



DIVISION OF
CORPORATION FINANCE

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

January 24, 2017

Amy Natterson Kroll, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Morgan Stanley Smith Barney LLC & Citigroup Global Markets, Inc.
**Morgan Stanley and Morgan Stanley Finance LLC – Waiver Request of Ineligible
Issuer Status under Rule 405 of the Securities Act**

Dear Ms. Kroll:

This is in response to your letter, dated January 17, 2017, written on behalf of Morgan Stanley (“MS”) and Morgan Stanley Finance LLC (“MSFL”) and constituting an application for relief from MS and MSFL being considered “ineligible issuer[s]” under clause (1)(vi) of the definition of ineligible issuer in Rule 405 of the Securities Act of 1933 (“Securities Act”). MS and MSFL request relief from being considered ineligible issuer(s) under Rule 405 due to the entry on January 24, 2017 of a Commission Order (“Order”) pursuant to Section 8A of the Securities Act against Morgan Stanley Smith Barney LLC (“MSSB”). The Order requires that, among other things, MSSB cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

Based on the facts and representations in your letter, and assuming MSSB complies with the Order, the Commission, pursuant to delegated authority, has determined that MS and MSFL have made a showing of good cause under clause (2) of the definition of ineligible issuer in Rule 405 and that MS and MSFL will not be considered ineligible issuers by reason of the entry of the Order. Accordingly, the relief described above from MS and MSFL being ineligible issuers under Rule 405 of the Securities Act is hereby granted. Any different facts from those represented or failure to comply with the terms of the Order would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

Sincerely,

/s/

Tim Henseler
Chief, Office of Enforcement Liaison
Division of Corporation Finance

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January 17, 2017

Timothy Henseler, Esq.
U.S. Securities and Exchange Commission
Division of Corporation Finance
100 F Street, N.E.
Washington, D.C. 20549

Re: In the Matter of Morgan Stanley Smith Barney LLC

Dear Mr. Henseler:



We are writing on behalf of Morgan Stanley ("Morgan Stanley") and Morgan Stanley Finance LLC ("MSFL") (collectively "MS") in connection with the settlement of the above-referenced administrative proceeding (the "Proceeding") of the Securities and Exchange Commission ("SEC" or "Commission") arising out of certain activities at Morgan Stanley's wholly-owned subsidiary, Morgan Stanley Smith Barney LLC ("MSSB").¹ The settlement will result in an Order Instituting Cease and Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 (the "Securities Act") Making Findings, and Imposing a Cease and Desist Order (the "Order").

Morgan Stanley is a publicly-traded company listed on the New York Stock Exchange ("NYSE") and is a reporting company under the Securities Exchange Act of 1934 ("Exchange Act"). Morgan Stanley qualifies as a "well-known seasoned issuer" ("WKSI") as defined in Rule 405 under the Securities Act. MSFL is a wholly-owned subsidiary of Morgan Stanley and securities issued by MSFL are fully and unconditionally guaranteed by Morgan Stanley. We respectfully request a waiver from the Division of Corporation Finance (the "Division"), acting pursuant to its delegated authority, or the Commission itself, determining that it is not necessary under the circumstances that MS would be an "ineligible issuer" as defined in Rule 405 under the Securities Act, as a result of the Commission entering the Order which is described below. Consistent with the framework outlined in the Division's *Revised Statement on Well-Known Seasoned Issuer Waivers* (April 24,

¹ During the relevant time period, Citigroup Global Markets, Inc. ("CGMI") held a 49% ownership interest in MSSB. CGMI no longer holds this ownership interest.

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2014) (the "Revised Statement"), there is good cause for the Division to grant the requested waiver, as discussed below.

We request that the determination that Morgan Stanley and MSFL are not ineligible issuers be made effective upon entry of the Order.

1. Background

MSSB has agreed to settle the matter as described below, and the staff of the Division of Enforcement ("Staff") has recommended that settlement to the Commission. Pursuant to this agreement and as reflected in an offer of settlement, MSSB will consent to the entry of the Order, which will be brought pursuant to Section 8A of the Securities Act.

In the Order, the Commission will find that three MSSB registered representatives presented to fifteen brokerage clients (the "Relevant Investors") in writing and orally a foreign exchange trading program called "CitiFX Alpha" (the "CitiFX Alpha Program"). The CitiFX Alpha Program was a foreign exchange program developed by CGMI and introduced to the MSSB registered representatives by CGMI prior to the period covered by the Order. The program was marketed in writing to the Relevant Investors using materials prepared by CGMI. The Order will state that the written materials and oral presentations used to pitch the CitiFX Alpha Program were materially misleading because they failed to adequately disclose that the Relevant Investors could be placed into the CitiFX Alpha Program using more leverage than was disclosed and that mark-ups would be charged on each trade. The Order will state that both the written and oral presentations focused on the CitiFX Alpha Program's past performance and risk metrics assuming that accounts would be fully collateralized (that is accounts in which the amount of collateral was equal to the notional amount being traded) and that no mark-ups would be charged on trades. The Order will further state that neither assumption was adequately disclosed to investors. The Order also will state that each of (a) the failure to adequately disclose that the past performance and risk metrics did not reflect the degree of leverage that the Relevant Investors actually would employ, which would have materially altered the disclosed performance and risk metrics, and (b) the failure to question the past performance upon which the CitiFX Alpha was pitched by not adequately disclosing that the stated performance figures were gross of mark-ups or adequately disclosing the amount of mark-ups, which would have materially altered the disclosed performance figures, resulted in the omission of material information necessary in order to make statements about CitiFX Alpha not misleading.

The Order will state that as a result of the conduct described in the Order, MSSB violated section 17(a)(2) of the Securities Act. MSSB will be ordered to (a) cease and desist from committing or causing any violations or any future violations of Section 17(a)(2) of the Securities Act and (b) pay disgorgement of \$624,458.27, prejudgment interest of \$89,277.34, and a civil money penalty in the amount of \$2,250,000.00 to the Commission.

2. Discussion

A WKSI is eligible to use many important reforms in the securities offering and communication processes that the Commission adopted in 2005. Among other things, a WKSI can register securities for offer and sale under an automatic shelf registration statement, which becomes

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effective upon filing and is also eligible for other benefits of the streamlined registration process, such as the ability to file automatically effective post-effective amendments to register additional securities and pay registration filing fees on a “pay as you go” basis. Furthermore, a WKSI is also able to communicate more freely than a non-WKSI during the offering process, including through the use of free writing prospectuses.

When an issuer becomes an “ineligible issuer” as defined in Rule 405 under the Securities Act, it no longer qualifies as a WKSI and as a result loses the benefits to which a WKSI is entitled including, but not limited to, the ability to use the automatic shelf registration statement and to use free writing prospectuses (except in very limited circumstances). An issuer is an ineligible issuer if, as would be relevant here, the issuer or an entity that at the time was a subsidiary of the issuer has been within three years the subject of an administrative decree or order arising out of a governmental action that requires the issuer or its subsidiary to cease and desist from violating the anti-fraud provisions of the federal securities laws or determines that the issuer or the issuer’s subsidiary violated the anti-fraud provisions of the federal securities laws.²

The entry of the Order against MSSB will cause MS to become an ineligible issuer under Rule 405. As a result, absent a waiver from disqualification, MS will lose its current status as a WKSI.

The Commission has the authority, both directly or pursuant to authority delegated to the Division, to determine “upon a showing of good cause that it is not necessary under the circumstance that the issuer be considered an ineligible issuer.”³ In the Revised Statement, the Division stated that it would consider the following factors in determining whether to grant a waiver:

- The nature of the violation 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;
- Whether the alleged misconduct involved a criminal conviction or scienter-based violation;
- Who was responsible for the misconduct and what was the duration of the misconduct;
- What remedial steps the issuer took; and
- The impact if the waiver request is denied.

For the reasons set forth below, we respectfully submit that there is good cause for the Commission, or the Division pursuant to delegated authority, to grant the waiver requested and determine that it is not necessary for the public interest or the protection of investors that MS be considered an ineligible issuer.

a. Nature of Violation and Whether the Violation Casts Doubt on the Ability of the Issuer to Produce Reliable Disclosures to Investors

² 17 CFR 230.405(1)(vi).

³ 17 CFR 230.405(2).

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As discussed above, the conduct described in the Order does not pertain to the disclosures provided by MS in documents filed with the Commission and provided to MS investors. Rather, the documents at issue were prepared by CGMI and were used by MSSB employees to market the CitiFX Alpha Program. Furthermore, the disclosures at issue in this Proceeding do not involve misstatements or omissions in MS's disclosures and do not call into question the reliability of MS's disclosures or its ability to produce reliable disclosures in the future. Rather, the findings in the Order are centered upon the negligence of three MSSB registered representatives in their use of written materials produced by CGMI, and in their oral statements pitching a single CGMI program that omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. There was no connection between the activities of the three MSSB registered representatives and disclosures prepared by either Morgan Stanley or MSFL and the three MSSB registered representatives were not and are not involved in the preparation of any MS disclosures.

b. The Order Is Not Criminal in Nature and Does Not Involve Scier-er-Based Fraud

The Order does not involve a criminal conviction and does not state that MSSB acted with scienter or intent to defraud. The Order will find violations of only Section 17(a)(2) of the Securities Act, a non-scienter-based anti-fraud provision of the federal securities laws. The Order also specifically will state that "[n]egligence is sufficient to establish a violation of Section 17(a)(2) of the Securities Act."

c. The Duration of the Misconduct and the Persons Responsible for the Misconduct

The Order will state that the violative conduct occurred over eleven (11) months, from August 2010 through July 2011.

The Commission does not charge in the Order any individuals associated with MSSB with violations in connection with the conduct underlying the Order and we understand that no such charges are forthcoming. As described above, three MSSB registered representatives participated in the pitches of the CitiFX Alpha Program to the Relevant Investors. These three MSSB registered representatives were not involved in the preparation of the CitiFX Alpha Program materials that are the subject of the Order. These MSSB registered representatives are not and were not members of MSSB's, Morgan Stanley's or MSFL's management and are not and were not involved in the preparation of Morgan Stanley's or MSFL's disclosures. Two of the three MSSB registered representatives no longer are employed by MSSB or in the Morgan Stanley family of entities.

d. Remedial Steps

By about March 2011, MSSB had received an inquiry from the Commodity Futures Trading Commission about eligible contract participant ("ECP") certifications for customers engaged in foreign exchange ("FX") activity. That inquiry prompted MSSB compliance to undertake a review to ensure that all customers who traded in FX had ECP certifications on file. Until that time, MSSB compliance was not aware of CitiFX Alpha or any similar FX products being sold within MSSB by CGMI. One of the customers in the ECP review was an MSSB registered representative who personally participated in the Citi FX Alpha Program and also had sold it to his clients. When he responded to MSSB compliance regarding the ECP certification, he stated that the recent FX

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activity related to the CitiFX Alpha Program, leading MSSB compliance to look further into the program.

Thereafter, MSSB required that each MSSB registered representative who had customers in the CitiFX Alpha Program contact their customers before every CitiFX Alpha trade and obtain the customers' approval of the trade. MSSB also initiated a review of the CitiFX Alpha Program with CGMI. For example, MSSB began a review of the written materials used to market the CitiFX Alpha Program to its customers and proposed revisions to the materials to conform with MSSB's internal disclosure standards. MSSB also began discussing with CGMI the documentation that would be required for an investor to participate in the CitiFX Alpha Program, and how the fees associated with the program would be charged. In or about October 2011, while CGMI was still considering these compliance enhancements, CGMI decided to stop offering the CitiFX Alpha program to MSSB customers. By that time, however, most of the Relevant Customers had already stopped participating in CitiFX Alpha.

Furthermore, the operational structure that historically provided CGMI's foreign exchange desk access to MSSB registered representatives no longer exists. During the relevant period, as a result of the joint venture between Morgan Stanley and Citigroup that created MSSB, CGMI cleared and settled all MSSB customer foreign exchange transactions. This arrangement provided certain CGMI employees with access to MSSB registered representatives to whom the CGMI employees introduced – initially unbeknownst to MSSB compliance – the CitiFX Alpha Program. Since no later than mid-2013, however, MSSB's customer foreign exchange activity has cleared and settled through Morgan Stanley, and CGMI personnel no longer interact with MSSB's registered representatives. Accordingly, CGMI's ability to sell a foreign exchange trading program like CitiFX Alpha to MSSB's registered representatives or customers has been eliminated.

The CitiFX Alpha Program did not undergo MSSB review and approval. Rather, as a result of the joint venture, during the relevant period, certain CGMI employees had direct access to MSSB FAs, and introduced the CitiFX Alpha Program directly to MSSB FAs and, with and through them, to MSSB clients. These conditions no longer exist. All products proposed to be offered through MSSB must undergo a new product approval process. The MSSB new product approval process is administered by the MSSB Global Product Committee ("GPC"), which is a risk committee. The GPC approval process includes a determination that a new product, service or offering proposed to be offered through MSSB: (1) represents a compelling investment opportunity for MSSB clients, (2) is one in which MSSB clients are capable of understanding the risks and rewards, (3) is supported by an internal control framework sufficient to ensure that only suitable clients are solicited to invest in the product, (4) can be fully operationally supported by the MSSB processing and other systems, and (5) meets all regulatory and legal requirements.

e. *Previous Actions*

Morgan Stanley has previously been granted waivers regarding its WCSI status in the following instances:

- *In the Matter of Morgan Stanley Smith Barney, LLC* (January 13, 2017), related to errors by MSSB in advisory client fee billing, custody examination violations, and books and records violations.

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- *In the Matter of Morgan Stanley Investment Management, Inc. and Sheila Huang* (December 22, 2015) related to a series of unlawful prearranged trades by a portfolio manager/trader formerly employed by Morgan Stanley Investment Management, Inc. ("MSIM").
- *In the Matter of Morgan Stanley & Co. LLC* (June 18, 2015) related to the failure by Morgan Stanley & Co. LLC ("MS&Co.") to conduct adequate due diligence on certain municipal securities offerings in connection with the Municipalities Continuing Disclosure Cooperation Initiative. This matter was self-reported to the Commission and the settlement involved 36 underwriters.
- *In the Matter of Morgan Stanley & Co. LLC; Morgan Stanley ABS Capital I Inc.; and Morgan Stanley Mortgage Capital Holdings LLC* (July 24, 2014) related to understatements of current and/or historically delinquent loans collateralizing two subprime residential mortgage-backed securities offerings in which MS&Co. acted as underwriter, Morgan Stanley ABS Capital I Inc. acted as depositor and Morgan Stanley Mortgage Capital Holdings LLC acted as sponsor.
- *In the Matter of Morgan Stanley Investment Management, Inc.* (Nov. 16, 2011) related to conduct by MSIM in connection with the investment advisory fees charged to a particular fund by the fund's Malaysian sub-adviser and representations made to investors and the fund's board of directors regarding the nature of the services provided by the sub-adviser. MSIM served as the primary investment adviser to the fund.
- *In the Matter of Morgan Stanley & Co. Incorporated* (July 20, 2009) related to conduct by Morgan Stanley & Co. Incorporated in connection with recommendations to certain advisory clients of certain money managers who were not on a pre-approved list of money managers, contrary to the procedures described in disclosure materials provided to clients, failing to disclose the conflicts of interest associated with such recommendations, failing to supervise a financial adviser involved in such violations and failing to maintain certain books and records.
- *In the Matter of Morgan Stanley & Co. Incorporated* (May 11, 2007) related to conduct by Morgan Stanley & Co. Incorporated in connection with best execution owed to retail customers on over-the-counter orders.

The conduct that was the subject of the above referenced waiver requests and the conduct that is the subject of the Order do not relate to MS's conduct as an issuer of securities and do not call into question MS's ability to make accurate and reliable disclosures. Further, there is no relationship between the CitiFX Alpha Program and the manner in which it was pitched to the Relevant Investors and any of the actions underlying the waiver requests listed above. Lastly, Morgan Stanley and its affiliates have taken the remedial steps described above, related to the conduct described in the Order, to help prevent such conduct from recurring.

f. *Impact on Morgan Stanley if the Request Is Denied*

Given that the conduct attributed to MSSB in the Order was of limited duration (eleven months) and involved the marketing of a single program to fifteen Relevant Investors by three MSSB registered representatives, we respectfully submit that the impact of MS being designated an ineligible issuer, resulting in the loss of WKSI status for MS, would be unduly severe.

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Morgan Stanley is a global financial institution that relies on automatic shelf registration statements to conduct its day-to-day business transactions, including frequent offers and sales under automatic shelf registration statements. For Morgan Stanley, the automatic shelf registration process provides a critical means of access to the capital markets, which is an essential source of funding for its global operations, in a timely and efficient manner. In addition, many Morgan Stanley institutional and retail clients seek to purchase investment products that are structured to meet the specific investment goals of those clients. These structured products are securities issued by MS and are often sold in offerings registered with the SEC using Morgan Stanley's automatic shelf registration statement, as described further below. Consequently, the ability to avail itself of automatic shelf registration and the other benefits available to a WKSI is extremely important to MS's ability to raise capital, conduct its operations and operate client-facing businesses.

As an ineligible issuer, MS would, among other things, lose the ability to:

- file automatic shelf registration statements to register an indeterminate amount of securities;
- offer additional securities of the classes covered by a registration statement without filing a new registration statement;
- allow Morgan Stanley to include certain information omitted from the registration statement at the time of effectiveness through the filing of prospectus supplements or incorporated Exchange Act reports;
- take advantage of the "pay as you go" filing fee payment process;
- qualify a new indenture under the Trust Indenture Act of 1939, if needed, without filing or having the Commission declare effective a new registration statement; and
- use free writing prospectuses other than one that contains only a description of the terms of the offered securities or the offering itself.

Morgan Stanley currently has on file an automatic shelf registration statement on Form S-3 that registers indeterminate amounts of multiple classes of securities. As described above, Morgan Stanley amended its registration statement in February 2016, to add MSFL as an issuer. Securities issued by MSFL are fully and unconditionally guaranteed by Morgan Stanley. For the period from June 1, 2014 to May 31, 2016, MS, including securities offered by Morgan Stanley and MSFL, priced approximately 1,165 securities offerings under its automatic shelf registration statement, with a total principal amount of approximately \$55,252,568,000.⁴ MS uses its automatic shelf registration statement to offer and sell three principal categories of securities.

- First, Morgan Stanley issues securities to meet its regulatory capital requirements, such as preferred stock and subordinated debt. For the period from June 1, 2014 to May 31, 2016, approximately 5 offerings, with a total principal amount of approximately \$7,388,455,000 were conducted pursuant to the automatic shelf registration statement.⁵

⁴ Morgan Stanley priced approximately 1,101 securities offerings with a total principal amount of approximately \$54,994,814,000 and MSFL priced approximately 64 securities offerings with a total principal amount of approximately \$257,754,000.

⁵ MSFL did not offer any securities to meet regulatory capital requirements.

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- Second, MS issues senior debt securities with a fixed or floating rate of interest. For the period from June 1, 2014 to May 31, 2016, approximately 61 offerings, with a total principal amount of approximately \$41,769,447,000, were conducted pursuant to the automatic shelf registration statement, including offerings by both Morgan Stanley and MSFL.
- Finally, MS issues a variety of structured products linked to the performance of different underlying assets and sells them to its clients and through third-party dealer relationships. These structured products include: market-linked notes (which provide investors with a market-based return in addition to the return of par or some other guaranteed amount); leveraged performance investments (which provide enhanced returns relative to an underlying asset's actual return); enhanced yield investments (which may provide current income derived from taking a view on an underlying asset); and access investments (which provide exposure to the returns of less-accessible sectors, asset classes or investment strategies). For the period from June 1, 2014 to May 31, 2016, approximately 1,099 offerings, with a total principal amount of approximately \$6,094,666,000, were conducted pursuant to the automatic shelf registration statement, including securities offered by Morgan Stanley and MSFL.

The vast majority of these securities offerings used a free writing prospectus as one of the offering documents. The ability to use free writing prospectuses enables MS to communicate more freely with its prospective investors and provide them with important information needed for an informed investment decision. For example, many of the free writing prospectuses used by MS in its offerings are investor education materials. MS would be at a disadvantage compared to other issuers if it were unable to use these types of communications, which have become commonplace following the securities offering reforms adopted by the Commission in 2005. For example, if MS was unable to use certain free writing prospectuses, certain third-party dealers may refuse to sell its structured notes due to their marketing documentation requirements.

Accordingly, certain MS lines of business would encounter significant difficulty if the benefits of WKSI status described above became unavailable. The ability to avail itself of these benefits is extremely important to MS's ability to raise capital efficiently and conduct its operations. As noted, these WKSI benefits are also important to a number of MS's investment client-facing businesses as it allows them to efficiently offer structured products and provide educational materials to investors about their terms, in the same manner as other peers in these markets. Denial of this request would hinder necessary access to the capital markets and these client-facing investment markets by significantly increasing the time, labor, and cost of such access, a result that would be inequitable to its shareholders and its clients.

3. Conclusion

We believe that the granting of the waiver requested here is merited because the Order does not find any misconduct relating to Morgan Stanley's financial statements, to any disclosure by MS, or to any statements in any of MS's filings with the Commission. The Order does not find violations of scienter-based anti-fraud provisions or involve criminal conduct. MSSB undertook remedial efforts immediately after its compliance department learned of the CitiFX Alpha Program, which included efforts to revise the offering materials, enhancements to the controls over the placement of trades

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for customers, and initiation of discussions with CGMI that ultimately led CGMI to stop offering the program to MSSB customers. In light of these considerations, we believe that subjecting MS to ineligible issuer status is not necessary to serve the public interest or for the protection of investors.

Accordingly, we respectfully request that the Commission, or the Division pursuant to delegated authority on behalf of the Commission, make the determination that there is good cause for MS not to be considered an ineligible issuer as a result of the Order.

If you have any questions regarding any of the foregoing, please do not hesitate to contact me at 202.739.5746.

Sincerely,

A handwritten signature in blue ink that reads "Amy Natterson Kroll". The signature is written in a cursive, flowing style.

Amy Natterson Kroll

ANK