



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

DIVISION OF
CORPORATION FINANCE

September 30, 2020

Elizabeth Marino, Esq.
Sidley Austin LLP
60 State Street
36th Floor
Boston, MA 02109

Re: **In the Matter of Morgan Stanley & Co. LLC**
Waiver of disqualification pursuant to Rule 506(d)(2)(ii) of Regulation D
Release No. 34-90046, September 30, 2020
Administrative Proceeding File No. 3-20103

Dear Ms. Marino:

This letter responds to your letter dated September 15, 2020 (“Waiver Letter”), written on behalf of Morgan Stanley & Co. LLC (“MS&Co.”) and constituting an application for a waiver of disqualification under Rule 506(d)(2)(ii) of Regulation D under the Securities Act of 1933 (“Securities Act”). In the Waiver Letter, you requested relief from the disqualifications that arise by virtue of the Commission’s order entered September 30, 2020, in the Matter of Morgan Stanley & Co. LLC pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Release No. 34-90046 (the “Order”).

Assuming that MS&Co. complies with the Order, we have determined that MS&Co. has made a showing of good cause under Rule 506(d)(2)(ii) of Regulation D that it is not necessary under the circumstances to deny reliance on Regulation D by reason of the entry of the Order. Accordingly, the relief requested in the Waiver Letter regarding disqualifications that would arise as to MS&Co. by reason of the Commission’s Order is granted on the condition that MS&Co. fully complies with the terms of the Order. Any different facts or circumstances from those represented in the Waiver Letter 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.

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

Sincerely,

/s/

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



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September 15, 2020

By Email

Timothy Henseler, Esq.
Chief, Office of Enforcement Liaison
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *In the Matter of Morgan Stanley & Co. LLC*

Dear Mr. Henseler:

We are writing on behalf of Morgan Stanley & Co. LLC (“MS&Co.” or the “Firm”) in connection with the anticipated settlement with the United States Securities and Exchange Commission (“SEC” or “Commission”) relating to *In the Matter of Morgan Stanley & Co. LLC*. The settlement will result in an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (the “Exchange Act”), Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the “Order”) against MS&Co. The Order requires that the Firm comply with certain undertakings, discussed herein, by December 15, 2020.

On behalf of MS&Co., we hereby respectfully request a waiver of any disqualification that will arise pursuant to Rule 506 of Regulation D under the Securities Act of 1933 (the “Securities Act”) with respect to MS&Co. as a result of the entry of the Order.

BACKGROUND

MS&Co. has engaged in settlement discussions with the Division of Enforcement in connection with the above-referenced administrative proceeding. As a result of these discussions, MS&Co. expects to submit an Offer of Settlement that will agree to the Order, which will be presented by the staff to the Commission.

MS&Co. is registered with the Commission as a broker-dealer and is a wholly owned indirect subsidiary of Morgan Stanley.

The Order will arise out of MS&Co.’s violations of the order marking requirements of Regulation SHO of the Exchange Act resulting from its improper use of aggregation units in structuring the firm’s equity swaps business.

For broker-dealers, Regulation SHO contains an exception to the requirement that a broker-dealer net all of its “long” and “short” positions in an equity security across the entire firm if such broker-dealer establishes an “aggregation unit(s)” consistent with the requirements of Rule 200(f). In order to qualify for the exception, a broker-dealer must meet four requirements, including that the broker-dealer have a written plan that identifies each aggregation unit, specifies its trading objective(s) and supports its independent identity.

The Order will find that MS&Co. improperly operated its equity swaps business without netting certain “long” and “short” positions as required by Rule 200(c) of Regulation SHO. The Order will find that (1) when the Firm sold a customer long exposure to an equity security, one part of MS&Co. (the “Long Unit”) purchased the referenced equity securities in order to hedge that short synthetic exposure in the swap, and when the swap expired or was unwound by a client that had long swap exposure, MS&Co. sold those equity securities, while always marking those orders as long sales; (2) when the Firm sold a customer short exposure to an equity security, another part of MS&Co. (the “Short Unit”) short sold the referenced equity securities in order to hedge that long synthetic exposure in the swap; and (3) when the swap expired or was unwound by a client that had short swap exposure, MS&Co. bought those equity securities to cover the earlier short sale.

The Order will find that the Long and Short Units were not independent from one another and did not have separate trading strategies or objectives without regard to each other. The Order will also find that the Long and Short Units were not eligible for the exception in Rule 200(f) of Regulation SHO and that MS&Co. willfully violated Section 200(g) of Regulation SHO.

Without admitting or denying the findings in the Order, except as to the Commission’s jurisdiction over MS&Co. and the subject matter of the proceeding, MS&Co. 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 Rule 200(g) of Regulation SHO, (ii) be censured, (iii) pay a civil money penalty in the amount of \$5 million, and (iv) comply with certain undertakings enumerated in the Order.

DISCUSSION

MS&Co. understands that, absent a waiver, the entry of the Order will disqualify it and certain other issuers from relying on Rule 506 of Regulation D under the Securities Act pursuant to Rule 506(d)(1)(iv)(B). MS&Co. is concerned that, to the extent it is acting as an issuer, predecessor of an issuer, affiliated issuer, general partner or managing member of an issuer, or promoter of securities, or if it is acting in any other capacity described in Rule 506 for purposes of Rule 506(d)(1), then MS&Co. and third parties that engage MS&Co. to act in (or otherwise involve MS&Co. in) one of the listed capacities in connection with their securities offerings would be prohibited from relying on Rule 506.

The Commission has the authority to waive this disqualification upon a showing of good cause that such disqualification is not necessary under the circumstances.¹ MS&Co. requests that the Commission do so here, on the following grounds:

1. *The Violations Involved the Offer and Sale of Securities*

The conduct set forth in the Order involved the offer and sale of securities both in that MS&Co. offered its customers the ability to enter into swaps and MS&Co. carried out its own purchases and sales of securities to hedge synthetic exposure to equity securities referenced in the swap. The Order will find Regulation SHO violations related to order marking resulting from the Firm's improper use of aggregation units in structuring its equity swaps business.

2. *The Misconduct Does Not Involve Violations of Scier-Based Statutory or Regulatory Provisions and Does Not Involve a Criminal Proceeding*

The violations in the Order are not criminal in nature and do not involve scier-based fraud or other scier based violations.

3. *Duration of the Misconduct*

The conduct described in the Order occurred from 2004 to present.

4. *Responsibility for the Misconduct*

With respect to who was responsible for the misconduct, the Division of Corporation Finance has stated that it would also consider, among other factors, whether (1) "the misconduct reflects more broadly on the entity as a whole" or (2) "the tone at the top of the party seeking the waiver condoned, encouraged or did not address the misconduct, or actions or omissions by the party seeking the waiver, or any of its affiliates, obstructed the regulatory or law enforcement investigation."²

The Order describes MS&Co.'s conduct with respect to separating its equity swaps business into separate Long and Short Units, which the Commission will find resulted in violations of the order marking provisions of Regulation SHO by MS&Co. The Conduct at issue in the Order does not reflect more broadly on MS&Co. Rather, the conduct at issue in the Order relates only to a discrete area of MS&Co.'s business – the use of aggregation units in structuring the Firm's equity swaps business. The Order does not find Regulation SHO violations in connection with MS&Co.'s use of aggregation units across other segments of its business. The

¹ See Rule 506(d)(2)(ii).

² See Division of Corporation Finance, Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D (Mar. 13, 2015).

Commission has not sought to charge any individuals currently associated with MS&Co. with violations in connection with the conduct underlying the Order. Furthermore, as noted above, the Order involves the Firm's reliance on the exception to firmwide netting of all of its positions in a particular equity security for its equity swaps business through its use of Long and Short Units, which the Commission's Order found violated Regulation SHO. Furthermore, the individuals responsible for firmwide netting of equity positions for the Firm's equity swaps business are not involved in the Firm's Rule 506 activity, outlined below.

The Firm has agreed to comply with the enumerated undertakings set forth in the Order. Specifically, the Firm is agreeing to operate the Long Unit and Short Unit as a single independent trading unit, upon completion of the undertakings outlined below.

5. *Remedial Steps Undertaken by MS&Co.*

As detailed in the Order, MS&Co. will agree to implement certain undertakings including the following:

- MS&Co. will operate the Long Unit and Short Unit as a single independent trading unit that aggregates all of its positions in a security to determine its net position, and will complete the ongoing process of implementing all necessary system recoding, testing, and migration by not later than December 15, 2020.
- Certification: MS&Co. will certify in writing compliance with the undertaking(s) set forth above. The certification will identify the undertaking(s), provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and MS&Co. agrees to provide such evidence.

Prior to the entry of the Order, MS&Co. initiated the process of, and made significant progress toward, operating the Long Unit and Short Unit as a single independent trading unit. Operating the Long Unit and Short Unit as an independent trading unit involves extensive technological enhancements and changes to MS&Co. systems, as well as subsequent testing and migration related to the enhancements and changes, and MS&Co. has been working diligently over the last four months to implement such enhancements and changes. Furthermore, in August 2019, MS&Co. modified its management structure to provide for a new layer of separate supervisors for the Long and Short Units, both of whom were still supervised by the same front-line supervisor, and enhanced surveillance for potential coordination between the Units.

MS&Co. thus has taken and will continue to take concrete steps to remediate the conduct at issue in the Order. By operating the Long Unit and Short Unit as an independent trading unit for its equity swaps business, the Firm will net its Long and Short Units together and, therefore,

will no longer rely on the exception in Rule 200(f) of Regulation SHO for its equity swaps business. This will prevent the recurrence of the conduct at issue in the Order. Accordingly, it is not necessary to disqualify MS&Co. from relying on Rule 506 in connection with an offering.

6. *Disqualification Would Have a Material Impact on MS&Co. and its Clients*

MS&Co. currently acts, and in the future desires to continue to act, as a placement agent and/or solicitor for private placements of securities offered by third-party issuers (“Private Placements”). The Private Placements may be offered and sold in reliance on applicable exemptions under the Securities Act, including Rule 506 under Regulation D (“Rule 506”) and Section 4(a)(2) of the Securities Act (“Section 4(a)(2)”). MS&Co.’s inability to act as a placement agent or compensated solicitor for Rule 506 offerings would have an adverse impact on its clients and would be damaging to MS&Co. and issuers of Private Placements that have retained, or may retain MS&Co. during the pendency of the undertakings, to facilitate capital formation in connection with transactions that rely on the exemptions under Rule 506(b) or (c).³

As of September 3, 2020, MS&Co. is currently engaged as a placement agent and/or compensated solicitor for approximately 17 Private Placements, approximately 14 of which are either currently open or expected to be open before the close of 2020. Any of the 17 Private Placement deals could be offered in reliance on Section 4(a)(2) or Rule 506. Furthermore, certain of the issuers which are relying on Section 4(a)(2) may also seek to rely on Rule 506 in the event that Section 4(a)(2) becomes unavailable to them or such issuers otherwise decide to do so. As of September 3, 2020, MS&Co. is endeavoring to work on approximately seven Private Placement deals for which it may act as a placement agent and/or solicitor within the next few months, should MS&Co. be engaged on such deals. Any of the seven Private Placement deals could be offered in reliance on Section 4(a)(2) or Rule 506. Furthermore, as noted above, certain of the issuers who may seek to rely on Section 4(a)(2) may also seek to rely on Rule 506 in the event that Section 4(a)(2) becomes unavailable to them or such issuers otherwise decide to do so.

As placement agent, MS&Co. works constructively with issuers to appropriately structure the Private Placements. However, the issuer and the issuer’s counsel ultimately determine whether to offer the issuer’s securities in reliance on the Rule 506 safe harbor. Reliance on Rule 506 may be preferred or required by issuers in various circumstances. For example, Private Placements entailing the use of general solicitation or general advertising are permissible pursuant to Rule 506(c) (but not Section 4(a)(2)). Therefore, depending on the anticipated form of solicitation and/or anticipated investors for an offering, an issuer may decide to utilize Rule 506 rather than Section 4(a)(2) or vice versa. If MS&Co. was disqualified from conducting offerings pursuant to Rule 506, it would not be able to compete effectively against its peer firms

³ MS&Co.’s period of disqualification will expire upon its certification of completion of the undertakings, which it anticipates occurring in late 2020 or early 2021.

or meet the needs of its issuer clients who rely on the Rule 506 safe harbor in order to effectuate their capital raising needs during the pendency of the undertakings.

7. *Provision of Written Description of Administrative Order*

If this requested waiver is granted, until MS&Co. provides the certification to the Commission staff described above and detailed in the Order, MS&Co. agrees to furnish (or cause to be furnished) to each purchaser in a Rule 506 offering that would otherwise be subject to the disqualification under Rule 506(d)(1) as a result of the Order, a description in writing of the Order a reasonable time prior to sale.

REQUEST FOR WAIVER

In light of the nature of the violations in the Order, the enforcement remedies that already will be obtained by entry of the Order, and the remedial measures MS&Co. has taken and will take, MS&Co. respectfully submits that it has shown good cause that relief from the Rule 506 disqualification should be granted.

Accordingly, we respectfully urge the Division, on behalf of the Commission, or the Commission, pursuant to Rule 506(d)(2)(ii), to waive the disqualification provisions in Rule 506 under the Securities Act applicable to MS&Co. as a result of the entry of the Order.

We appreciate your consideration of this request. Please feel free to contact me with any questions.

Very truly yours,



Elizabeth A. Marino