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By Email

Timothy Henseler, Esq.
Chief, Office of Enforcement Liaison
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 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 Morgan Stanley Smith Barney LLC's ("MSSB") anticipated settlement with the United States Securities and Exchange Commission ("SEC" or "Commission") relating to *In the Matter of Morgan Stanley Smith Barney LLC*. The settlement will result in an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 15(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Section 203(e) and 203(k) of the Investment Advisers Act of 1940 (the "Advisers Act"), Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the "Order") against MSSB.

Morgan Stanley is a publicly traded company listed on the New York Stock Exchange and is a reporting company under the Exchange Act. Morgan Stanley qualifies as a "well-known seasoned issuer" ("WKSI") as defined in Rule 405 under the Securities Act of 1933 ("Securities Act"). MSFL is a wholly-owned finance 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 considered 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, 2014) ("Revised Statement"), there is good cause for the Division, on behalf of the Commission, or the Commission itself to grant the requested waiver, as discussed below.

We request that the determination that MS not be considered an ineligible issuer be made effective upon entry of the Order.

I. BACKGROUND

MSSB expects to submit an Offer of Settlement that will agree to the entry of the Order (without admitting or denying the findings), which will be presented by the staff to the Commission.

MSSB is dually registered with the Commission as a broker-dealer and investment adviser. MSSB is a wholly owned indirect subsidiary of Morgan Stanley. MSSB is a sponsor of wrap fee programs in which retail clients can select one or more third-party sub-advisers ("wrap managers") to make investment decisions in the clients' accounts.

The Order will arise in connection with certain information describing MSSB's wrap fee programs to advisory clients and MSSB's policies and procedures related to trades not executed at MSSB. Specifically, the Order will arise in connection with the information provided regarding the wrap fee charged by MSSB when trades are directed by the wrap managers away from MSSB. In order to meet best execution obligations, wrap managers may "trade away" from MSSB. The Order will find that from at least October 2012 until June 2017, MSSB provided incomplete and inaccurate information indicating that MSSB executed most client trades and that, while additional transaction-based costs were possible, clients did not actually incur them in the ordinary course. The SEC found that this information was misleading for certain retail clients because some wrap managers directed most, and sometimes all, client trades to third-party broker-dealers for execution, which resulted in certain clients paying transaction-based charges that were not visible to them. The Order will also find that, on occasion, wrap managers directed trades to MSSB-affiliated broker-dealers in which clients incurred transaction-based charges in violation of MSSB's affiliate trading policies without detection by MSSB.

The Order will find that MSSB willfully violated Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder. Without admitting or denying the findings in the Order, except as to the Commission's jurisdiction over MSSB and the subject matter of the proceeding, MSSB will consent to the issuance of the Order and to (i) 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, (ii) be censured, and (iii) pay a civil money penalty in the amount of $5 million.

II. DISCUSSION

A WKSI is eligible to utilize 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 effective upon filing and is also eligible for the 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 non-term sheet free writing prospectuses.

The Commission also created another category of issuer under Rule 405 – the "ineligible issuer." A company that is an "ineligible issuer" loses all of the benefits bestowed on a WKSI, including, and most importantly, the ability to utilize an automatic shelf registration statement and to use free writing prospectuses (except in very limited circumstances). An issuer is an ineligible issuer if "[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 provisions of the federal securities laws."[1]

The entry of the Order against MSSB will render MS an ineligible issuer under Rule 405. As a result, absent a waiver from the disqualification, MS would no longer be able to utilize the benefits of WKSI status.

The Commission retains the authority under Rule 405 to determine "upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer."[2] The Commission has delegated the authority to the Division to make such a determination.[3] In the Revised Statement, the Division stated that it will 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 misconduct involved a criminal conviction or scienter-based violation;

- who was responsible for the misconduct and what was the duration of the misconduct;

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[1] 17 C.F.R. 230.405(1)(vi).

[2] 17 C.F.R. 230.405(2).

[3] 17 C.F.R. § 200.30-1(a)(10).

- 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 Division to grant the waiver 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 the Violation and Whether the Violation Casts Doubt on the Ability of the Issuer to Produce Reliable Disclosures to Investors

The conduct described in the Order does not pertain to any disclosures provided by MS in documents filed with the Commission, does not pertain to activities undertaken by MS in connection with its role as an issuer of securities (or any disclosure related thereto) or involve fraud in connection with MS's offerings of securities. Furthermore, the conduct does not involve any intentional misconduct by MS or MSSB. Rather, the conduct described in the Order that gives rise to the ineligibility relates only to MSSB – a subsidiary of Morgan Stanley – not to MS itself, and arises out of MSSB's marketing and client communications regarding certain aspects of its third-party manager wrap fee programs. None of the conduct described in the Order relates in any way to MS's current or future disclosures as an issuer of securities. As the Order provides, MSSB permits wrap managers to "trade away" from MSSB to seek best execution for the trades. As discussed above, the Order will find that the information regarding the trade execution services provided by MSSB and the transaction-based execution costs incurred by clients in wrap fee program accounts, which was communicated through various means, indicated that MSSB executed most client trades and that, while additional transaction-based costs were possible, clients did not actually incur them in the ordinary course. The Order will find that this information was misleading for certain retail clients because some wrap managers directed most, and sometimes all, client trades to third-party broker-dealers for execution, which resulted in certain clients paying transaction-based charges that were not visible to them. Accordingly, the Order will find that, although MSSB's Form ADV Wrap Fee Program Brochure and client agreements stated that the wrap fee did not cover certain costs, such as brokerage commissions incurred for trades not executed through MSSB, MSSB did not disclose that these additional costs would not be visible to the wrap fee program client on the client's account documents. The Order will also find that, on occasion, wrap managers directed trades to MSSB-affiliated broker-dealers in which clients incurred transaction-based charges in violation of MSSB's affiliate trading policies without detection by MSSB.

The violations at issue in the Order will pertain to MSSB's marketing and client communications to certain clients of MSSB's retail wrap fee program and MSSB's failure to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act in connection with trading away. There is no connection between the

activities of MSSB described in the Order and disclosures prepared by MS as an issuer of securities or in its filings with the Commission.

When Morgan Stanley issues securities in registered offerings, including for the purposes of satisfying regulatory capital requirements or addressing funding needs, Morgan Stanley utilizes its WKSI shelf registration statement. When Morgan Stanley conducts a shelf takedown in such an instance, upon receipt of various internal approvals, it utilizes a lead underwriter (either Morgan Stanley & Co. LLC ("MS & Co.") or, in the case of shelf takedowns that are settled through Euroclear and Clearstream, Luxembourg, Morgan Stanley & Co. International plc ("MSIP")) for the offering. Morgan Stanley (as issuer) and the lead underwriter are each always represented by separate outside counsel in syndicated registered offerings,[4] even though MS & Co. and MSIP are affiliates of Morgan Stanley.[5] Both issuer's and underwriter's counsel assist the issuer and the underwriter(s) with the transaction, including from a disclosure perspective (including prospectus preparation and due diligence and typically including the delivery of disclosure opinions) and a contractual perspective (including underwriting or distribution agreement preparation and delivery of required enforceability and validity opinions). MS's outside auditors also review the applicable documentation and deliver a customary comfort letter pursuant to applicable accounting standards.

The federal securities laws do not explicitly require an issuer and underwriter to be separately represented by outside counsel, that outside counsel be closely involved in prospectus preparation, due diligence, delivery of disclosure opinions and preparation of underwriting or distribution agreements, that required validity and tax opinions be delivered by outside counsel, or that comfort letters be delivered; however, Morgan Stanley has implemented such processes – even where the lead underwriter is an affiliate of Morgan Stanley – because it believes they are prudent practices to ensure that Morgan Stanley's disclosures and its offering procedures and practices are in compliance with the federal securities laws.

Likewise, when MS issues structured products in registered offerings, it utilizes its WKSI shelf registration statement. When MS issues structured products in such instances, it typically utilizes MS & Co. as the underwriter for the offering. MS is always represented by outside counsel and such counsel assists both MS and MS & Co. with the transaction, including from a disclosure perspective. Outside counsel provide required enforceability, validity and tax opinions for each transaction. In order to conduct such an offering, MS must obtain various internal approvals.

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[4] When Morgan Stanley issues registered securities, it typically does so in syndicated offerings, with the exception of structured products (which are described below).

[5] For non-syndicated registered offerings, Morgan Stanley and its underwriter (MS & Co. or MSIP) are represented by the same outside counsel.

MS uses free writing prospectuses in connection with all of the types of offerings described above. As is the case with the other offering documents, all such free writing prospectuses are reviewed by outside counsel, in addition to being reviewed by or on behalf of various groups within MS. To the extent that any free writing prospectus is a "retail communication" subject to the Financial Industry Regulatory Authority's communications rules, such free writing prospectus will also be prepared and used in accordance with such rules (including the requirements related to principal review and approval).

MS's WKSI shelf registration statement incorporates by reference Morgan Stanley's most recent annual report on Form 10-K and its current and periodic reports. As required by SEC rules, MS has established and maintains a system of disclosure controls and procedures designed to ensure that it is able to timely record, process, summarize and report information (financial and otherwise) required in its public reports and communicates this information to management. Further to these controls and procedures, MS has established a committee comprised of senior MS personnel responsible for significant disclosure and control areas and for oversight of the accuracy and timeliness of the disclosures made by MS in its public reports filed with the SEC. External attendees also include MS's independent auditors and, in furtherance of Morgan Stanley's due diligence efforts and best practices, outside disclosure counsel, and designated underwriters' counsel is invited to review drafts of Morgan Stanley's periodic reports and participate in certain drafting sessions. Among other responsibilities, this committee and other senior officers responsible for disclosure and control areas help determine disclosure obligations on a timely basis. The committee also reviews MS's disclosure controls and procedures on a quarterly basis to determine the effectiveness thereof. MS also has implemented other processes to assist it and its officers with its certification and disclosure requirements, including receipt of "back-up" certifications. Such disclosure controls and procedures were not implicated in any way in the processes by which MSSB's marketing and client communications are prepared and distributed.

Morgan Stanley respectfully submits that it has robust and disciplined processes, including processes related to compliance, governance and the drafting of current and periodic reports, surrounding its offerings and issuances of securities under its WKSI shelf registration statement and otherwise. In consultation with outside counsel, Morgan Stanley has designed its securities offering procedures not only to comply with the federal securities laws but to be what Morgan Stanley believes to be among the best of the major financial services companies in the U.S. Furthermore, for a period of three years following the date of the Order, MS will conduct a quarterly standing due diligence call between members of MS's legal and finance team, its issuer's counsel and its designated underwriter's counsel in connection with any MS shelf registration statement under which securities may be offered to the public, even if no securities offerings are contemplated for the quarter. MS will also engage its designated underwriters' counsel to review and comment on MS's disclosure controls and procedures on an annual basis, with a view to comparing MS's controls and procedures to market best practices. MS will also

engage its designated underwriters' counsel to review and comment on MS's offering policies and procedures on an annual basis, with a view to comparing MS's policies and procedures to market best practices.

None of the conduct described in the Order relates to MS's offering process, MS's disclosure controls and procedures or disclosures made by MS as an issuer of securities, and therefore should not implicate in any way the ability of MS to issue reliable disclosures to investors going forward.

B. The Order Is Not Criminal in Nature and Does Not Involve Scienter-Based Fraud

The Revised Statement indicates that the Division "will review whether the conduct involved a criminal conviction or scienter-based violation as opposed to a civil or administrative non-scienter based violation." The Order does not involve a criminal conviction and does not state that MSSB acted with scienter or intent to defraud. In particular, the violations found in the Order, which trigger disqualification, are Section 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which are non-scienter based anti-fraud provisions.

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

The Commission has not charged any individuals associated with MSSB with violations in connection with the conduct underlying the Order, and we understand that no such charges are forthcoming. Rather, the Order will find that MSSB provided incomplete and inaccurate information in connection with MSSB's retail wrap fee program to certain advisory clients regarding the trade execution services provided by MSSB and the transaction-based execution costs incurred by clients from at least October 2012 through June 2017, and that MSSB failed to adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act. The line of business responsible for the conduct described in the Order was separate and apart from the line of business responsible for the preparation of MS's public company disclosures.

Furthermore, certain improvements were made to the disclosures and practices related to trading away during such time. For example:

- In 2015, MSSB updated its Form ADV to include a prominent and lengthy new disclosure regarding managers who trade away more frequently, and the potential for additional, related costs.

- In 2015, MSSB updated its Single Advisory Contract to supplement the then-existing disclosures regarding trading away, and, in particular, to further inform customers that costs charged by third-party broker-dealers for trading away were not covered by the wrap fee.

- In 2015, MSSB implemented a new practice to collect information regarding trading away practices and, in particular, asked its wrap managers to provide information including:
  - The dollar-weighted percentage of the trades that the manager traded away from MSSB;
  - The types of additional costs incurred by MSSB client for trading away;
  - The average or a range of the additional costs incurred when trading away; and
  - The reasons why the manager decided to trade away.

- In December 2015, based on the information that MSSB collected from the wrap managers, MSSB published its first Annual Investment Strategy Step-Out Disclosure on its website, which included a chart that reported the dollar-weighted percentages that wrap managers traded away and included enhanced disclosures similar to its Form ADV.

As more fully described below and as described in the Order, MSSB has also continued to take extensive remedial efforts in connection with the conduct discussed in the Order.

D. Remedial Steps

As noted by the Commission in the Order, MSSB has taken remedial steps to address the conduct at issue in the Order. Specifically, MSSB has implemented the following substantial and extensive remedial actions:

- Enhanced its Form ADV and client agreements regarding trading away and the associated costs;

- Required its wrap managers to report to it the dollar-weighted percentage of the trades that the manager executed away from MSSB and the average cost associated with these trades;

- Placed on its website a chart that reflects the information reported by its wrap managers regarding the dollar-weighted percentage of the trades that wrap managers executed away from MSSB and the average cost associated with these trades;

- Enhanced its account statements and trade confirmations to: (1) reflect when a trade is a "step-out trade;" (2) include language that explains to clients that when a trade is marked as a "step-out trade," the client may have been assessed trading related costs by another broker-dealer, which are in addition to the wrap fee; and

(3) direct clients to MSSB's Annual Investment Strategy Step-Out Disclosure to obtain additional information;

- Implemented training for its financial advisors ("FAs") regarding trading away by wrap managers and the associated costs and has instructed FAs that they "are responsible for helping the client understand how step outs can affect their fees . . . [and] should consider his or her suitability review and the additional trading costs that a client may potentially incur when recommending a strategy that steps out more frequently;"

- Enhanced its affiliate trading policies and procedures and refunded to clients the transaction-based charges paid to MSSB's affiliates as a result of wrap managers trading with MSSB affiliates in violation of MSSB's policies;

- Sent to current clients information describing trading away frequency and associated costs and has notified clients that they can contact their FA for more information regarding the costs incurred by the client;

- Has adopted and is implementing written policies and procedures to provide information to new clients at account opening regarding trading away frequency and average costs; and

- Has adopted and is implementing written policies and procedures to review all communications with clients and prospective clients to ensure that statements in such communications related to trade execution services rendered by MSSB and costs incurred by clients are accurate for all clients regardless of the wrap manager or investment strategy selected by the client.

MSSB thus has taken concrete and substantial steps to remediate the conduct at issue in the Order. The steps are designed to enhance MSSB's overall retail wrap fee program going forward.

E. Previous Actions

MSFL and/or Morgan Stanley have previously been granted waivers regarding their WKSI status in the following instances; however, none of the previously granted WKSI waivers related, in any way, to MS's public company disclosures, named MS as the respondent or involved MS's disclosure controls and procedures. The conduct that was the subject of the below waiver requests and the conduct in this matter do not relate to MS's conduct as an issuer of securities, do not call into question MS's ability to make accurate and reliable disclosures and do not indicate a culture issue at MS. As discussed below, the majority of the actions for which waivers were granted related to MSSB's or Morgan Stanley & Co. Incorporated's retail broker-

dealer business and involved narrow, discrete compliance issues that were identified and remediated. Likewise, more than half of the below-referenced waiver requests involve conduct that occurred between eight and 16 years ago. Further, there is no relationship between the conduct in this matter and any of the actions underlying the below waiver requests. Lastly, MSSB has taken substantial and extensive remedial steps related to the conduct described in the Order to help prevent such conduct from recurring.

- *In the Matter of Morgan Stanley Smith Barney LLC* (November 7, 2019) related to certain retirement plan and charitable organization brokerage customers in which MSSB recommended and sold such customers more expensive share classes when less expensive share classes were available, contrary to MSSB's representations to such customers. As detailed in the order, MSSB had developed and implemented an automated share class selection system that was incorporated into Morgan Stanley's and later MSSB's order entry system; however, it contained three errors. The Commission's order noted that MSSB promptly undertook remedial acts in connection with the conduct in the order.

- *In the Matter of Morgan Stanley Smith Barney, LLC* (June 29, 2018) related to MSSB's failure to adopt policies and procedures reasonably designed to prevent MSSB personnel, and in particular one FA, from misusing and misappropriating funds in client accounts. As detailed in the order, upon receipt of an inquiry from one of the FA's clients, MSSB promptly conducted an internal investigation, terminated the FA and reported the conduct to the SEC and other law enforcement agencies. The order noted that MSSB had developed significant enhancements to its policies, procedures, systems and controls related to the conduct at issue in the order and also agreed, in connection with the order, to complete certain additional undertakings.

- *In the Matter of Morgan Stanley Smith Barney, LLC* (February 14, 2017) related to MSSB's solicitation of advisory clients to purchase certain single-inverse exchange traded funds without adequately implementing MSSB's written compliance policies and procedures designed to prevent violations of the Advisers Act. In connection with the conduct at issue in the order, MSSB implemented a number of remedial actions over time and ultimately prohibited FAs from soliciting purchases of single-inverse ETFs in clients' non-discretionary advisory accounts.

- *In the Matter of Morgan Stanley Smith Barney, LLC* (January 24, 2017) related to MSSB's failure to adequately disclose to investors material information about a foreign exchange trading program. The conduct at issue in the order was for a limited duration – less than one year, involved only 15 investors and related to a

foreign exchange trading program developed by another firm, which formerly owned 49% of MSSB. After initiating a compliance department review of the trading program, MSSB placed restrictions on the program, and ultimately no new investors enrolled in the program after July 2011. MSSB has also implemented a robust new product approval process, which is intended to prevent conduct such as that cited in the order from recurring.

- *In the Matter of Morgan Stanley Smith Barney, LLC* (January 13, 2017) related to MSSB's inadvertent errors in advisory client fee billing, failure to obtain annual surprise custody examinations, and failure to maintain signed client contracts. The conduct at issue in the order was primarily due to coding and other errors in billing systems and processes and the majority of the errors were identified and remediated by MSSB through its own internal compliance, audit and business-as-usual testing and practices. MSSB also took substantial remedial steps, on its own initiative, to address the conduct at issue in the order, and also agreed to take additional extensive remedial steps in connection with the undertakings outlined in the order.

- *In the Matter of Morgan Stanley Investment Management, Inc. and Sheila Huang* (Dec. 22, 2015) related to a series of unlawful prearranged trades conducted by one portfolio manager/trader formerly employed by Morgan Stanley Investment Management, Inc. ("MSIM"). The conduct at issue in the order occurred over a short period of time – from December 2011 until March 2012 – and involved six sets of trades. The order noted that it considered the remedial acts promptly undertaken by MSIM and, in particular, that MSIM had enhanced its policies, procedures, controls and training, voluntarily retained a compliance consultant and assisted the Commission's staff in its investigation.

- *In the Matter of Morgan Stanley & Co. LLC* (June 18, 2015) related to the failure by 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. An omnibus waiver was granted by the Commission in connection with the self-reporting initiative.

- *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. The conduct

at issue in the order involved transactions that closed in September 2007 – over 12 years ago – and the applicable entities implemented substantial remedial actions related to such conduct.

- *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. The conduct at issue in the order ended in late 2007 – over 12 years ago. In connection with the order, MSIM agreed to implement and maintain policies and procedures governing the conduct in the order and its oversight of advisers and sub-advisers, principal underwriters, administrators, and transfer agents that met certain enumerated criteria.

- *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 FA involved in such violations and failing to maintain certain books and records. The conduct at issue in the order was limited to clients of one branch office and involved the actions of one FA in such office. Furthermore, the conduct at issue in the order ended in April 2006 – almost 14 years ago – and, as noted in the order, Morgan Stanley & Co. Incorporated took remedial steps to address the conduct in the order.

- *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 at issue in the order ended in December 2004 – over 15 years ago – and resulted from errors in the coding of Morgan Stanley & Co. Incorporated's then-new market making system. As noted in the order, Morgan Stanley & Co. Incorporated took remedial actions, including instituting an internal investigation after discovering the errors in the system and enhancing its supervision and controls over the applicable trading technology.

- *In the Matter of Certain Auction Practices* (May 31, 2006) related to conduct by Morgan Stanley & Co. Incorporated and Morgan Stanley DW Inc. and 14 other firms in connection with auction rate securities. The conduct at issue in the order

ended in June 2004 – almost 16 years ago – and, as noted in the order, Morgan Stanley & Co. Incorporated and Morgan Stanley DW Inc. promptly undertook remedial actions in connection with the conduct at issue in the order.

F. Impact on Issuer if Request is Denied

The Division's Revised Statement indicates that it will "assess whether the loss of WKSI status would be a disproportionate hardship in light of the nature of the issuer's conduct." Given the conduct attributed to MSSB in the Order, 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.

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 January 1, 2017 to December 31, 2019, MS, including securities offered by Morgan Stanley and MSFL, priced approximately 3,711 securities offerings under its automatic shelf registration statement, with a total principal amount of approximately $70,815,276,776.74. MS uses its automatic shelf registration statement to offer and sell three principal categories of securities.[6]

- First, Morgan Stanley issues securities to meet its regulatory capital requirements, such as preferred stock and subordinated debt. For the period from January 1, 2017 to December 31, 2019, two offerings, with a total principal amount of $1,500,000,000.00, were conducted pursuant to the automatic shelf registration statement.[7]

- Second, MS issues senior debt securities with a fixed and/or floating rate of interest. For the period from January 1, 2017 to December 31, 2019, approximately 32 offerings, with a total principal amount of approximately $54,002,671,600.00, 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 January 1, 2017 to December 31, 2019, approximately 3,677 offerings, with a total principal amount of approximately $15,312,605,176.74, were conducted pursuant to the automatic shelf registration statement, including securities offered by Morgan Stanley and MSFL.

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[6] Morgan Stanley priced approximately 131 securities offerings with a total principal amount of approximately $56,236,453,120.00 and MSFL priced approximately 3,580 securities offerings with a total principal amount of approximately $14,578,823,656.74.

[7] MSFL did not offer any securities to meet regulatory capital requirements.

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 clients 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 they allow them to efficiently offer structured products and provide educational materials to clients 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.

III. CONCLUSION

We respectfully submit that the Division, on behalf of the Commission, or the Commission itself should grant the request for this waiver because the Order does not find violations of scienter-based fraud or involve criminal conduct; the Order does not find disclosure violations by Morgan Stanley or MSFL; and MSSB has undertaken extensive remedial actions to enhance its overall systems. Additionally, MSSB has fully cooperated with the Division of Enforcement in connection with its investigation. In light of these considerations, MS respectfully submits that it has shown good cause that it is not necessary under the circumstances that MS be considered an ineligible issuer. Accordingly, we request that the Division, on behalf of the Commission, or the Commission itself 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 617-223-0362.

Very truly yours,

Elizabeth A. Marino

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