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FOUNDED 1866

Securities Act of 1933
Section 5(a)

November 21, 2016

By electronic mail

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F St., NE
Washington, DC 20549

Re: Request for Interpretive Letter on IPO Procedures

Ladies and Gentlemen:

We are writing on behalf of Morgan Stanley Smith Barney LLC, a registered broker-dealer and investment adviser, and its affiliates (collectively, “Morgan Stanley” or the “Firm”) to request an interpretive letter from the Staff confirming that Morgan Stanley’s proposed process for offering and selling securities in initial public offerings (“IPOs”) as outlined in this request does not involve a pre-effective sale for purposes of Section 5(a) of the Securities Act of 1933, as amended (the “Securities Act”).

I. Background

Morgan Stanley operates one of the largest wealth management organizations in the world, with 608 locations and \$1.985 trillion in client assets as of December 31, 2015. Morgan Stanley offers personalized services to its wealth management clients and communicates with them largely through its nearly 16,000 financial advisors (“FAs”). Wealth management clients

November 21, 2016

Page 2

have dedicated FAs or FA teams, and clients can only purchase shares in IPOs by communicating directly with an FA.¹

Morgan Stanley Smith Barney LLC's affiliate, Morgan Stanley & Co. LLC, is a significant and leading underwriter in the capital markets on behalf of its issuer clients and provides access to IPOs for Morgan Stanley's wealth management clients, many of whom value and benefit from this access. In 2014 and 2015, Morgan Stanley wealth management clients participated in more than 125 IPOs, with over 30,000 unique accounts receiving allocations to invest over \$2.45 billion.

In offering and selling shares in IPOs to clients, Morgan Stanley's current policy is to solicit indications of interest ("IOIs") from clients after the filing of the registration statement and prior to the effectiveness of the registration statement for the offering (the "Pre-Effective Period") and to reconfirm these IOIs after effectiveness and the pricing of the offering to form contracts of sale. This process requires Morgan Stanley's clients to be available to their FAs during the relatively narrow period of time between pricing and the start of trading to reconfirm their interest in the offering by submitting a firm purchase order. Unlike institutional clients, which are staffed to react to market conditions, wealth management clients' schedules are typically not market driven, and this reconfirmation requirement can represent an inconvenience and even a hardship.

To simplify this process for clients and the Firm alike, Morgan Stanley is considering adopting procedures whereby it would solicit conditional offers to buy ("COBs") from its clients during the Pre-Effective Period (as further described below in Section II of this request, the "COB Process").² These COBs would not be binding on clients and could be withdrawn at any time up to and including the Withdrawal Time (as defined below in Section II). After the Withdrawal Time, Morgan Stanley could accept these COBs and form contracts of sale.

Morgan Stanley believes that adopting the COB Process would have benefits for both its clients and for the Firm. Specifically, for clients, the COB Process would improve the client experience by eliminating the requirement to reconfirm IOIs and the associated inconvenience to the client; would provide enhanced transparency and consistency during the offering process; and would be in line with how clients typically instruct their FAs to purchase securities in secondary market transactions and in shelf offerings. Separately, for Morgan Stanley, the COB

¹ The one exception to this statement is the "friends and family" directed share programs that Morgan Stanley may offer in an IPO to persons as directed by the issuer. The procedures for Morgan Stanley's "friends and family" directed share programs are not included within the scope of this request.

² There may be circumstances in which Morgan Stanley does not use the COB Process to offer and sell securities in IPOs, such as in IPOs of business development companies and closed end funds. Any procedures by which Morgan Stanley may conduct IPOs other than the COB Process are not included within the scope of this request.

November 21, 2016

Page 3

Process would decrease market risk for the Firm in allocating shares in its underwritten IPOs and would be scalable, consistent with the size and character of Morgan Stanley's retail wealth management business.

II. Proposed COB Process

The COB Process that Morgan Stanley proposes to adopt for IPOs would be as follows:

Prior to Transitioning to the COB Process

1. Morgan Stanley will distribute a written communication to inform clients about the COB Process for IPOs (the "COB Process Summary"). The COB Process Summary will be distributed to clients on an annual basis.
2. The Firm will revise its policies and procedures to incorporate the COB Process and will conduct training for its FAs on the COB Process. Such policies and procedures would provide, among other things, that when soliciting COBs from clients in IPOs, FAs will inform clients about the IPO's COB Price Range, as defined below. FAs will also be responsible for making sure that their clients understand that, in submitting COBs, they are not bound and can withdraw their COBs at any time up to and including the Withdrawal Time without any obligation.

During the Pre-Effective Period

3. An FA will initiate electronic delivery of the IPO preliminary prospectus (which must include a price range) to the FA's selected clients through the Firm's prospectus delivery email systems.³ The Firm will send all subsequent amendments to the prospectus for the offering, as well as any free writing prospectuses and pricing term sheets used in the IPO, to clients who received the preliminary prospectus.
4. Following the delivery of the preliminary prospectus, the FA will speak to his or her clients to determine if the clients would like to make COBs.
5. At the client's direction, the FA will complete and record a COB on behalf of the client by obtaining either the number or the dollar amount of shares that the client is offering to purchase. The offering price that the client is offering to pay will be a

³ The Firm currently requires and will continue to require all clients who participate in equity syndicate offerings, including IPOs, to enroll in electronic delivery of documents, thereby ensuring that clients receive information about the offering in a timely manner.

range that is 20% below the bottom end and 20% above the top end of the price range⁴ set forth in the preliminary prospectus (the “COB Price Range”).

6. To all clients who have submitted COBs, Morgan Stanley will send a generic email confirming receipt of the COB (the “COB Confirmation”) and informing the client that (a) the client will receive a Notice of Effectiveness, as defined below, (b) the client can withdraw the COB at any time up to and including the Withdrawal Time, as defined below, and (c) after the Withdrawal Time, Morgan Stanley will commence accepting COBs and allocating available shares.
7. If a client is not prepared to make a COB during the Pre-Effective Period, but expresses interest in the offering, then the FA may follow up after effectiveness and pricing to obtain an order to buy.
8. For internal administrative purposes only, an FA may make preliminary internal allocations to the FA’s clients, based on the estimated overall allotment to the FA and on the COBs collected from clients. Preliminary internal allocations are not binding contracts and will not be communicated to clients.
9. Prior to the time at which the registration statement for the offering is anticipated to be declared effective or once the registration statement has been declared effective, the Firm will so notify clients by email (“Notice of Effectiveness”) and provide them with at least one hour or until the time of effectiveness, whichever is later, to withdraw their COBs (“Withdrawal Time”). This will give clients a “one last chance” opportunity to withdraw their COBs before they are bound.⁵
10. If there is a material change to the preliminary prospectus, the existing COBs are no longer valid, and an FA will need to reconfirm a client’s COB or obtain a new COB after the amended preliminary prospectus has been delivered to clients.⁶

⁴ The 20% of the top and bottom ends of the price range would be calculated in accordance with Rule 430A under the Securities Act and Securities Act Rules CDI 627.01 (Apr. 24, 2009).

⁵ It is possible that the Notice of Effectiveness and the Withdrawal Time could also occur after the effectiveness of the registration statement.

⁶ The FA has the flexibility to follow up with only those clients who are likely to receive an allocation, as well as to reconfirm a COB or obtain a new COB at any time following the material change to the preliminary prospectus. If the FA follows up with a client after pricing, the client would be giving an order or offer to buy that is not conditional – i.e., the registration statement has been declared effective and the actual offering price is known – and therefore such offer can be accepted immediately. In this circumstance, the FA will make clear that he or she is taking a customer order for a securities purchase.

November 21, 2016

Page 5

11. In the event a client's COB has been outstanding (i.e., not accepted) for more than 20 days from the date it was submitted, such COB will no longer be valid and an FA will need to obtain a new COB from the client.⁷

After the Effectiveness of the Registration Statement

12. The offering is priced.
13. If the offering prices outside of the COB Price Range, the existing COBs are no longer valid, and an FA will need to obtain a new order to buy from a client based on the actual offering price in order to allocate any shares to such client.⁸

After the Withdrawal Time

14. In the event the offering prices within the COB Price Range, a client's COB can be accepted by Morgan Stanley without further action by the client.
15. Either (a) preliminary internal allocations become final allocations or (b) the FA makes final allocations in the system to clients who provided COBs.
16. No monies to fund purchases of shares in IPOs will be collected from any clients until after their COBs have been accepted.
17. The Firm will send confirmations of sales to clients in accordance with Rule 10b-10 under the Securities Exchange Act of 1934, as amended.

III. Analysis

Section 5(c) prohibits an "offer to sell or offer to buy...unless a registration statement has been filed." Once a registration statement has been filed, offers for securities may be solicited; Section 2(a)(3) of the Securities Act defines the terms "offer to sell," "offer for sale," and "offer" as "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in

⁷ The FA has the flexibility to follow up with only those clients who are likely to receive an allocation. If the FA follows up with a client after pricing, the client would be giving an order or offer to buy that is not conditional – i.e., the registration statement has been declared effective and the actual offering price is known – and therefore such offer can be accepted immediately. In this circumstance, the FA will make clear that he or she is taking a customer order for a securities purchase.

⁸ The FA has the flexibility to follow up with only those clients who are likely to receive an allocation, and as the client would be giving an order or offer to buy that is not conditional – i.e., the registration statement has been declared effective and the actual offering price is known – such offer can be accepted immediately. In this circumstance, the FA will make clear that he or she is taking a customer order for a securities purchase.

a security, for value.” Section 5(a) prohibits any sale of the securities until the registration statement has been declared effective; Section 2(a)(3) defines the terms “sale” and “sell” as to “include every contract of sale or disposition of a security or interest in a security, for value.”

The use of conditional offers to ultimately form a contract in compliance with Section 5 is widely accepted and non-controversial. For example, the Senate and House reports to the 1954 amendments to Section 5(a) explain that:

In substance, section 5...permits the making of offers but not sales, contracts of sale or contracts to sell prior to the effective date. Issuers, underwriters, and dealers should find no difficulty in regulating their conduct during the waiting period so as not to make “sales” before the registration statement becomes effective. This may be done by *conditioning offers*, limiting activity to solicitation of offers to buy, or by other means that keep the transaction short of a “sale.”⁹ (emphasis added)

In addition, the Loss securities treatise identifies conditional offers as “[p]erhaps the safest technique” a seller of securities can implement to ensure compliance with Section 5.¹⁰

Morgan Stanley’s policies and procedures are, and will continue to be, designed to prevent sales in registered offerings prior to the effectiveness of the registration statement.

Under the COB Process, FAs would solicit COBs during the Pre-Effective Period, and the conditions of these COBs, to the extent they are not withdrawn up to and including the Withdrawal Time, would be the effectiveness of the registration statement, the IPO pricing within the COB Price Range and no material change to the preliminary prospectus. Unless and until these conditions are satisfied, Morgan Stanley would not have the ability to accept the COB, and the client would not be bound and would be able to freely withdraw the COB without obligation. Put differently, a COB is not and cannot be accepted until after the Withdrawal Time, which will always be after the registration statement has been declared effective. Accordingly, in our opinion, any such contract of sale resulting from the acceptance of the COB would be consistent with Section 5(a) because contract formation would only occur post-effectiveness.

The COB Process contains several steps to protect investors. First, as outlined in Step 1 above, the Firm will educate clients about the COB Process by distributing the COB Process Summary prior to transitioning to the COB Process and annually thereafter. At the point in time when a client decides to submit a COB to his or her FA, the client will have received a copy of the COB Process Summary; the client will have received the preliminary prospectus with a price

⁹ See S. Rep. No. 83-1036, at 15 (1954); H.R. Rep. No. 83-1542, at 23 (1954).

¹⁰ See Louis Loss et al., FUNDAMENTALS OF SECURITIES REGULATION 159 (6th ed. 2011).

November 21, 2016

Page 7

range; and the client will have had an opportunity to discuss the IPO with his or her FA, including whether the IPO is consistent with the client's investment objectives, as well as any questions about the COB Process. Indeed, although Morgan Stanley provides an online platform for its wealth management clients to use, Morgan Stanley does not permit its wealth management clients to use the online platform to purchase shares in IPOs. Rather, clients form and communicate their decisions to submit COBs in IPOs in the context of their discussions with their dedicated FAs or FA teams.

As outlined in Step 6 above, Morgan Stanley will send a COB Confirmation to clients who have submitted COBs to remind them that they can withdraw their COBs at any time up to and including the Withdrawal Time without any obligation. Finally, as outlined in Step 9 above, Morgan Stanley will send a Notice of Effectiveness to clients who have submitted COBs, thereby informing them of the Withdrawal Time and providing them with a period of at least one hour to decide whether to withdraw their COBs before they are bound. As clients will have been informed about the COB Process and will have had the opportunity to discuss the COB Process with their FAs, their decision as to whether to take advantage of this final opportunity to withdraw their COBs will be an informed one. If the offering prices within the COB Price Range and there is no material change to the preliminary prospectus, then Morgan Stanley can accept the client's COB, either in whole or in part, after the Withdrawal Time.

In Morgan Stanley's view, the COB Process has been designed to and will protect investors by promoting transparency and informed decision-making throughout the COB Process.

IV. Conclusion

We are of the opinion that the COB Process as outlined in Section II of this request would not involve a pre-effective sale for purposes of Section 5(a) of the Securities Act. We hereby respectfully request your concurrence with our opinion.

Sincerely,



Thomas J. Kim