Private Equity Inc. (together with any investment adviser controlling, controlled by, or under common control with ML Private Equity Inc., the "Advisers") and Merrill Lynch Private Equity Trust I (the "Fund" and together with any future registered closed-end investment company advised by the Advisers, the "Funds").

FILING DATE: The application was filed on May 15, 1998, and amended on September 2, 1998. Applicants have agreed to file an amendment, the substance of which is incorporated in this notice, during the notice period.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on November 23, 1998, 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 may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants: South Tower, World Financial Center, New York, New York 10080.

FOR FURTHER INFORMATION CONTACT: Elaine M. Boggs, Senior Counsel, at (202) 942-0572, or Nadya B. Roytblat, Assistant Director, at (202) 942-0564 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. 202-942-8090).

Applicant's Representations

1. The fund will be a Delaware business trust and a privately offered closed-end investment company registered under the Act. ML Private Equity Inc. will register as an investment adviser under the

Investment Advisers Act of 1940 and will serve as the Fund's investment adviser. The Adviser also may serve as investment adviser to private accounts on a discretionary basis and as manager and/or investment adviser to other investment vehicles excepted from the definition of investment company by section 3(c)(1) or 3(c)(7) of the Act ("Private Funds").¹

2. ML Private Equity Inc. is a wholly-owned subsidiary of Merrill Lynch & Co., Inc. ("ML & Co."). Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), also a wholly-owned subsidiary of ML & Co., will act as placement agent for the Fund's shares.

3. The Fund will have at least four trustees who are natural persons ("Individual Trustees") and, in addition, the Adviser may serve as a trustee. Under the Fund's declaration of trust, the Individual Trustees will perform the duties imposed by the Act or the rules under the Act on directors of registered investment companies organized in corporate form and the Adviser as trustee will not be entitled to vote on any matters related to these duties.

4. The Fund will invest in institutional investment funds excepted from the definition of investment company by section 3(c)(1) or 3(c)(7) of the Act ("Underlying Funds"). The Underlying Funds may include real estate partnerships, venture capital funds, leveraged buyout funds, and hedge funds. The Underlying Funds will be managed by individuals or entities that are not affiliated with the Adviser.

5. Merrill Lynch will act as placement agent and financial adviser to the Underlying Funds and their sponsors. Merrill Lynch will receive compensation for its services from the sponsors (but not from the Underlying Funds). In general, fees for the combined financial advice and placement agency services range up to 2 percent of the proceeds of the offering for a new Underlying Fund, together with reimbursement of out-of-pocket transaction expenses.

6. The Fund proposes to make investments in the Underlying Funds concurrently with one or more other Funds, the Private Funds, and "ML Entities" ("Co-Investments").² The

Fund will not invest in an Underlying Fund unless at least 70 percent of the capital committed to the Underlying Fund is committed by investors that are not Funds, Private Funds, or ML Entities.

Applicants' Legal Analysis

A. Co-Investments

1. Section 17(d) of the Act and rule 17d-1 under the Act prohibit any affiliated person of or principal underwriter for a registered investment company or any affiliated person of such person or principal underwriter ("second-tier affiliate"), acting as principal, from effecting any transaction in connection with any joint enterprise or other joint arrangement or profit sharing plan, in which the investment company participates unless the Commission by order approves the transaction. Under section 2(a)(3) of the Act, an affiliated person of another person includes any person directly or indirectly controlling, controlled by, or under common control with the other person and the investment adviser to an investment company. Applicants request an order pursuant to section 17(d) and rule 17d-1 to permit the Co-Investments.

2. In determining whether to approve a transaction under rule 17d-1, the SEC considers whether the proposed transaction is consistent with the provisions, policies, and purposes of the Act, and the extent to which the participation of the investment companies is on a basis different from or less advantageous than that of the other participation. For the reasons stated below, applicants believe that the Co-Investments meet these standards.

3. Applicants state that the proposed Co-Investments will not be less advantageous to any Fund than they are to any other Fund, Private Fund, or ML Entity since each Fund will be offered the opportunity to participate in the Co-Investments with each other participating Fund, Private Fund, or ML Entity on an identical basis. In addition, applicants state that oversight by the Individual Trustees as provided for in the conditions below will protect the Fund from overreaching by any affiliated person in a Co-Investment.

B. Payment of Compensation to Advisers

1. Section 17(e) of the Act places limitations on the types and amounts of compensation that an affiliated person or second-tier affiliate of a registered investment company, acting as agent, may receive with respect to purchases and sales of securities by the investment company. Section 6(c) permits the SEC to exempt any person or transaction from any provision of the Act, if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies of the Act.

2. Applicants request an exemption under section 6(c) from section 17(e) to the extent that the section is applicable to compensation received by Merrill Lynch or an affiliate attributable to the purchase of the Underlying Funds by the Funds. The exemption would only be available to purchases of an Underlying Fund by a Fund in which neither Merrill Lynch nor any affiliate receives any commissions, fees, or other compensation from a Fund or an Underlying Fund in connection with the purchase.

3. Applicants state that the limitations in section 17(e) were designed to prevent affiliates of registered investment companies from receiving excessive compensation attributable to portfolio transactions conducted by the investment companies. Applicants state that fees received by Merrill Lynch from a sponsor of an Underlying Fund will be identical with respect to each investor in an Underlying Fund for which Merrill Lynch acts as placement agent, regardless of the identity of the purchaser or whether it is affiliated with Merrill Lynch.

Applicants' Conditions

Applicants agree that any order of the SEC granting the requested relief will be subject to the following conditions:

1. A majority of the Individual Trustees of each Fund will not be "interested persons," as defined in section 2(a)(19) of the Act, of the Fund.

2. A fund will not invest in an Underlying Fund unless at least 70 percent of the capital committed to the Underlying Fund is committed by investors that are not Funds, Private Funds, or ML Entities.

3. The Individual Trustees of each Fund participating in a Co-Investment in an Underlying Fund, including a majority of the non-interested Individual Trustees, will approve Co-Investments in advance. To facilitate the Individual Trustees' determinations, the

¹ Private Funds may include certain employees' securities companies formed for the benefit of employees of Merrill Lynch & Co., Inc. If the Adviser acts as the general partner of a Private Fund, it may make a capital contribution in connection with the organization of the Private Fund and maintain an interest in the Private Fund.

² "ML Entities" refers to the Advisers, ML & Co., any other entity controlling, controlled by, or under

common control with ML & Co. and other entities (other than the Funds or the Private Funds) with respect to which ML & Co., or any entity controlling, controlled by, or under common control with ML & Co., is authorized to cause the entity to provide the opportunity for a Fund to participate in the sale of an investment as contemplated by condition 6 below.

Adviser will provide the Individual Trustees of a Fund with periodic information listing all investments suitable for investment by the Fund which have been entered into by another Fund or, to the knowledge of the Adviser, a Private Fund or an ML Entity.

4. (a) Before making a Co-Investment, the Adviser will make a preliminary determination as to whether each particular Co-Investment opportunity meets the Fund's investment objective, policies, and restrictions. The Adviser will maintain written records of the factors considered in any preliminary determination.

(b) Following the making of the determination referred to in (a), information concerning the proposed Co-Investment will be distributed to the Individual Trustees. This information will be presented in written form and will include the name of each Fund, each Private Fund, and each ML Entity that, to the knowledge of the Adviser, may participate and the maximum amount offered to each entity.

(c) Information regarding the Adviser's preliminary determinations referred to in (a) will be reviewed by the Individual Trustees, including a majority of the non-interested Individual Trustees. The Individual Trustees, including a majority of the non-interested Individual Trustees, will make an independent decision as to whether to participate and the extent of participation in a Co-Investment in an Underlying Fund based on the factors as are deemed appropriate under the circumstances. If a majority of the non-interested Individual Trustees of the Fund determines that the amount proposed to be invested by the Fund is not sufficient to obtain an investment position that they consider appropriate under the circumstances, the Fund will not participate in the Co-Investment. Similarly, the Fund will not participate in a Co-Investment if a majority of the non-interested Individual Trustees of the Fund determines that the amount proposed to be invested is an amount in excess of that which is determined to be appropriate under the circumstances, although the non-interested Individual Trustees may make a determination that the Fund take other than their allotted portion of an investment. A Fund will only make a Co-Investment if a majority of the non-interested Individual Trustees of the Fund prior to making the Co-Investment in an Underlying Fund conclude, after consideration of all information deemed relevant (including the extent to which such participation is on a basis different from or less advantageous than that of other

participants and the extent to which an ML Entity has or will provide investment banking or other services to the Underlying Fund), that the investments by any other Fund, Private Fund, and/or ML Entity, as applicable, would not disadvantage the Fund in the making of the investment, in maintaining its investment position or in disposing of the investment, and that participation by the Fund would not be on a basis different from or less advantageous than that of the other Fund, Private Fund, and/or any ML Entity, as applicable. The non-interested Individual Trustees will maintain at the Fund's office written records of the factors considered in any decision regarding the proposed Co-Investment.

(d) The non-interested Individual Trustees will, for purposes of reviewing each recommendation of the Adviser, request additional information from the Adviser as they deem necessary for the exercise of their reasonable business judgment, and they will also employ such experts, including lawyers and accountants, as they deem appropriate for the reasonable exercise of this oversight function.

5. Co-Investments in equity interests in an Underlying Fund by a Fund with any other Fund, any Private Fund, and/or any ML Entity, as applicable, will consist of the same class of securities, including the same registration rights (if any), and other related rights, and will be purchased at the same unit consideration, and the approval of these transactions, including the determination of the terms of the transactions by the Fund's non-interested Individual Trustees, will be made in the same time period.

6. A Fund will not participate in a Co-Investment in an Underlying Fund with another Fund, a Private Fund, or an ML Entity unless each other party agrees to permit the Fund to participate, in the manner set forth in this condition, in the disposition of (a) an interest in each Underlying Fund or (b) securities received through an in-kind distribution by the Underlying Fund. If a Fund, a Private Fund, or an ML Entity proposes to dispose of a security described in the preceding sentence, notice of the proposed sale will be given to the non-interested Individual Trustees of the relevant Fund(s) at the earliest practical time. A Fund will participate in the disposition of the security on a lock-step basis with any other Fund, Private Fund, or an ML Entity, unless the non-interested Individual Trustees of a Fund determine that the Fund should not participate in the sale or not participate on a lock-step basis. A Fund need not participate on a lock-step basis in the

disposition of securities sold by any other Fund, a Private Fund, or an ML Entity if the non-interested Individual Trustees of the Fund find that the retention or sale, as the case may be, of the securities is fair to the Fund and that the Fund's participation or choice not to participate in the sale on a lock-step basis is not the result of overreaching by any other Fund, any Private Fund, and/or an ML Entity, as applicable. If this finding is not made, then the relevant Fund must participate in the sale on the basis of a lock-step disposition. If at any time the result of a proposed disposition of any portfolio security held by a Fund would alter the proportionate holdings of each class of securities held by the other Funds, Private Funds, and/or an ML Entity, as applicable, holding the Co-Investment, then the non-interested Individual Trustees of the Fund or Funds involved must determine that this result is fair to the relevant Fund(s) and is not the result of overreaching by any other Fund, Private Fund, and/or ML Entity, as applicable. The non-interested Individual Trustees will record in the records of the Fund the basis for their decisions as to whether to participate in the sale.

7. A decision by the Individual Trustees of a Fund (a) not to participate in a Co-Investment or (b) not to sell, exchange, or otherwise dispose of a Co-Investment in the same manner and the same time as another Fund, Private Fund, or ML Entity will include a finding that the decision is fair and reasonable to the Fund and not the result of overreaching of the Fund or its share holders by the other Fund, Private Fund and/or ML Entity, as applicable. The non-interested Individual Trustees of each Fund will be provided quarterly for review all information concerning Co-Investments made by the Funds, the Private Funds, and/or ML Entities, as applicable, including Co-Investments in which the Fund declined to participate, so they may determine whether all Co-Investments made during the preceding quarter, including those Co-Investments they declined, complied with the conditions set forth above. In addition, the non-interested Individual Trustees of each Fund will consider at least annually the continuing appropriateness of the standards established for Co-Investments by the Fund, including whether the use of these standards continues to be in the best interest of the Fund and its share holders and does not involve overreaching of the Fund or its share holders on the part of any party concerned.

8. No non-interested Individual Trustee of a Fund will be an affiliated person of a Private Fund or Underlying

Fund or have had, at any time since the beginning of the last two completed fiscal years of any Private Fund or Underlying Fund, a material business or professional relationship with any Private Fund or Underlying Fund.

9. A Fund, each Private Fund, and/or ML Entity, as applicable, will bear its own expenses associated with the disposition of portfolio securities. The expenses, if any, of distributing and registering securities under the Securities Act of 1933 sold by the Fund, one or more Private Funds, and/or the ML Entity, as applicable, at the same time will be shared by the Fund, the selling Private Fund(s), and/or each ML Entity, as applicable, in proportion to the relative amounts they are selling.

10. Merrill Lynch and its affiliates will receive no commissions, fees, or other compensation from a Fund or an Underlying Fund in connection with a purchase by the Fund of an interest in the Underlying Fund.³

11. The Fund will maintain all records required of it by the Act, and all records referred to or required under these conditions will be available for inspection by the Commission. The Fund will also maintain the records required by section 57(f)(3) of the Act as if the Fund was a business development company and the Co-Investments were approved by the non-interested Individual Trustees under section 57(f).

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98-29470 Filed 11-3-98; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40606; File No. SR-NASD-98-51]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Microcap Initiatives-Amendments to NASD Rules 6530 and 6540

October 27, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"

or "Exchange Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 20, 1998, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly-owned subsidiary, the Nasdaq Stock Market, Inc. ("Nasdaq") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. On October 7, 1998, the NASD filed with the Commission Amendment No. 1 to the proposal.³ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Association is proposing amendments to NASD Rules 6530 and 6540 to limit quotations on the OTC Bulletin Board® ("OTCBB") to the securities of issuers that are current in their reports filed with the SEC or other regulatory authority, and to prohibit a member from quoting a security on the OTCBB unless the issuer has made current filings, respectively. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

6530. OTCBB Eligible Securities

A Member shall be permitted to quote the [The] following categories of securities [shall be eligible for quotation] in the Service:

(a) any domestic equity security that *satisfies the requirements of paragraph (1) and either paragraph (2) or (3) or (4) below;*

(1) *the security is not listed on The Nasdaq Stock Market ("Nasdaq") or a registered national securities exchange in the U.S., except that an equity security [securities that are] shall be considered eligible if it:*

(A) *is listed on one or more regional stock exchanges, and*
(B) *[do] does not qualify for disseminating of transactions reports via the facilities of the Consolidated Tape [shall be considered eligible.]; and*

(2) *the issuer of the security is required to file reports pursuant to Section 13 or 15(d) of the Act or the security is described in Section*

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Letter from Robert E. Aber, General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated October 7, 1998 ("Amendment No. 1"). The substance of Amendment No. 1 is incorporated into this notice.

12(g)(2)(B) of the Act, and, subject to a thirty calendar day grace period, the issuer of the security is current in its reporting obligations, or

(3) *the security is described in Section 12(g)(2)(G) of the Act and, subject to a sixty calendar day grace period, the issuer or the security is current in its reporting obligations, or*

(4) *the issuer of the security is a bank or savings association that is not required to file reports with the Commission pursuant to Section 13 or 15(d) of the Act and, subject to a sixty calendar day grace period, the issuer of the security is current with all required filings with its appropriate Federal banking agency or State bank supervisor (as defined in 12 U.S.C. 1813).*

(b) any foreign equity security or American Depositary Receipt (ADR) that meets all of the following criteria:

(1) [prior to April 1, 1998, is not listed on Nasdaq or a registered national securities exchange in the U.S., except that a foreign equity security or ADR shall be considered eligible if it is:

(A) listed on one or more regional stock exchanges, and

(B) does not qualify for dissemination of transaction reports via the facilities of the Consolidated Tape.

(2) after March 31, 1998,] *the security is registered with the Securities and Exchange Commission pursuant to Section 12 of the [Securities Exchange Act] Act [of 1934] and the issuer of the security is current in its reporting obligating; or the security satisfies the requirements of paragraph (a)(2) or (3) or (4) above; and*

(2) *the security is not listed on Nasdaq or a registered national securities exchange in the U.S., except that a foreign equity security or ADR shall [be considered eligible] meet this subparagraph (2)⁴ if it is:*

(A) listed on one or more regional stock exchanges, and

(B) does not qualify for dissemination of transaction reports via the facilities the Consolidated Tape.

(c) any equity security that [is] *meets the following criteria:*

(1) *the security is undergoing delisting from either the New York Stock Exchange, Inc. (NYSE) or the American Stock Exchange, Inc. (AMEX) for non-compliance with maintenance-of-listing standards; and*

(2) *the security is subject to a trading suspension imposed by the NYSE or*

⁴ The proposed rule text was changed from "subparagraph (3)" to "subparagraph (2)" to correct the internal cross-reference. Telephone conversation between Sara Nelson Bloom, Associate General Counsel, Nasdaq, and Robert B. Long, Attorney, Division Commission, on October 28, 1998.

³ This condition does not limit arrangements in which an Underlying Fund initially pays a placement fee to Merrill Lynch but is reimbursed or credited with such amount so that the sponsor of the Underlying Fund effectively bears the cost of the placement fee.