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August 16, 2006

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

Re: RIN 3064-AD08:
Proposed Rule Implementing a One-Time Assessment Credit

RIN 3064-AD02:
Proposed Rule Setting the Designated Reserve Ratio

RIN 3064-AD07:
Proposed Interim Rule Specifying Dividend Requirements

Dear Mr. Feldman:

Merrill Lynch Bank USA, a Utah-chartered industrial bank, the deposits of which are insured by the Federal Deposit Insurance Corporation ("FDIC") ("MLBUSA"), and Merrill Lynch Bank & Trust Co., FSB, an FDIC-insured federal savings association ("MLBT-FSB"), appreciate the opportunity to comment on the proposed rulemakings issued by the FDIC relating to a One-Time Assessment Credit, 71 Fed. Reg. 28809-28819 (May 18, 2006) ("Proposed Assessment Credit Rule"), the Deposit Insurance Assessments--Designated Reserve Ratio, 71 Fed. Reg. 41973-41976 (July 24, 2006) ("Proposed DRR Rule"), and the Interim Rule Specifying Dividend Requirements, 71 Fed. Reg. 28804-28809 (May 18, 2006) (the "Proposed Interim Dividends Rule"). All of these proposed rules have been issued by the FDIC pursuant to the provisions of the

Federal Deposit Insurance Reform Act of 2005, Title II of Public Law 109-171 ("Reform Act").

Summary of Recommendations

In summary, our comments to the FDIC on the proposed rule are as follows:

- **The FDIC should exercise its regulatory discretion and not automatically apply the one-time assessment credit ("Credit") to offset 100 percent of the deposit insurance premium assessment in 2007 and 90 percent of such premium assessment in 2008 and 2009.** Rather, the FDIC should phase-in the application of the Credit over a four or five year period.

- **Transfers of Credits should be permitted only in cases of mergers, consolidations, or purchase and assumption transactions where the underlying deposit is also transferred.** The FDIC should not allow for the transfer of Credits not coupled with a transfer of the underlying deposit, as this type of transfer of Credits is not contemplated by the Reform Act.

- **The DRR should be set at the lower end of the range established by Congress; a 1.25 percent DRR is not necessary given the supervisory and enforcement tools available to the FDIC and the other federal bank regulatory authorities and the current and projected financial condition of the industry.** The FDIC should let the DRR drift towards 1.15 percent until the Credit is utilized, and then, *only if conditions warrant*, increase the DRR over several years so as to minimize the "premium shock" that will result from a rapid increase in the ratio.

- **A phased-in increase in the DRR will prevent sharp swings in premium assessment rates.** Any DRR set by the FDIC that is at or approaches the historic deposit reserve ratio should be phased in over a period of time. Without such a phased-in approach, setting the DRR at or near historic levels would have a significant, profound, and disproportionately negative impact on those institutions that have grown substantially since 1996 and have little or no Credits available to offset any increase in assessments, as well as on those institutions that exhaust their

Credits in 2007. Any dramatic increase in assessment rates to achieve a high DRR (even one at 1.25 percent) over a short period of time also could prevent those institutions with little or no Credits available from fairly competing in the financial services marketplace. It could also discourage new institutions from forming and entering that marketplace.

- **Any interim dividend rule should take into account all statutory factors.** We urge the FDIC to adhere to the multi-factor criteria set forth in the statute for calculating dividend payments, and to put in place a framework ensuring that all institutions paying assessments into the DIF will receive their *pro rata* share of any dividends paid by the DIF.

A. Background

MLBUSA and MLBT-FSB are wholly-owned subsidiaries of Merrill Lynch & Co., Inc. ("Merrill Lynch"). Merrill Lynch, through its financial institution subsidiaries, has been in the banking industry for two decades. MLBT-FSB, or its predecessor insured depository institution, has been FDIC-insured since April 30, 1986 and MLBUSA has been FDIC-insured since October 31, 1988. MLBUSA and MLBT-FSB are both "well capitalized" as that term is defined in the prompt corrective action provisions of the Federal Deposit Insurance Act ("FDIA") and implementing regulations.[1] Both MLBUSA and MLBT-FSB have experienced significant *de novo* deposit growth since 1996. Thus, while both institutions are eligible to participate in the one-time deposit insurance assessment credit discussed below, their proportion of the Credit is relatively small.

B. The Reform Act

The Reform Act, enacted on February 8, 2006, after several years pending in Congress, amends the deposit insurance system, by among other things, merging the Savings Association Insurance Fund and the Bank Insurance Fund, increasing deposit insurance coverage for retirement accounts, and providing for a reform of the risk-based insurance assessment system. The Reform Act also provided for a one-time credit against future deposit insurance assessments for those institutions that were in existence on December 31, 1996, and had paid assessments prior to that date (the last time

[1] *See* 12 U.S.C. § 1831o; 12 C.F.R. Part 208, Subpart D.

insurance assessments were generally imposed on financially sound, well capitalized institutions).

The Reform Act is premised on two important concepts - first, that all insured depository institutions are to pay premiums or assessments at some level for deposit insurance; and second, that the FDIC Board is given the discretionary authority to establish the designated reserve ratio ("DRR") at a level between 1.15 percent and 1.50 percent and a mandate to exercise its best judgment to annually establish the DRR at a level that reflects the needs of the insurance fund. Of all the significant changes contained in the Reform Act, probably the most significant is the elimination of the fixed DRR of 1.25 percent that had existed since 1991, and the directive to the FDIC Board to use its discretionary authority to set the DRR where the Board believes it most appropriate --within that statutorily prescribed range of 1.15 percent to 1.50 percent-- given the true risk faced by the insurance fund.[2]

C. The Aggregate Assessment Credit Should be Allocated Over a Period of Time and Transfers of Credits Should be Permitted Only in Cases of Mergers, Consolidations, or Purchase and Assumption Transactions

1. The Aggregate Assessment Credit Should be Allocated Over a Four or Five-Year Period

Under the Reform Act, the FDIC is required to provide for a one-time assessment Credit to each "eligible" insured institution, based on that institution's assessment base as of December 31, 1996, compared to the combined aggregate assessment base of all eligible institutions as of that date, that may be applied to offset future deposit insurance assessments imposed on such institution.[3] In allocating this Credit (which equals 10.5 basis points of the total combined assessment base as of December 31, 2001, or approximately $4.7 billion), Congress provided the FDIC with some discretion to establish the qualifications and procedures that would govern the application of the

[2] Fed. Deposit Ins. Reform Act of 2005, 120 Stat. 14 (2006) (codified as amended at 12 U.S.C. § 1817(b)(3) (2006)).

[3] Fed. Deposit Ins. Reform Act of 2005, 120 Stat. 18 (2006) (codified as amended at 12 U.S.C. § 1817(e)(3) (2006)).

Credit.[4] However, the Reform Act also provides that, generally, for assessments that become due for assessment periods beginning in fiscal years 2008, 2009 and 2010, Credits may not be applied to more than 90 percent of an institution's assessment. In addition, certain institutions that exhibit financial, operational or compliance weaknesses may not apply the entire Credit allocated to them, and the Credit may be restricted further if the FDIC is operating under a restoration plan to recapitalize the Deposit Insurance Fund ("DIF").[5]

The Proposed Assessment Credit Rule generally follows these Reform Act provisions. However, while it is not explicitly stated, to the extent that institutions have available Credits, the Proposed Assessment Credit Rule would put in place a procedure that would automatically apply an institution's available Credit to offset 100 percent of any deposit insurance premium due in 2007 and 90 percent of the premium due in 2008, 2009, and 2010. While the literal text of the Reform Act appears to allow for such an approach, we note that if the FDIC were to implement this provision as proposed, it would clearly take what was intended by Congress to be a ***ceiling*** and make it a ***floor***. In this instance, the Reform Act (at least as to the application of the Credit to assessments imposed in 2008 through 2010) is explicit:

> "The amount of a credit to any eligible insured depository institution under this paragraph *may not be applied to* ***more than*** *90 percent* of the assessments imposed on such institution … that become due for assessment periods beginning in fiscal years 2008, 2009, and 2010."[6] (Emphasis added.)

In short, we urge the FDIC to exercise its regulatory discretion and phase-in the application of the Credit over a four or five year period.

We also believe that the FDIA provides the FDIC with the discretion to limit the use in any one year of the aggregate amount of the Credit available to all eligible institutions to a certain percentage of the total $4.7 billion. For example, using basic notions of safety and soundness as support, the FDIC could limit the total amount of the

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[4] *Id.*

[5] *Id.*

[6] *Id.*

aggregate Credit available to all institutions to 20 percent per year. In such a scenario, an eligible institution could apply 20 percent of its total Credit allocated to it per year, thus utilizing the entire Credit over a period of five years. A 20 percent allocation of the aggregate Credit per year would help to smooth out the anticipated disproportionately negative impact on the more than 1,400 banks, including MLBUSA and MLBT-FSB, that are not eligible for, or are only entitled to, a small percentage of the Credit, if the DRR also is increased significantly and substantial assessments are required to be imposed. In addition, a limit on aggregate Credit use in whatever form would be more consistent with one of the principal concepts behind the Reform Act, namely that all insured institutions, not just certain institutions, should be required to pay insurance assessments. As discussed further below, phasing in the use of Credits would also implement the statutory mandate to avoid payment shock to the institutions required to pay the assessments.

Furthermore, while we recognize that some cut-off date had to be established to determine which institutions would be eligible for the Credit, and that any transfers of deposits after that date would be difficult to track other than those transferred by merger or purchase and assumption transactions, the effect of the Reform Act's Credit provisions is somewhat arbitrary in that the institutions that will receive the largest benefit from the Credit are those that have grown substantially since 1996 by merger, rather than those (such as MLBUSA) that have grown substantially by attracting new bank deposits. Deciding to phase in the Credit would minimize this somewhat arbitrary impact of the law on similarly sized institutions that have grown over the past ten years, but in different ways, and create a more equitable playing field, as well as avoid volatility in premiums for both types of institutions going forward.

2. Transfers of Credits Should be Permitted Only in Cases of Mergers, Consolidations, or Purchase and Assumption Transactions where the Underlying Deposit is also Transferred

We also believe that the FDIC should interpret the "successor" provision of the FDIA[7] narrowly to allow only for transfers of Credits in connection with transfers of the underlying deposits in true mergers or consolidations or in connection with purchase and assumption transactions that are the equivalent of mergers in which an eligible institution conveys all of its deposit liabilities and substantially all of its assets to a single acquiring

[7] *Id.*

institution-- transactions which in either case require regulatory approval under Section 18(c) of the FDIA. The term "successor" is used in the Reform Act in connection with determining which institutions should be eligible for the Credit. The Reform Act also provides for transfers of Credits to successors of eligible insured institutions that also succeed to the predecessor's assessment base.[8] Thus, transfers of deposits due to mergers, consolidations, or purchase and assumption transactions occurring after the Credit is established are contemplated by the Reform Act.

However, Section 327. 34(c) of the Proposed Assessment Credit Rule authorizes the transfer of Credits to any insured depository institution without any accompanying transfer of the underlying deposit.[9] This type of transfer of Credits is not contemplated by the terms of the Reform Act. We believe that the FDIC should therefore follow the language and intent of the Reform Act and not allow for such transfers. Otherwise, authorizing the transfer of Credits, as proposed in Section 327. 34(c), could result in the utilization of the entire $4.7 billion amount of Credits in the first year, increasing the likelihood that institutions such as MLBUSA and MLBT-FSB would have to pay a disproportionately high percentage of the near-term deposit assessment premiums especially if the FDIC decides--as it has proposed-- to increase the DRR.

D. The DRR Should be Set at the Lower End of the Range Established by the Reform Act, and Any Increases in the DRR Should be Phased In

1. The DRR Should be Set at the Lower End of the Range: A 1.25 Percent DRR is not Necessary in the Current Environment

MLBUSA and MLBT-FSB believe that, in implementing the new risk-based deposit insurance assessment system mandated by the Reform Act, the FDIC should exercise its new authority and set the DRR at the lower end of the statutorily mandated range, instead of the 1.25 percent put forth in the Proposed DRR Rule. We believe this point is more important than our comments about the use of Credits set forth in Part C of this letter.

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[8] *Id.*

[9] *See* Notice of Proposed Rulemaking on One-Time Assessment Credit, 71 Fed. Reg. 28809, 28818 (May 18, 2006).

MLBUSA and MLBT-FSB recognize the historical significance of the 1.25 percent deposit reserve ratio. At the time the 1.25 percent deposit reserve ratio was mandated by Congress in 1991, the FDIC and the banking system had just experienced the savings and loan crisis of the late 1980's and were experiencing the beginning of an economic dislocation that ultimately would result in a significant number of bank and savings and loan association failures. Given the then history and condition of the economy and the banking industry at that point, setting a relatively stringent deposit reserve ratio at the time made imminent sense and resulted in sufficient reserves for the insurance funds to withstand the impact of the failures during those years. With the full regulatory implementation of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989[10] and the passage of the Federal Deposit Insurance Corporation Improvement Act of 1991,[11] however, the FDIC and the other federal bank regulatory agencies have been provided with numerous supervisory and enforcement tools to enhance the safe and sound operation of insured depository institutions. These statutory and regulatory provisions include, for example, higher capital requirements, tougher enforcement provisions, prompt corrective action authority, cross-guarantee liability, enhanced affiliate transaction restrictions, and the increased use of business plans. As a result of these provisions, the banking industry is today substantially stronger than it was in the early 1990's, with far fewer bank failures and a corresponding reduction in claims against the deposit insurance fund.

In part because of the success of these supervisory tools, and the recommendation of the FDIC to provide it with more flexibility in setting deposit assessment rates that more closely reflect the risk to the fund, the Reform Act now gives the FDIC the ability to set the DRR on an annual basis at a level that the FDIC believes is most appropriate within the statutorily prescribed range of 1.15 percent to 1.50 percent, based on several factors. The factors that the FDIC is to consider include (i) the risk of losses to the DIF in such year and future years, including historic experience and potential and estimated losses from insured depository institutions; (ii) economic conditions generally affecting insured depository institutions so as to allow the DRR to increase during more favorable economic conditions and to decrease during less favorable economic conditions, notwithstanding the increased risks of loss that may exist during such less favorable

[10] Pub. L. No. 101-73, 103 Stat. 183 (1989).

[11] Pub. L. No. 102-242, 105 Stat. 2236 (1991).

conditions, as determined to be appropriate by the FDIC Board; (iii) a mandate to seek to prevent sharp swings in the assessment rates for insured depository institutions; and (iv) such other factors as the FDIC Board may determine to be appropriate.[12]

A review of these statutorily mandated factors should compel the FDIC to conclude that it can set the DRR at the lower end of the range. First, the risk of loss to the deposit insurance fund since 1997 has been, and continues to be, relatively low. Indeed, a review of the actuarial history of the FDIC from 1990 to 2005 shows that FDIC insured losses materially decreased during the period from 1995 to 2005 as compared to the losses experienced by the insurance fund during the period from 1990 to 1994. In addition, the ratio of insolvency losses to average insured deposits has been quite low in recent years, especially when compared to the early 1990's. (*See* **Exhibit A** attached to this letter.) This especially low level of losses over the past 12 years, both in absolute terms and relative to total insured deposits, coupled with an equally favorable loss outlook for the next few years, strongly supports a strategy of allowing the DRR to drift downward close to 1.15 percent. While no one can project the future with certainty, a review of the actuarial history since the mid-1990's strongly suggests that these trends will continue in the short and intermediate term. In fact, the FDIC has reported that "there has not been a failure of an FDIC-insured institution in more than seven quarters--since June 25, 2004. This [now two-year period] is the longest interval without an insured institution failure in the FDIC's 73-year history."[13]

On this basis alone, MLBUSA and MLBT-FSB believe that the current and projected financial condition of the industry do not support continuing the DRR at its historical rate of 1.25 percent and that the FDIC should exercise the discretion given to it by Congress under the Reform Act. Specifically, the FDIC should let the DRR drift towards 1.15 percent until the Credit is utilized, and then, *only if conditions warrant*, increase the DRR over several years so as to minimize the "premium shock" due solely to increasing the ratio. The FDIC has the statutory authority to take such action and would not, in our view, be subjecting the deposit insurance system to any undue risk. Certainly,

[12] Fed. Deposit Ins. Reform Act of 2005, 120 Stat. 14 (2006) (codified as amended at 12 U.S.C. § 1817(b)(3) (2006)).

[13] FDIC Press Release, *Banks and Thrifts Report Record Earnings in First Quarter*, May 25, 2006.

that point is driven home when one considers that the recent reduction in the DRR is caused almost exclusively by deposit growth rather than losses suffered by the FDIC.[14]

The Reform Act also requires the FDIC to "seek to prevent sharp swings in the assessment rates" for all insured depository institutions. Thus, it appears that Congress gave the FDIC Board the flexibility to change the DRR in large part to prevent such large swings in assessment rates. Moreover, the FDIC's own recommendations on deposit insurance reform in 2001 urged that the FDIC be given this flexibility, stating:

> "Sharp premium swings triggered by deviations from the DRR should be eliminated. If the fund falls below a target level, premiums should increase gradually. If it grows above a target level, funds should be rebated gradually. The emphasis of the current deposit insurance system on maintaining the 1.25 percent DRR creates the potential for volatile premiums. This is likely to result in the industry paying high premiums when both banks and the economy can least afford it. The deposit insurance system should work to smooth economic cycles, not

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[14] *See, e.g.*, FDIC Press Release, *Banks and Thrifts Report Record Earnings in First Quarter*, May 25, 2006 ("[As of] March 31[, 2006], the reserve ratio of the new fund was 1.23 percent, compared to 1.25 percent at the end of 2005 and 1.29 percent on March 31, 2005. The declining trend in the reserve ratio has been caused by strong growth in insured deposits in response to higher interest rates on deposit accounts."); FDIC, *Risk-Based Assessment System, Current Status of the Funds*, updated May 17, 2006 ("In preparing the November assessment rate cases, staff assumed that between June 30, 2005 and June 30, 2006 there would be modest loss provisions for insurance losses. So far, however, DIF has benefited from negative provisions for losses for the 9 months ending in March 2006. On the other hand, preliminary estimates of insured deposit growth for the 9 months ending in March 2006 have been higher than anticipated for the 12-month period through June 30, 2006 (about 6.6 percent over 9 months, compared to a 5.6 percent 12-month growth projection from June 30, 2005 through June 30, 2006 in the November Board case)"); FDIC Press Release, *FDIC Board Votes to Maintain Premium Rates for Banks and Thrifts*, May 9, 2006 ("The reserve ratio for the funds combined stood at 1.25 percent as of December 31, 2005. An early estimate indicates that the reserve ratio for the DIF fell to 1.23 percent as of March 31, 2006, due to very strong insured deposit growth. While the banking industry remains healthy and no insured institution has failed since June 2004, the FDIC staff expects strong insured deposit growth to reduce the reserve ratio to 1.20 percent by year-end without an increase in premium rates.").

exacerbate them. It would be preferable for the fund to absorb some losses and for premiums to adjust gradually. This can be accomplished by establishing a target for the fund. If the fund varied from the target, surcharges or rebates would be used to bring the fund back to the target gradually. The target could be a range within which premiums would be constant. Alternatively, it could be a fixed reserve ratio such as the current DRR. For example, the reserve ratio could be allowed to vary between 1.15 percent and 1.35 percent."[15]

Avoiding volatile swings in net assessment rates should be a particularly critical factor to the FDIC in setting the DRR during the next five years, so that sharp swings in net deposit insurance rates do not occur as a result of the implementation of the Credit. The FDIC staff recognized this issue in the Proposed DRR Rule, when it noted that the implementation of the Credit would limit initial assessment income, putting further downward pressure on the reserve ratio, if recent robust insured deposit growth continues.[16] Although the FDIC staff's "best estimate" for insured deposit growth for calendar year 2006 is 6.8 percent, the staff states that growth in insured deposits this year

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[15] FDIC, *Keeping the Promise: Recommendations for Deposit Insurance Reform*, April 2001, at 12. Evidently in part because of these recommendations, a report issued by the House Financial Services Committee on the Reform Act noted that the Congressional Budget Office ("CBO") expected "that the FDIC would attempt to limit volatility in premiums and avoid increases in premiums for temporary reductions in the fund. As a result, CBO assumes that the FDIC would *try to set premiums at levels considered likely to achieve the desired reserve ratio over several years.* By expanding insurance coverage, H.R. 1185 also would affect the FDIC's decision about the reserve target, because increasing insured deposits would reduce the DIF's reserve ratio from 1.3 percent to less than 1.2 percent. For this estimate, *CBO assumes that the FDIC would opt to rebuild the reserve gradually following enactment of the bill,* ***resulting in a reserve ratio of close to 1.20 percent*** *over the 10-year period. Setting a higher target would require correspondingly higher assessments and would yield higher receipts to the DIF.*" (Emphasis added.) U.S. House of Representatives, Comm. on Fin. Servs., *Federal Deposit Insurance Reform Act of 2005*, 109th Congress, 1st Session, 2005, House Report 109-67, at 28.

[16] Notice of Proposed Rulemaking on Deposit Insurance Assessments--Designated Reserve Ratio, 71 Fed. Reg. 41973, 41975 (July 24, 2006).

could be as high as 9.8 percent.[17] According to the FDIC staff, institutions with few or no Credits will be forced to pay more in the early years.[18] Certainly, as Credits are utilized by eligible institutions, *all* insured depository institutions - including those eligible for Credits - will experience "premium shock" if the DRR is increased dramatically over a short time frame, *i.e.* 1 to 2 years.

2. A Phased-In DRR will Prevent Sharp Swings in Assessment Rates

If the FDIC nevertheless feels compelled--as it has proposed-- to set the reserve ratio at its historic level of 1.25 percent and not at the lower end of the permitted range as we recommend, we urge the FDIC Board to allow for the 1.25 percent DRR to be phased in over a period of time. As noted previously, in its Recommendations for Deposit Insurance Reform in 2001, the FDIC recognizes that the DRR can be considered either as a fixed target or a range that could be raised to 1.25 percent over time.[19] Because the FDIC itself recognizes that requiring a DRR of 1.25 percent in 2007 will almost certainly create volatile premiums and a severe rate shock in 2007, any plan to maintain a 1.25 percent reserve ratio should be achieved gradually over a period of time.

MLBUSA and MLBT-FSB respectfully suggest that any assessment rate increase of more than 7 basis points in 2007 under the new assessment system required by the Reform Act would constitute a "premium shock" of the type Congress has directed the FDIC to avoid. Furthermore, we believe that the premium assessment rate for Category 1A banks after 2007 should be limited to 4 basis points to minimize the assessment rate differential between banks with a substantial remaining Credit relative to those with no remaining Credit, until such time as 95 percent of the aggregate amount of the Credit has

[17] FDIC, Arthur J. Murton, Director of the Division of Insurance and Research, Memorandum to the FDIC Board, *DIF Assessment Rates for the Second Semiannual Assessment Period of 2006*, May 5, 2006, at 15.

[18] *Id.*, at 4 ("The staff believes that the premium increase next year may be substantial absent a significant slowing in insured deposit growth. The burden of the higher premium rates in the next couple of years would fall primarily on newer banks and other banks that have grown rapidly since 1996, *i.e.*, those banks with few or no assessment credits.").

[19] FDIC, *Keeping the Promise: Recommendations for Deposit Insurance Reform*, April 2001, at 12.

been utilized. In other words, any effort to increase the DRR should be structured so that no institution in Category 1A would pay assessments any higher than 7 basis points in the first year under the new insurance assessment system and that any assessment in any subsequent year where more than 5 percent of the Credits remain unutilized be limited to 4 basis points, as long as the institution remained in Category IA. We believe that this approach will allow the FDIC to gradually increase the DRR to the level desired by the FDIC without any one insured institution in Category IA suffering from "premium shock."

Without such a phased-in approach, setting the DRR at 1.25 percent would have a significant, profound, and disproportionately negative impact on those well-managed and well-capitalized institutions that have grown substantially since 1996 and have little or no Credits available to offset the increase in assessments that will be necessary to achieve that DRR. Indeed, any dramatic increase in assessment rates to achieve a high DRR (even one at 1.25 percent) over a short period of time could prevent those institutions with little or no Credits available from fairly competing in the financial services marketplace. It could also discourage new institutions from forming and entering that marketplace. MLBUSA and MLBT-FSB believe that the Reform Act requires the FDIC to exercise its discretion in a way that avoids these anti-competitive effects, and instead results in a system with more moderate and (assuming economic conditions remain stable) predictable premiums.

E. Any Interim Dividend Rule Should Take Into Account all Statutory Factors

With respect to the Proposed Interim Dividends Rule, the Reform Act requires that the FDIC declare dividends under certain circumstances from the DIF, when the reserve ratio at the end of a calendar year exceeds 1.35 percent. The allocation of the dividend to each insured institution is based on a number of factors, including: (i) the ratio of the assessment base of an insured depository institution (including any predecessor) on December 31, 1996 to the assessment base of all eligible insured depository institutions on that date; (ii) the total amount of assessments on or after January 1, 1997, paid by an insured depository institution (or any predecessor) to the DIF; (iii) that portion of assessments paid by an insured depository institution (including any predecessor) that reflects higher levels of risk assumed by the institution; and (iv) such other factors that the FDIC Board deems appropriate.[20]

Despite these factors, the Proposed Interim Dividends Rule would, for a two-year period, allocate any dividends paid by the DIF when the ratio exceeds 1.35 percent based *exclusively* upon each insured institution's 1996 assessment base ratio. We urge the FDIC to adhere to the multi-factor criteria set forth in the statute for calculating dividend payments, since to omit from the dividend calculation "the total amount of assessments paid on or after January 1, 1997" is simply unfair to those institutions that were chartered or experienced significant growth in insured deposits since December 31, 1996. While we do not dispute the assertion made by the FDIC in promulgating the proposed rule that "it appears quite unlikely that the reserve ratio of the DIF will equal or exceed 1.35 percent in the near future" and that there is only "a small likelihood of a dividend,"[21] we nevertheless believe that the statutory criteria should be adhered to even if the likelihood of a dividend is extremely remote, and a framework should be put in place from the outset ensuring that all institutions paying assessments into the DIF will receive their *pro rata* share of any dividends paid by the DIF.

Furthermore, if the DRR for any reason exceeds 1.35 percent in the next two years, such increase in the fund will most likely be due to the premiums about to be paid by those institutions that either are not eligible for the Credit or are only entitled to a small amount of the aggregate Credit. If significant assessments are imposed on these institutions that receive little or no benefit from the Credit as a result of the FDIC increasing the DRR, for example, to as high as 1.25 percent in one year, and then insured deposit growth slows substantially or reverses, it should not be that institutions receiving substantial benefit from the Credits also subsequently receive the benefit of any dividend. Such a system of allocating dividends based solely upon each insured institution's 1996 assessment base ratio would be grossly unfair in that it would impose yet another burden on those institutions receiving little or no benefit from the Credit that would already be forced to pay significant assessments. Therefore, we urge the FDIC to adhere to the

[20] Fed. Deposit Ins. Reform Act of 2005, 120 Stat. 16 (2006) (codified as amended at 12 U.S.C. § 1817(e)(2) (2006)).

[21] Notice of Proposed Rulemaking on Dividends, 71 Fed. Reg. 28804, 28806 (May 18, 2006).

multi-factor criteria set forth in the statute for calculating dividend payments and to include in the dividend calculation the total amount of assessments paid on or after January 1, 1997.

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MLBUSA and MLBT-FSB greatly appreciate this opportunity to comment on the Proposed Assessment Credit Rule, the Proposed DRR Rule, and the Proposed Interim Dividends Rule. If you have any questions or would like to discuss our comments with you in further detail, please contact the undersigned at 212-449-1639.

Sincerely,

Mark S. Leiman

EXHIBIT A

FDIC ACTUARIAL HISTORY[22]

Dollars in millions.

	Premium income			Losses in banks closed that year				Estimated insured deposits at end of the year			
Year	BIF	SAIF	Total	BIF	SAIF	Total	Ratio of Premium/Losses	BIF	SAIF	Total	Ratio of Losses/Average Insured Deposits (in basis points)
1989								1,873,837		1,873,837	
1990	2,885.3	18.2	2,903.5	2,782.5	RTC	2,782.5	1.04	1,929,612		1,929,612	14.63
1991	5,160.5	93.5	5,254.0	5,997.2	RTC	5,997.2	0.88	1,957,722		1,957,722	30.85
1992	5,587.8	172.1	5,759.9	492.4	RTC	492.4	11.70	1,945,623		1,945,623	2.52
1993	5,784.3	897.7	6,682.0	644.6	RTC	644.6	10.37	1,906,885		1,906,885	3.35
1994	5,590.6	1,132.1	6,722.7	179.1	RTC	179.1	37.55	1,896,060	692,626	2,588,686	0.80
1995	2,906.9	970.0	3,876.9	84.5	28.2	112.7	34.41	1,952,543	711,017	2,663,560	0.43
1996	72.7	5,221.6	5,294.3	38.7	21.9	60.6	87.39	2,007,447	683,090	2,690,537	0.23
1997	24.7	13.9	38.6	5.0	0.0	5.0	7.68	2,055,874	690,132	2,746,006	0.02
1998	21.7	15.4	37.1	225.9	0.0	225.9	0.16	2,141,268	708,959	2,850,227	0.81
1999	33.3	15.1	48.4	633.1	1.2	634.3	0.08	2,157,536	711,345	2,868,881	2.22
2000	45.1	19.2	64.3	30.8	1.3	32.1	2.00	2,301,604	752,756	3,054,360	0.11
2001	47.8	35.4	83.2	5.8	338.7	344.5	0.24	2,408,878	801,849	3,210,727	1.10
2002	84.0	23.8	107.8	443.5	1.0	444.5	0.24	2,527,948	860,351	3,388,299	1.35
2003	80.2	14.6	94.8	77.7	0.0	77.7	1.22	2,554,624	896,493	3,451,117	0.23
2004	95.3	8.9	104.2	5.0	0.0	5.0	20.88	2,672,397	951,316	3,623,713	0.01
2005	52.6	8.3	60.9	0.0	0.0	0.0	--	2,825,366	1,005,554	3,830,920	0.00
Totals/average: 1997 to 2005			**639.3**			**1,769.1**	**0.36**				**0.61**

[22] Data source upon which actuarial computations are based: FDIC, *Annual Report 2005*, at 109-110, 113-115. The RTC was responsible for the cost of all thrift closures prior to July 1, 1995. Some portion of the 1995 loss amount may have been chargeable to the RTC. No attempt was made to separate the insolvency loss chargeable to the RTC from the loss chargeable to the SAIF.