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New York, NY 10020

Morgan Stanley

April 12, 2011

The Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Proposed Participant Disclosure Regulation
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210
VIA Mail and Electronic Delivery (http://regulations.gov)

Re: Proposed Regulation Amending the Definition of Fiduciary – Additional Comments

Ladies and Gentlemen:

On behalf of Morgan Stanley[1], Morgan Stanley & Co. Incorporated[2]and Morgan Stanley Smith Barney LLC[3] (collectively, "Morgan Stanley"), this letter is submitted in

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[1] Morgan Stanley: (NYSE: MS). Morgan Stanley (NYSE: MS) is a global financial services firm that, through its subsidiaries and affiliates, provides its products and services to a large and diversified group of clients and customers, including corporations, governments, financial institutions and individuals. Morgan Stanley was originally incorporated under the laws of the State of Delaware in 1981, and its predecessor companies date back to 1924. Morgan Stanley is a financial holding company regulated by the Board of Governors of the Federal Reserve System (the "Fed") under the Bank Holding Company Act of 1956, as amended (the "BHC Act"). Morgan Stanley conducts its business from its headquarters in and around New York City, its regional offices and branches throughout the U.S. and its principal offices in London, Tokyo, Hong Kong and other world financial centers. At December 31, 2009, Morgan Stanley had 61,388 employees worldwide (including employees of Morgan Stanley & Co., Incorporated, and Morgan Stanley Smith Barney LLC, which are described in more detail below).

[2] Morgan Stanley & Co. Incorporated: Morgan Stanley & Co. Incorporated ("MS&Co"), together with its wholly owned subsidiaries, provides a wide variety of products and services to a large and diversified group of clients and customers, including corporations, governments, financial institutions and individuals. Its businesses include securities underwriting and distribution; financial advisory services, including advice on mergers and acquisitions, restructurings, real estate and project finance; sales, trading, financing and market-making activities in equity securities and related products and fixed income securities and related products including foreign exchange and investment activities. MS&Co provides brokerage and investment advisory services covering various investment alternatives; financial and wealth planning services; annuity and insurance products; credit and other lending products; cash management; and retirement plan services. MS&Co and certain of its subsidiaries are registered with the SEC as broker-dealers, and is a member of FINRA and the NYSE. MS&Co is also registered as a futures commission merchant with the CFTC, and as an investment advisor with the SEC. MS&Co is a wholly-owned subsidiary of Morgan Stanley.

response to the U.S. Department of Labor's ("Labor" or the "Department") request for additional comments to the proposed fiduciary regulation published on October 22, 2010 (the "Proposed Regulation").[4] At the March 1-2 hearings on the Proposed Regulation, the Department asked for any supplemental comments on the Proposed Regulations to be filed with the Department by April 12, 2011. We appreciate the opportunity afforded by the Department to add to the record with respect to this important initiative.

Our comments focus on the following areas of concern. The first, raised by representatives of the Department at the hearing, is the assertion that, even if brokers were deemed to be "fiduciaries" through the provision of advice, virtually all of the transactions currently engaged in by plans covered by the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and IRAs subject to the requirements of Internal Revenue Code section 4975 (the "Code"), are covered by existing prohibited transaction exemptions ("PTEs"). The second is that, notwithstanding the Department's lack of information with respect to the true costs to plans and IRA owners of the Proposed Regulation, the Department has concluded that the Proposed Regulation is nonetheless beneficial. Third, we would like to expand on our views with respect to the Department's request on the advisability of revising its view, expressed in Advisory Opinion 2005-23A, that rollover conversations are not "fiduciary" for purpose of ERISA and the Code.

We believe the Department should address all of these areas (as well as the numerous comments raised in the record), before making any final determination on the Proposed Regulation.

Availability of Prohibited Transaction Exemptive Relief For Fiduciary Brokerage Transactions

At the hearings, various Department officials suggested that securities brokers could rely on a series of ERISA class exemptions to mitigate the risks of becoming ERISA fiduciaries under the expanded definition of investment advice that the

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[3] Morgan Stanley Smith Barney LLC: Morgan Stanley Smith Barney LLC ("MSSB") is a wholly-owed subsidiary of Morgan Stanley Smith Barney Holdings LLC ("Holdings"), which is 51% owned indirectly by Morgan Stanley and 49% by Citigroup Inc. (NYSE:C). MSSB and its subsidiaries offer a wide variety of financial products and provide financial services to a large and diversified group of clients, financial institutions and individuals. MSSB's businesses include financial advisory services, sales and trading in fixed income securities and related products, including foreign exchange and investment activities and new issue distribution of fixed income, equity and packaged products. MSSB provides clients with a comprehensive array of financial solutions, including MSSB products and services, and products and services from third party providers, such as insurance companies and mutual fund families. MSSB offers brokerage and investment advisory services covering various investment alternatives; financial and wealth planning services; annuity and insurance products; cash management; and retirement plan services. MSSB is a leader in wealth management with over 130 years of experience consisting of over 17,300 financial advisors and 822 brokerage locations around the U.S. MSSB is a broker-dealer and investment advisor registered with the SEC and a member of FINRA and the NYSE. The MSSB combined businesses operate on a worldwide basis as "Morgan Stanley Smith Barney."

[4] Definition of the Term "Fiduciary," 75 Fed. Reg. 65263 (Oct. 22, 2010) (the "Proposed Regulation").

Department has proposed. Specifically, the Department suggested that PTE 84-24, PTE 86-128 and PTE 75-1 provide ready relief from ERISA's conflict of interest provisions in the event that brokers become ERISA fiduciaries due to providing advice to ERISA plans and IRAs.

We are heartened that the Department feels that the exemptive relief provided is broad, but we are concerned that this assertion flies in the face of the language of the exemptions and almost 30 years of interpretative guidance by the Department (formal and informal). In our view, the Department has sought to interpret broadly ERISA's conflict of interest provisions. At the same time, the Department has sought to construe narrowly the potential statutory and class exemptions that might be available in the event a fiduciary faces a conflict of interest, and has further limited the issuance of individual exemptions that provide relief from the conflict of interest rules. In order to be useful for the Department's review of this subject, we will focus below on common issues arising in connection with the investment in mutual funds by ERISA-covered defined contribution plans and IRAs under those exemptions.

1. Broad Interpretation of Conflicts of Interest Rule under Section 406(b)

The Department's regulations indicate that a fiduciary violates the provisions under ERISA section 406(b) whenever the fiduciary uses its authority, control or responsibility that makes the person a fiduciary to "cause a plan to pay an additional fee to such fiduciary." 29 C.F.R. § 2550.408b-2(e). In our experience, and as borne out by the Department's litigation positions over the years, the Department generally views the prohibition of ERISA section 406(b) as absolute, meaning that any ability to affect one's own compensation per se violates the law, regardless of whether the transaction is in the interest of the ERISA plan. The court authority is mixed. Compare, e.g., Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984) (per se) with Bidwell v. Garvey, 943 F.2d 498 (4th Cir. 1991).

Further, the Department has given specific guidance that a fiduciary providing investment advice with respect to the investment of plan assets would violate ERISA section 406(b) because the amounts that may be paid to the fiduciary or its affiliates may vary. See Labor Adv. Op. 2001-09A (Dec. 14, 2001). We are concerned that the Department's expansive view of the fiduciary conflicts rule should guide how any service provider should view the availability of exemptive relief for potential fiduciary self-dealing transactions. We believe this is only prudent and that it is appropriate to view this both from an interpretative, as well as a litigation perspective, given that the Department noted that one of the primary reasons articulated for the re-proposal of the fiduciary "investment advice" definition is its ability to bring successful fiduciary breach cases before the courts involving ERISA-covered plans.

2. Narrow Interpretation of Statutory and Class Exemptions

In reviewing how the Department has chosen to interpret the various statutory and class exemptions, we believe that the record reflects that the Department's perspective on the importance of broadly interpreting any potential fiduciary breach colors its views on

the availability of exemptive relief for such breaches. With respect to mutual funds, the most common investment option for both ERISA defined contribution plans and IRAs, the Department has consistently cut back on the coverage that these exemptions provide – as to the types of products, the situations where the relief is provided (often, where the fiduciary status is "inadvertent," not intentional, and the types of fees covered.

a. Section 408(b)(2)

ERISA section 408(b)(2) provides a statutory exemption for the provision of services. The plain language of ERISA section 408(b)(2) indicates it provides relief from both ERISA section 406(a) and 406(b). Therefore, where a broker provides services to ERISA plans (i.e., acts as agent rather than principal in effective securities transactions) and when it transacts principally with an ERISA account as a fiduciary, on its face section 408(b)(2) would appear to provide relief. However, the Department has issued regulations and other guidance that limits ERISA section 408(b)(2) to situations that would otherwise give rise to a prohibited transaction only under ERISA section 406(a)'s party in interest rules. 29 C.F.R. § 2550.408b-2(a) (acts described in section 406(b) are "separate transactions" not exempt by section 408(b)(2)). The courts are divided on the issue, though most side with the Department's view in deference to the issuance of the regulations. Harley v. Minnesota Min. and Mfg. Co., 284 F.3d 901, 908-9 (8th Cir. 2002) (covers section 406(b)); Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001) (collecting cases).

b. Section 408(b)(14)

A more recent example is provided by the recent ERISA section 408(b)(14) regulations. ERISA section 408(b)(14), enacted by Congress as part of the Pension Protection Act of 2006, provides a statutory exemption for investment advice programs, which broadly covers securities transactions (including mutual funds) and direct and indirect compensation. Section 408(g) establishes detailed conditions with respect to the exemption.

The Department's original "final" rule under ERISA section 408(b)(14) construed the exemption to provide meaningful relief with respect to advice given with respect to IRAs. See 74 Fed. Reg. 3822 (Jan. 21, 2009). Specifically, the final rule contained a class exemption permitting "off model" advice, which allowed an advisor to continue to be responsive to the participant after the provision of computer model-generated advice or after the provision of investment education materials (where computer model advice was not feasible).

Proposed Revisions: Since issuing its final rule, the Department issued a series of delays in its effective date and ultimately withdrew the regulation. The Department has since issued a revision to the regulations in proposed form. 75 Fed. Reg. 9360 (March 2, 2010). Most notably, the Department removed from the proposal the class exemption contained in the final rule, notwithstanding the fact that it had initially found the class exemption met all the criteria of ERISA section 408(a) (administratively feasible, in the interest of participants, and protective of participants).

In addition, the Department added new conditions into the proposed regulation, which further narrow the relief provided. Most troublesome in our view is that the Department added a new condition under the computer model approach, which requires any computer model to avoid investment recommendations that distinguish among investment options within a single asset class "on the basis of a factor that cannot confidently be expected to persist in the future." 75 Fed. Reg. at 9366. This condition essentially eliminates historical performance as an appropriate criterion in recommending investment funds within the computer model context, which we do not believe comports with the operation of virtually all computer models currently offered – whether as part of an investment advice fiduciary program or as part of a "participant education" program explicitly endorsed by the Department in Interpretative Bulletin 96-1.

c. PTE 84-24 (Affiliated Mutual Funds)

PTE 84-24 provides relief from the prohibition of ERISA section 406(b) for the sale of shares of a registered investment company (i.e., a mutual fund) if certain conditions are met. Specifically, PTE 84-24 exempts (i) the "effecting" of a plan's purchase of mutual fund shares by the mutual fund principal underwriter or its affiliates, and (ii) the receipt of sales commissions by the principal underwriter or its affiliates in connection with sales of shares of the mutual fund. Originally, the Department had indicated that PTE 84-24 is intended to cover investment recommendations and advice. 47 Fed. Reg. at 14810 (Preamble to PTE 84-24); 42 Fed. Reg. at 32395, 32396 n. 2 (Preamble to PTE 77-9); Labor Department Info. Ltr. to W. Chadwick (Aug. 8, 1980). However, the Department has limited the scope of PTE 84-24 in important ways.

Affiliated Funds Only: The Department has limited the scope of PTE 84-24 to affiliated mutual funds only. As such, it cannot be relied on for the purchase and sale of unaffiliated mutual funds, which is clearly the more common type of offering for both ERISA plans and IRAs. Labor Department Adv. Op. 80-30A (May 21, 1980).

Fees Covered: Clearly, the exemption covers the receipt of sales commissions. However, the commissions must be paid to the "principal underwriter." While the exemption defines an underwriter to include its affiliates, the Department has raised questions as to whether a broker's receipt of a commission is covered (rather than the underwriter's), even where the broker is an affiliate of the principal underwriter.

In addition to commissions, the terms of the exemption should provide relief for the receipt of various other mutual fund fees, such as investment advisory fees, shareholder servicing, sub-transfer agent, and revenue sharing payments, because the exemption provides broad section ERISA 406(b) relief for "effecting" mutual fund transactions, in addition to providing relief for the receipt of a sales commission.

However, the Department, in a footnote to an advisory opinion on a separate issue under PTE 84-24, made the following comment that casts doubt on the applicability of PTE 84-24 with respect to advisory programs:

> It is the Department's view that PTE 84-24 would not provide relief for any prohibited transaction that may arise in connection with any fees or other

> compensation separate and apart from the commission paid to a principal underwriter upon a plan's purchase of recommended securities. **Thus, PTE 84-24 does not exempt any prohibited transaction arising out of transactions involving fees paid to a fiduciary service provider with respect to an advice program which provides specific/individualized asset allocation recommendations to participants based on their responses to questionnaires.** [Emphasis added.]

Labor Department Adv. Op. 2000-15A n.4 (Nov. 15, 2000). This footnote on the scope of PTE 84-24 has called into question whether PTE 84-24 provides any meaningful relief for affiliated mutual fund transactions. The most literal interpretation of the footnote would suggest that PTE 84-24 only clearly provides exemptive relief for the receipt of "commissions" (including sales loads and 12b-1 fees) by principal underwriters, but not by brokers if they are affiliated with such underwriters. Further, under this interpretation, no other fees paid by mutual funds would be covered by PTE 84-24, including management fees or fees paid for administrative services that cannot be characterized as a commission. Additionally, the exemption would not cover any investment advisory fees paid by ERISA plans, including asset-based fees, wrap fees or flat fees.

Individual Exemption History: The Department has issued two individual exemptions that are near clones of PTE 84-24 to Merrill Lynch and Aetna. These individual exemptions allowed Merrill Lynch and Aetna to offer collective trusts to ERISA plans and still have relief that covers the sale of affiliated mutual funds to the same plans. PTE 99-36, 64 Fed. Reg. 52546 (Sept. 29, 1999); PTE 91-67, 56 Fed. Reg. 57680 (Nov. 13, 1991).

After issuing the Merrill Lynch and Aetna exemptions, the Department was asked to issue similar individual exemptions for other financial institutions. The Department would not issue the exemptions because of a concern that PTE 84-24 did not cover formal advisory programs. Instead, it only covered "accidental" or "incidental" investment advice.

Thus, it is difficult to understand how PTE 84-24, or any of the individual exemptions passed on by the Department, offers meaningful assurances to brokers trying to comply with a fiduciary standard given the Department's prior approaches.

d. PTE 75-1 (Principal Transactions and Unaffiliated Mutual Funds)

Part II of PTE 75-1 exempts purchases and sales of securities in "principal transactions" between a registered broker-dealer and a plan. Again, the Department has only extended the general relief afforded under Part II has only extended to the party in interest prohibitions under ERISA section 406(a) by the Department. As such, there is no relief for securities transactions where a broker acts as both a fiduciary to the investing plan and acts as principal in the transaction.

Since its issuance in 1975, Section II(d) of PTE 75-1 provided added relief from ERISA section 406(b) with respect to "the purchase and sale by the plan of securities issued by an open-end investment company." In 2006, the Department revised section II

of PTE 75-1 and "repositioned" the exemption for mutual funds into its own free-standing exemption. See PTE 75-1, § II(2).

However, a number of uncertainties have surrounded the application of PTE 75-1 with respect to mutual fund transactions that the Department has yet to address.

The Department Revision: When the Department proposed a revision to PTE 75-1's mutual fund exemption in 2004, it sought "public comments regarding the current utility of the [mutual fund] exemption in the new paragraph (2)." 69 Fed. Reg. at 23218 (Apr. 28, 2004). The Department's comments suggested that the Department did not understand the scope of the exemption and was considering restricting its application, which was borne out at the time by informal comments made by Department representatives. Moreover, when issuing its final revisions to PTE 75-1, the Department indicated that the scope of the mutual fund exemption itself is still under review, implying that it may not, in fact, continue to be available. See 71 Fed. Reg. at 5885 (Feb. 3, 2006).

Principal vs. Agency Transaction: Part II of PTE 75-1 is titled "Principal Transactions." However, mutual fund sales are not effected as principal transactions (i.e., shares are never owned by the broker who sells them to plans). Although still somewhat unclear, the uncertainty associated with this issue was, in fact, improved when the Department revised the exemption in 2006 to make clear that the mutual fund exemption was separate from the exemption related to the purchase and sale of securities.

Fees Covered: Part II of PTE 75-1 covers the receipt of sales commissions, as well as the actual purchase transaction. See 41 Fed. Reg. 56760, 56761 (Dec. 29, 1976) (preamble to proposed PTE 77-9). The Department has characterized front-end sales loads paid by nonproprietary funds as commissions that "may" be covered by PTE 75-1. Labor Department Adv. Op. 80-30A n.5 (May 21, 1980). However, there is uncertainty over the other types of fee payments that could be covered, such as shareholder servicing, sub-transfer agent, and revenue sharing fees. This uncertainty has only been added to by the Department's opinion (Labor Department Adv. Op. 2000-15) calling into question the scope of mutual fund fees covered by PTE 84-24.

e. **PTE 86-128**

Section II(a) of PTE 86-128 provides an exemption from ERISA section 406(b) for a "plan fiduciary's using its authority to cause a plan to pay a fee for effecting or executing securities transactions to that person as agent for the plan, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency." 51 Fed. Reg. 41686, 41695 (Nov. 18, 1986). This exemption clearly covers the payment of traditional commissions to brokers that are plan fiduciaries in connection with securities transaction where the broker acts as agent for the plan. The exemption does not cover principal transactions.

In one advisory opinion, the Department indicated that PTE 86-128 may provide relief for a plan fiduciary's receipt of commissions in connection with sales of shares of mutual funds. Labor Department Adv. Op. 80-30A n.5 (referring to PTE 79-1, which was amended and restated as PTE 86-128). However, there is significant uncertainty

about the scope of relief that PTE 86-128 affords to the different types of fees paid in connection with mutual fund transactions.

Fees Covered: It is unclear whether PTE 86-128 covers a fiduciary's receipt of fees paid from the mutual fund or its agent rather than directly from the plan. This is because the exemption covers a plan fiduciary who is "using its authority to cause *a plan* to pay a fee . . . ." PTE 86-128, § II(a) (emphasis added). Indeed, in a case brought by the Department, the court in Chao v. Linder, 421 F. Supp. 2d 1129 (N.D. Ill. 2006), expressly rejected arguments that PTE 86-128 could cover a fiduciary's receipt of fees from third parties in connection with a plan's investment transactions. At issue were fees and commissions paid by insurance companies to a plan fiduciary in connection with the plan's investments in variable group annuity contracts. The court held that fees covered by PTE 86-128 must be paid by the plan itself, stating that —

> [i]n looking at the plain language of the exemption it is clear that a covered transaction is one in which a plan itself pays the fees of the fiduciary. Defendants neither pointed to nor could we find any indication in the exemption itself, or in the explanation and history of the exemption, that PTE 86-128 was intended to cover commissions paid by a third party to the fiduciary.

Id. at 1138.

Discretionary v. Non-Discretionary Fiduciary Programs: As a final point, we would also note that Departmental representatives, as recently as last week, could not confirm the applicability of PTE 86-128 in a non-discretionary advisory context. We note this only to further observe that it is difficult to structure an approach using the exemption if its basic availability is called into question.

3. Conclusion

Our comments are not intended to be exhaustive about the types of products, or exemptive relief, which will be necessary for plans (and IRAs) to continue to invest through brokers for a wide variety of products. Other commentators, we are sure, will illustrate those points, but we would be happy to discuss them further with the Department.

Rather, it illustrates what we believe are the issues that the Department needs to address before we or other vendors can conclude that even ordinary, mutual fund-based transactions, can operate under the existing prohibited transaction guidance where the broker or custodian is held to a fiduciary standard under ERISA. We would submit that the guidance provided by the Department over the years, as described above, contradicts the assertions made by Department representatives at the hearing.

Additional Vendor and Client Costs to IRAs and Small Plans

A second point discussed at the hearing was the economic impact of the Proposed Regulation on both vendors and the plan clients, and the Department acknowledge that its

data was incomplete with respect to this analysis. Accordingly, we thought it might be helpful for the Department to have some additional information as to why we believe the costs of implementation as well as the client costs – have been seriously understated.

1. **<u>Vendor Costs Substantially Understated Based On Prior Regulatory Estimates</u>**

As described in our testimony at the hearing, we would offer our experience to date in complying with the Department's various disclosure proposals – notably the Form 5500 disclosure requirements and the upcoming ERISA section 408(b)(2) requirements – as illustrative of the typical understatement of costs added to the vendors.

For the Form 5500 disclosure effort, we would note that the cost estimates proposed by the Department were between $14.8 -$15.4 million while crediting benefit savings to be approximately $98 million.[5] With approximately a 2% market share in the private defined contribution and defined benefit markets, Morgan Stanley alone has spent, to date, in excess of $17 million dollars of internal and external costs <u>by ourselves</u> in complying with these particular requirements. If you extrapolate our actual costs to the industry, it is clear that even under a conservative reading, the costs of implementation far exceed the benefits.

For the new ERISA section 408(b)(2) fee disclosure requirements, the construction of various disclosure reports and website offerings to make available direct and indirect compensation amounts was estimated industry-wide at $54.3-58.7 million.[6] Regrettably, we believe our own expenditures, not yet complete, will be a substantial fraction of what the Department estimates is the total cost. Further exacerbating the issue, a significant portion of this work may turn out to have been "throw away" work as the imposition broader "fiduciary" status under the Proposed Regulation will cause certain exemptions to be unavailable and thus redefine what narrower subset of compensation types will be permissible going forward.

Based on our prior experience, we believe that the Department's cost estimates substantially understate the implementation costs of the new fiduciary rules.

2. **<u>Additional Client Costs</u>**

More importantly, we are sure, from the Department's perspective, is a clear understanding of the costs that this change are likely to imposed on ERISA plans and IRA beneficial owners.

As illustrated above, we believe that to continue offering products and services as a broker to ERISA-covered defined contribution plans and IRAs, we cannot rely on the patchwork of incomplete exemptive relief. Thus, in order to appropriate structure

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[5] 72 Fed. Reg. 64710, 64716 (November 16, 2007).

[6] 75 Fed. Reg. 41600, 41602 (July 16, 2010).

programs to comply with these requirements going forward, in the absence of a clear exemptive path from the Department, we believe that the most fruitful approach is to not follow the exemptive guidance (especially in the retail/IRA context) but to the advisory opinions offered by the Department – namely Frost,[7] SunAmerica[8] and/or Country Trust[9].

Under this approach, as the Department knows, the most logical way to comply with these issues for retail plans and IRAs is as follows:

- Structure all of the accounts as subject to the Investment Advisers Act (including a new signed advisory contract, as generally required under such Act), with a single "wrap" fee covering both advice and transactional charges, which will likely be a higher direct compensation charge than similarly-situated brokerage clients currently hold under the existing legal framework (both for the new advisory services offered as well as the inability for such firms to collect and hold "indirect" compensation from third parties);
- Prevent all such accounts from trading principally with Morgan Stanley or its affiliates, given the lack of guidance from the Department on how principal transactions may be affected in an ERISA fiduciary account (and to the extent such investments are purchased from a third party broker, such broker would in fact need to be compensated, probably through an additional charge to the account); and
- Limit the product offerings that may be held in these accounts to, primarily, open end mutual funds – limited to no "proprietary" products or other products (fixed income, structured notes, limited partnerships, ETFs, etc.) unless the precise levels of compensation received by the broker-dealer in connection with those products can either be offset against the wrap fee or declined by the broker.

We believe that the advisory account structure, while providing clients with new and additional services, all result in enhanced client costs, and more limited client product choices.

Finally, we understand that Davis and Harman LLP, on our behalf and on behalf of a group of similarly-situated financial services firms, has engaged Oliver Wyman to analyze the financial impact on IRA investors of the Proposed Regulation, in response to the Department's request for such impact analysis. We hope that the contents of this study will be useful for the Department to consider in its review of the Proposed Regulation.

3. Additional Comments Regarding Plan Distributions and Rollovers

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[7] Labor Department Advisory Opinion 97-15A (May 22, 1997).

[8] Labor Department Advisory Opinion 2001-09A (December 14, 2001)

[9] Labor Department Advisory Opinion 2005-10A (May 11, 2005).

As we noted in our original comment letter, Morgan Stanley believes that the guidance issued under Labor Department Advisory Opinion 2005-23A (noting that rollover assistance and information should not be deemed to be "fiduciary" under ERISA or the prohibited transaction provisions of the Code is appropriate, and should not be reversed by the Department. We think this approach continues to be appropriate and consistent with the nature of plan to IRA (and IRA-to-IRA) rollover decisions by individuals.

a. Rollover Decisions Are Made By Clients As A Result of Multiple Factors, Not Merely Investment Selection: In our experience, the decision that a client makes to roll over his or her ERISA-covered plan account to an IRA is made is much more than just technically buying or selling a investment in the plan, such as:

- Desire to Consolidate Retirement Assets As A Matter of Administrative Convenience: As the Department is aware, the average American worker will be employed by multiple employers during his or her working career, with the possibility of participating in multiple defined contribution plans or arrangements sponsored by each employer. Rollovers allow clients to simplify their recordkeeping – in effect, to pay better attention to their retirement futures by providing the opportunity to monitor and watch retirement assets.
- Rollovers Help Mitigate The Issue of "Abandoned Plans": As the Department is no doubt well aware through its regional offices, small plan participants are often at a disadvantage in tracking down retirement assets held at plans sponsored by prior employers, let alone having any influence at all upon expanding or changing investment menus or options. This is even more the case where such employers are either in bankruptcy or are no longer in business. Plan rollovers help to mitigate these issues.
- Rollovers Allow Plan Participants Access to Features That May Not Be Offered Through A Particular Plan: These features may include the ability of a plan participant to convert his or her pre-tax balances into Roth balances (a valuable feature, but not one that is required to be made available in plans), as well as take advantage of various IRA distribution options.

Clearly, IRAs offer greater breadth of investment choices than the standard profit-sharing plan accounts, but these are not the only reasons that individuals seek information or help in determining whether or not to take a rollover from a particular plan account.

b. We Believe That By Making All Rollover Conversations Fiduciary, the Department Will Discourage the Provision of Information, Rather than Encourage It, And Inadvertently Discourage Retirement Savings: To the extent that conversations regarding rollovers become fiduciary for providers of IRAs, without an exemption permitting such conversations to occur without the punitive regime of the Code section 4975 excise taxes, we believe it is logical to view that fewer, rather than more, discussions will occur about the relative merits of rollovers. We would note that this

approach – that of discouraging discussions about IRAs – is antithetical to Congressional efforts to facilitate retirement plan consolidations through rollovers.

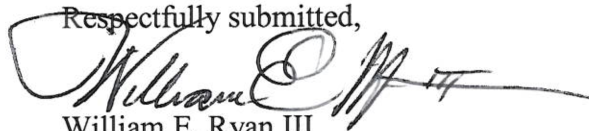
That does not mean, however, that participants of 401(k) plans will not, in fact, take distributions when changing jobs – not merely due to their own decision, but also through the ability of employers to force distributions of small account balances. In our view, what will happen is that clients, especially with small account balances, will simply take the distributions and spend them, not save them. This result will, we believe, be supported in the Oliver Wyman study previously noted in this letter.

Conclusion

As a final point for the Department's consideration, and in line with our prior expressed views, we believe that any issuance of the regulation in final form needs to be accompanied by contemporaneous, and comprehensive, exemptive relief for the various types of transactions cited by us and other commentators that goes into effect at the same time as the new rules.

We are happy to assist the Department in any way that we can in addressing its concerns while preventing inadvertent, and unanticipated, harm to plan and IRA participants.

Respectfully submitted,



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