UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

October 10, 2023

Marc P. Berger, Esq.
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017-3954

Re: **M&T Bank Corporation - Waiver Request of Ineligible Issuer Status under Rule 405 of the Securities Act of 1933**

Dear Mr. Berger:

This is in response to your letter dated October 5, 2023, written on behalf of M&T Bank Corporation ("M&T"), requesting that M&T not be considered an "ineligible issuer" under clause (1)(vi) of the ineligible issuer definition in Rule 405 of the Securities Act of 1933 as a result of an October 10, 2023 Commission Order ("Order"), issued pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), against M&T subsidiary Wilmington Trust Investment Management, LLC ("WTIM"). The Order requires that, among other things, WTIM cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

M&T has made a showing of good cause and, assuming WTIM complies with the Order, we have determined pursuant to clause (2) of the ineligible issuer definition in Rule 405 that it is not necessary under the circumstances that M&T be considered an ineligible issuer by reason of the entry of the Order. Any different facts or circumstances from those represented in the letter or failure to comply with the terms of the Order would require us to revisit our determination and could constitute grounds to revoke or further condition this waiver of ineligible issuer status. The Commission reserves the right, in its sole discretion, to revoke or further condition this waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/ Michael P. Seaman

Michael P. Seaman
Chief Counsel
Division of Corporation Finance

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VIA E-MAIL

October 5, 2023

Re: Wilmington Trust Investment Management, LLC

Office of Enforcement Liaison
Division of Corporation Finance
U.S. Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Office of Enforcement Liaison:

We write on behalf of M&T Bank Corporation ("M&T") in connection with the resolution of the above-referenced investigation by the Division of Enforcement of the Securities and Exchange Commission (the "Commission"). Resolution of this matter has resulted in an Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order (hereinafter, the "Order") against Wilmington Trust Investment Management, LLC ("WTIM").

M&T is a publicly traded company listed on the New York Stock Exchange, is a reporting company under Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") and is currently qualified as a well-known seasoned issuer ("WKSI") as defined in Rule 405 of the Securities Act of 1933 ("Securities Act"). WTIM is a wholly-owned subsidiary of M&T and is registered with the Commission as an investment adviser.

M&T respectfully requests a waiver from the Division of Corporation Finance, acting pursuant to its delegated authority, or from the Commission itself, so that it is not deemed an "ineligible issuer" as this term is defined in Rule 405 of the Securities Act as a result of the Order. This is the first time that M&T has requested such a waiver. For the reasons set forth below, M&T believes that good cause exists to relieve M&T from any ineligible issuer status and accordingly requests that a waiver be granted.

BACKGROUND

WTIM and the Division of Enforcement have settled the above-referenced matter concerning share class selection in WTIM's Portfolio Architect Wrap Fee Program (the "Wrap Fee Program"). WTIM has consented to, solely for the purpose of proceedings brought by or on behalf of the Commission or to which the Commission is a party, the entry of the Order without admitting or denying the matters set forth in the Order (except as to the jurisdiction of the Commission and the subject matter of the proceeding).

The Order finds that WTIM violated its duty to seek best execution when it utilized funds and share classes with higher expense ratios when funds and share classes with lower expense ratios were available between February and August 2020. The higher expense ratio funds and share classes avoided transaction surcharges incurred by WTIM, but also increased costs to clients. The Order finds that WTIM failed to disclose in its ADV Brochure (the "Wrap Fee Program Brochure") the conflict of interest arising from this practice. In addition, the Order finds that WTIM failed to adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Investment Advisers Act of 1940 ("Advisers Act") and the rules thereunder in connection with its mutual fund share class selection practices.

The Order finds that, in connection with the issues described above, WTIM violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. The Order requires that WTIM cease and desist from committing or causing any violations or future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder and requires WTIM to pay disgorgement of $999,559, prejudgment interest of $77,588 and a civil penalty of $250,000 for a total of $1,327,147. WTIM, prior to entry of the Order, reimbursed clients for the increased costs they incurred.

DISCUSSION

A company that qualifies as a WKSI as defined in Rule 405 is eligible, among other things, to register securities for offer and sale under an "automatic shelf registration statement," as so defined, and to have the benefits of a streamlined registration process under the Securities Act. Similarly, the Securities Act rules permit an issuer to communicate with the market prior to filing a registration statement and to communicate more freely during registered offerings by using free-writing prospectuses."[1] Designation as an "ineligible issuer," however, would result in the loss of these benefits.

Pursuant to Rule 405 of the Securities Act, an issuer is an "ineligible issuer" if, among other things, "[w]ithin the past three years... the issuer or any entity that at the time was a subsidiary of the issuer was made the subject of any judicial or administrative decree or order arising out of a governmental action that (A) prohibits certain conduct or activities regarding, including future violations of, the anti-fraud provisions of the federal securities laws; (B) requires that the person cease and desist from violating the anti-fraud provisions of the federal securities laws; or (C) determines that the person violated the anti-fraud

[1] *See* Rules 163, 164, and 433 of the Securities Act.

provisions of the federal securities laws." Because WTIM, the entity named in the Order, is a subsidiary of M&T, M&T recognizes that entry of the Order renders M&T an "ineligible issuer" under Rule 405. However, Rule 405 also grants the Commission the authority to determine, "upon a showing of good cause that it is not necessary under the circumstances that the issuer be considered an ineligible issuer." The Commission has delegated the authority to grant waivers from ineligible issuer status to the Director of the Division of Corporation Finance.[2]

The Division of Corporation Finance has stated that, in connection with a request for a waiver from ineligible issuer status, it will review "the nature of the violation or conviction and whether it involved disclosure for which the issuer or any of its subsidiaries was responsible or calls into question the ability of the issuer to produce reliable disclosure currently and in the future. In addition, the Division of Corporation Finance will review whether the conduct involved a criminal conviction or scienter based violation, as opposed to a civil or administrative non-scienter based violation."[3] Each of these factors strongly weighs in favor of granting M&T's request for a waiver.

The Division of Corporation Finance has further stated that it considers the following three additional factors in determining whether to grant a waiver: (1) who was responsible for the violation and its duration; (2) remedial steps taken by the issuer; and (3) impact on the issuer if the waiver request is denied. Each of these additional factors further supports granting the requested waiver.[4]

Nature of the Violation

The conduct described in the Order involves WTIM's failure, with respect to a specific investment product, the Wrap Fee Program, to seek best execution in its share class selection practices, its failure to adequately disclose its related conflict of interest and deficiencies in its related compliance policies and procedures. While the Order relates to the adequacy of disclosures concerning share class selection practices, these disclosures involved WTIM, which does not issue securities, and were made to WTIM advisory clients, not to M&T investors. Accordingly, these disclosures did not pertain to any disclosures by M&T itself or by any M&T subsidiary that is an issuer, or occur in connection with any public offering of securities. Thus, the Order does not call into question the reliability of M&T's current or future disclosures.

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[2] 17 C.F.R. § 200.30-l(a)(10).

[3] *See* Securities and Exchange Commission, *Revised Statement on Well-Known Seasoned Issuer Waivers*, April 24, 2014, available at: https://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm.

[4] *Id.*

No Scienter-Based Violation

The Order does not involve any scienter-based violation by M&T, WTIM or any M&T subsidiary, and does not involve any parallel criminal proceeding. As such, M&T is not subject to the higher standard for showing good cause.

Responsibility for the Violation

The Order addresses a practice and the related disclosures of WTIM in connection with the selection of mutual fund share classes for clients in a specific investment product, the Wrap Fee Program. The conduct at issue relates specifically to WTIM's asset management business. WTIM believes that the disclosure deficiencies and duty of care failures at issue in the Order were primarily caused by insufficient communication between the business personnel that sit within WTIM's asset management business and the legal and compliance personnel that support that business. None of the personnel in WTIM's asset management business, including the respective legal and compliance personnel that support that business, are involved in M&T's disclosures as an issuer of securities or M&T's filings with the Commission. Instead, M&T's Corporate Finance and Controller functions, both of which report to the Chief Financial Officer, are responsible for M&T's disclosures as an issuer of securities and filings with the Commission.

Duration of the Violation

The conduct at issue in the Order occurred from February 2020 to August 2020, a period of approximately six months.

Remedial Steps Taken

M&T and WTIM voluntarily adopted substantial remedial measures with respect to the practices addressed in the Order.

A. Revised ADV Brochure

Before WTIM received notice in July 2020 of a SEC exam of WTIM, and prior to receiving an inquiry from the Division of Enforcement in October 2021, on June 30, 2020 WTIM amended its Wrap Fee Program Brochure to include enhanced disclosure regarding its conflict of interest in selecting funds, which includes clear language that WTIM has a conflict of interest in choosing share classes, that such conflict arises as a result of transaction fees, and that, as a result, WTIM does not always choose the most cost-effective share class. WTIM's determination to enhance its then-existing fund expense disclosures was made as a result of an internal review initiated in May 2020 by WTIM's compliance and legal teams after the fund and share class exchanges occurred and prior to the July 2020 exam and October 2021 inquiry from the Division of Enforcement on this issue.

B. Reimbursed Clients

Also in connection with the internal review conducted by WTIM's compliance and legal teams discussed above, WTIM determined to reimburse clients for any negative impact

that resulted from the conversions and exchanges into higher expense ratio funds and share classes. WTIM conducted a remediation for the six share class conversions and three fund exchanges in January and May 2021. Later, in connection with responding to the Division of Enforcement's October 2021 inquiry, WTIM reevaluated some of its remediation calculations and made additional reimbursements to make clients affected by the conversions and exchanges whole.

C. Ceased Operating Wrap Fee Program

In connection with a long-planned prior business decision, in June 2021, WTIM ceased serving as sponsor and manager of the Portfolio Architect Wrap Fee Program and the client accounts that were invested in that program were transferred to LPL Financial, LLC.

D. Enhanced Policies and Procedures

As discussed above, WTIM no longer manages the Portfolio Architect Wrap Fee Program. Even still, M&T has rebuilt certain operational policies and procedures related to the selection of mutual fund share classes. For example, M&T has enhanced its procedures to require the Manager Research team to contact each fund company on its internal Master List of Approved Vehicles on a quarterly basis to review and assess changes in available share classes.

In addition, M&T has implemented a periodic review of managed accounts to monitor for unsuitable share classes. Specifically, M&T's First Line Wealth Risk Management team conducts a comparison of client holdings in share classes of certain funds in order to identify share classes that have a higher expense ratio relative to the approved share class of the same fund. M&T also has an existing automatic control monitoring process, under which M&T's systems generate automatic alerts to Investment Advisors when potentially unsuitable funds are transferred in from another firm. M&T is currently working on a proposed enhancement to this process to include monitoring specifically for potentially unsuitable share classes.

E. Personnel Changes

In June 2022, M&T hired a new Chief Compliance Officer for M&T's four current registered investment advisers ("RIAs"). M&T has strengthened its Compliance program as it relates to the RIAs by modifying the roles and responsibilities of certain personnel. For example, the RIA Chief Compliance Officer role has been re-focused on core RIA functions and the RIA Chief Compliance Officer has been granted veto power over New Products and Services raised to the SIPSC, discussed in detail below. Additionally, regular touchpoints have been implemented between senior M&T compliance and legal personnel and the senior compliance and business personnel leading the RIAs to permit for more fluid communication between these groups.

Finally, the former Head of Product Management, whose primary job function was to oversee Portfolio Architect and who was a lead participant in the conversions and exchanges at issue in the Order, is no longer with the firm.

F. Created Senior Investment Products and Services Committee ("SIPSC")

A significant measure that has been put in place to prevent the recurrence of events like those at issue in the Order is the creation of the Senior Investment Products and Services Committee ("SIPSC"). The SIPSC is an operating committee formed for the purpose of providing oversight and management of the investment products, services, and strategies of the Wealth Management ("WM") and Institutional Client Services ("ICS") divisions, which encompass WTIM. Specifically, SIPSC is the formal governance body to review and approve new products and material product modifications when such products are ready for formal consideration. Membership consists of the Chief Fiduciary and Business Risk Officer for Wealth Management, the Senior Compliance Manager, the Head of Shared Services/Banking Services (operations), the Chief Information Officer, the Head of Equity and Non-Traditional Investments for Wealth Management, the Area Executive for Wealth Management, the Business Risk Officer for ICS, the Head of Global Capital Markets/ICS, the Deputy General Counsel for the Wealth and Institutional Services Division, the Head of Asset Management Product Development Oversight, the Head of Retirement and Institutional Custody, the Chief Investment Officer for Wealth Management and the Chief Fiduciary Risk Officer for Wealth Management.

The SIPSC's responsibilities include, among other things, reviewing potential conflicts of interest and ensuring appropriate disclosure through Form ADVs and appropriate supplemental or special disclosures for the investment products and services offered throughout WM/ICS as well as adherence to the newly enacted Wilmington Trust Investment Management Product Approval Policy ("Product Approval Policy"). The purpose of the Product Approval Policy is to appropriately manage the risks associated with creating new products and materially modifying existing products. Any change to a product that may negatively impact clients requires SIPSC approval.

G. Enhanced Regulatory Training

In 2021, as part of its annual compliance program, M&T enhanced the required training for all RIA investment professionals, including WTIM personnel. The enhancements to the training specifically address certain issues that presented in the course of the events at issue in the Order, including the importance of full and fair disclosure of conflicts of interest as well as the duty of care and duty of loyalty owed to clients. The enhanced training on conflicts of interest specifically addresses share class selection.

Impact on the Issuer if the Waiver Request is Denied

Were the Commission to deny M&T's request for a waiver, the impact on M&T would be a disproportionate hardship in light of the nature of the misconduct and could result in burdens and limitations on M&T that are not necessary for the public interest or the protection of investors.

M&T is a large, multi-state financial institution that relies on automatic shelf registration statements to conduct its ordinary course business transactions. The loss of M&T's status as an eligible issuer would reduce M&T's flexibility in raising capital, which

it relies on when considering its capital, liquidity and contingency planning, including with respect to conducting its operations and complying with certain banking regulations, including regulations relating to M&T's level of capital and liquidity, as described in the following paragraph.

M&T is regulated by the Board of Governors of the Federal Reserve ("FRB") as a Bank Holding Company ("BHC"), and its status as a WKSI is a significant factor in its capital and liquidity planning. As a BHC, M&T is subject to regulatory capital, liquidity and other requirements imposed by the FRB. These include, among other things, compliance with (i) minimum regulatory capital requirements, (ii) enhanced liquidity risk management requirements, including liquidity stress tests and a contingency funding plan, and (iii) requirements related to the financial strength of its insured depository institution subsidiary, M&T Bank.

M&T has made regular use of its WKSI status. Since November 2008, M&T has filed five automatic shelf registration statements (the two most recent of which registered an indeterminate number of securities) and twelve corresponding offerings. M&T has relied on automatic shelf registration for a variety of purposes, including the sale of stock issued to the United States Department of the Treasury, the registration of common stock issuable upon vesting or exercise of equity awards and the issuance of preferred stock, depository shares and fixed and floating rate notes.

These offerings have allowed M&T to quickly and efficiently raise funds for general corporate purposes and to redeem outstanding securities as well as to issue securities in connection with mergers and acquisitions. For example, most recently, M&T filed an automatic shelf registration statement on September 29, 2021 through which it registered common stock on April 4, 2022 in connection with M&T's acquisition of People's United Financial, Inc. and issued fixed rate/floating rate senior notes on August 10, 2022 and January 26, 2023 totaling $1.5 billion. Prior to that, M&T conducted offerings of depository shares on July 25, 2019 and August 12, 2021 under its October 1, 2018 automatic shelf registration, totaling $891 million. Through these offerings M&T has raised approximately $4 billion.

As an ineligible issuer, M&T would lose the flexibility (i) to file automatic shelf registration statements to register an indeterminate amount of securities, (ii) to offer additional securities of the classes covered by the registration statement without filing a new registration statement, (iii) to omit certain information from the prospectus, and (iv) to take advantage of the "pay-as-you-go" fees.

* * *

For the reasons above, M&T respectfully submits that good cause exists for the Commission to determine that M&T's classification as an "ineligible issuer" under Rule 405 is not necessary to serve the public interest, for the protection of investors, or for any other reason. Accordingly, M&T requests that the Division of Corporation Finance, acting pursuant to its delegated authority, or the Commission itself, grant a waiver of any ineligible issuer status with regard to M&T.

If you have any questions regarding any of the foregoing, please do not hesitate to contact me.

Respectfully submitted,

Marc P. Berger

cc: Oreste McClung, SEC Division of Enforcement
Mark Nelson, M&T Bank