

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING  
File No. 3-12631

In the Matter of	)
Morgan Stanley & Co.	)
Incorporated,	)
Respondent.	)
	)

**PROPOSED PLAN OF DISTRIBUTION**

**A. OVERVIEW**

1. This Plan of Distribution (the "**Plan**") proposes a methodology for distributing to investors \$6,457,200, plus accumulated interest, paid by Morgan Stanley & Co. Incorporated ("**MS & Co.**" or "**Respondent**") in settlement of administrative proceedings addressing certain automated order-handling practices on behalf of retail customer orders.

2. On May 9, 2007, the Commission entered an Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (the "**Order**") against MS & Co. MS & Co. consented to the entry of the Order without admitting or denying the Order's findings. The Order found, among other things, that between October 24, 2001 and December 8, 2004 (the "**Relevant Period**"), MS & Co. failed to seek to obtain best execution for certain orders for over-the-counter ("**OTC**") securities placed by retail

customers of MS & Co., MS & Co's broker-dealer affiliate and third-party broker-dealers that routed orders to MS & Co. for execution.

3. The Order required, among other things, that MS & Co. disgorge \$5,949,222 plus prejudgment interest of \$507,978 for a total of \$6,457,200 and retain an Independent Distribution Consultant ("**IDC**"), not unacceptable to the staff of the Securities and Exchange Commission ("**Commission**"), to develop and submit a Distribution Plan for the distribution of disgorgement and interest (the "**Fund**") to investors pursuant to Rule 1101 of the Commission's Rules Regarding Fair Fund and Disgorgement Plans ("**Disgorgement Rules**"). The Order further required that MS & Co. "cooperate fully with the IDC and shall provide the IDC with access to its files, books, records, and personnel as reasonably requested for review." The Order also directed that MS & Co. "shall require that the IDC develop a Distribution Plan for the distribution of the disgorgement . . . and any interest thereon, according to a methodology developed in consultation with MS & Co. and acceptable to the staff of the Commission." In addition, the Order directs that MS & Co. "shall pay all costs and expenses of the distribution, including but not limited to, taxes and the expenses of the Plan Administrator and the Tax Administrator."

4. In accordance with the Order, MS & Co. has retained Elizabeth A. Coley, the Chief Executive Officer of ComplianceRX LLC, a securities regulatory consulting firm, as the IDC. Ms. Coley is a former Commission lawyer having substantial securities industry legal and regulatory experience. Respondent has agreed to pay all costs associated with the engagement of the IDC.

5. Notice of this Plan shall be published in the SEC Docket, on the Commission website [<http://www.sec.gov>] and on the Respondent's website [<http://www.morganstanley.com>].

Any person or entity wishing to comment on the Plan must do so in writing by submitting their comments within thirty days of the date of the notice (i) by sending a letter to the Office of the Secretary, United States Securities and Exchange Commission, 100 F. Street, N.E., Washington, D.C. 20549-1090; (ii) by using the Commission's Internet comment form ([www.sec.gov/litigation/admin.shtml](http://www.sec.gov/litigation/admin.shtml)); or (iii) by sending an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Comments submitted by e-mail or via the Commission's website should include the Administrative Proceeding File Number (Admin. Proc. File No. 3-12631) in the subject line. Comments received will be available to the public. Commenters should only submit information they wish to make publicly available.

6. This Plan provides that the calculation of amounts to be distributed to investors will be based on records of MS & Co., its affiliated broker-dealer and certain other third-party entities. Accordingly, the Fund is not being distributed according to a claims-made process, so the procedures for providing notice and for making and approving claims are not applicable.

**B. APPOINTMENT OF AN ADMINISTRATOR**

7. The Order requires the IDC to submit a Plan for the "administration and distribution of disgorgement funds pursuant to Rule 1101 of the Disgorgement Fund Rules." The IDC proposes that Rust Consulting, Inc. ("**Rust**") serve as the administrator of the Plan (the "**Plan Administrator**"). Rust will be compensated by the Respondent.

8. In coordination with the IDC, the Plan Administrator will be responsible for, among other things, overseeing administration of the Fund, obtaining accurate and current mailing information for investors, preparing accountings of distributions made, providing documentation and information necessary for income tax compliance ruling and advice work assigned to the tax administrator appointed by the Commission, and distributing money from the

Fund to investors in accordance with this Plan. The Plan Administrator will provide customer support and communications programs to address investor questions or concerns regarding the distribution which will become active at least by the time the first distribution occurs. These services will include a toll-free number and a website available to the public. The Commission retains the right to review and approve any material posted on the website. The IDC believes Rust will perform satisfactorily the duties of Plan Administrator.

9. The IDC proposes that the bond requirement for Rust be waived. In lieu of a bond, Rust currently maintains, and will continue to maintain until the Fund is fully distributed, the insurance described below. The primary insurer, Illinois Union Ins. Co. ("ACE USA") is a company which, as of the most recent renewal of its coverage, was rated "A+ XV" by A.M. Best. Rust maintains, and will continue to maintain until the Fund is fully distributed, E&O insurance in the amount of \$10,000,000. It has a policy limit of \$10,000,000 per occurrence and an overall limit of \$10,000,000 during the life of the policy. Rust also maintains an additional \$10,000,000 in excess E&O insurance. In addition, Rust maintains a crime policy in the amount of \$5,000,000 per occurrence, which provides protection against employee dishonesty, forgery or fraudulent alteration of securities, and electronic and computer crime exposures, which include losses due to transfer, payment, or delivery of funds as a result of fraudulent input, preparation or modification of computer instructions, data or fraudulent electronic transmissions or communications. Furthermore, Rust performs all of its services pursuant to a standard of care in its service agreement pursuant to which Rust agrees at all times to act in good faith and to use its best efforts within reasonable limits to ensure the accuracy of all services performed under the agreement. Under the Plan, Rust will not, at any time, have access to monies belonging to the Fund in excess of the amount covered by insurance. Rust will have no custody, and only limited

control, of the Fund. Rust has provided documentation to the Commission staff, which supports the foregoing representations of insurance coverage and the staff has deemed the coverage not unacceptable.

10. Neither the IDC nor the Plan Administrator will provide tax advice to any investors receiving distributions from the Fund.

11. While the distribution is being implemented, the Plan Administrator will file an accounting during the first ten days of each calendar quarter on a standardized accounting form provided by the Commission staff. The Plan Administrator will submit a Final Accounting for approval by the Commission prior to the discharge of the Plan Administrator.

12. The IDC and the Plan Administrator, and/or each of their designees, agents and assigns, will be entitled to rely on any orders issued in connection with this proceeding by the Commission, the Secretary for the Commission by delegated authority, or an Administrative Law Judge, and may not be held liable to any person other than the Commission or the Fund for any act or omission in the course of administering the Fund, except upon a finding that such act or omission is caused by such party's gross negligence, bad faith or willful misconduct, reckless disregard of duty, or reckless failure to comply with the terms of the Plan. This paragraph is an expression of the IDC's and the Plan Administrator's standard of care and is not intended, nor should it be deemed to be, a representation to or an indemnification of the IDC or the Plan Administrator or their designees, agents and assigns by the Commission or the Fund, nor should this paragraph preclude the Commission or the Fund from seeking redress from the IDC or the Plan Administrator in accordance with the rules and regulations of the Commission and the Plan.

### **C. TAX ADMINISTRATOR**

13. The Commission has appointed Damasco and Associates LLP as the tax administrator of the Fund ("**Tax Administrator**").<sup>1</sup> The IDC, Plan Administrator and Respondent will cooperate with the Tax Administrator in providing information necessary to accomplish the income tax compliance, ruling and advice work assigned to the Tax Administrator by the Commission. The Tax Administrator shall be compensated by MS & Co. MS & Co. will provide the Tax Administrator with funds to pay tax liability and tax compliance costs for the Fund.

### **D. CONTROL OF THE FUND**

14. Pursuant to the Order, on June 5, 2007, MS & Co. paid a total of \$6,457,200 in disgorgement and prejudgment interest to the Commission. Those funds were subsequently transferred to, and are currently deposited at, the Bureau of Public Debt ("**BPD**"), U.S. Treasury, for investment in U.S. government obligations. The assets of the Fund are subject to the continuing jurisdiction and control of the Commission. The Fund will not receive additional funds, other than the accrued interest from the invested funds.

15. The Fund constitutes a Qualified Settlement Fund ("**QSF**") under § 468B(g) of the Internal Revenue Code, 26 U.S.C. § 468(B)(g), and related regulations, 26 C.F.R. §§ 1.468B-1 through 1.468B-5.

16. Upon approval of the Plan, the IDC and the Plan Administrator shall establish an escrow account at Deutsche Bank Trust Company America ("**Deutsche Bank**" or the "**Bank**"), in the name of and bearing the Taxpayer Identification Number of the QSF (the "**Escrow Account**") as follows: Morgan Stanley Distribution Fund, EIN 26-0372401, as custodian for the

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<sup>1</sup> In re Morgan Stanley & Co. Incorporated, Order Appointing Tax Administrator, Exchange Act. Rel. No. 55911 (June 15, 2007).

benefit of the investors allocated from the Morgan Stanley Plan of Distribution. The escrow agreement ("**Escrow Agreement**") must be acceptable to the Commission staff and shall provide that the escrowed funds be (i) invested as soon as reasonably possible in AAA-rated Money Market Mutual Funds registered under the Investment Company Act of 1940 that invest in short term U.S. Treasury securities and obligations backed by the full faith and credit of the U.S. Government of a type and term necessary to meet the cash requirements of the payments to Eligible Investors (defined below in **Section F., ¶24**); and (ii) distributed only in accordance with the validated lists of payees described below in **Section J., ¶32(h)**. Any and all taxes payable on the amount of income earned by the money in the Escrow Account shall be paid by MS & Co. The Bank is expressly authorized and directed to work with the IDC, the Plan Administrator and Tax Administrator to make such payments. Monies shall be transferred from the BPD to the Escrow Account in accordance with **Section J., ¶32(h)** as the validated lists of payees are submitted to the Commission staff.

17. Upon approval of the Distribution Plan by the Commission, the IDC and the Plan Administrator shall further establish a controlled disbursement account in the name of and bearing the Taxpayer Identification number of the QSF (the "**Disbursement Account**"). All funds will remain in the Escrow Account pursuant to the Escrow Agreement until needed to satisfy a presented check or electronic wire instruction. At that time, subject to the controls set forth below in **Section J., ¶32(h)**, the amount needed to satisfy any presented check or electronic wire transfer instruction will be transferred to the Disbursement Account. Presented checks or electronic transfers will be subject to "positive pay" controls before being honored by the Bank. For any payment to be made by electronic wire instruction and subject to the controls set forth below in **Section J., ¶32(h)**, funds will be paid by the Bank from the Escrow Account in

accordance with written instructions provided to the Bank by parties authorized by the Escrow Agreement.

18. Rust shall be the signer on the Disbursement Account, in coordination with the IDC and the continuing jurisdiction and control of the Commission. Rust shall authorize the Bank to provide information on the Escrow Account and Disbursement Account directly to the Tax Administrator. Rust will also authorize the Bank to provide copies of bank statements for the Escrow Account and Disbursement Account to the IDC, the Tax Administrator and Daniel M. Hawke, Regional Director, Securities and Exchange Commission, Mellon Independence Center, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

19. The Plan Administrator shall use the assets and earnings of the Fund to provide payments to the Eligible Investors as identified in **Section F., ¶24**. The Bank will provide the IDC with an attestation that all funds in the Escrow Account and Disbursement Account will be held for this Plan and that the Bank will not place any lien or encumbrance of any kind upon the funds. Interest earned on the monies will inure to the benefit of Eligible Investors as an additional component of compensation and will be allocated and disbursed to Eligible Investors on a pro rata basis at the time of each distribution. All costs associated with maintaining and operating the Escrow Account and the Disbursement Account will be borne exclusively by MS & Co. Upon the Bank's receipt of funds from the BPD, the Bank shall promptly deposit the funds into the Escrow Account ("**Distribution Start Date**").

20. Deutsche Bank maintains a Financial Institutions ("FI") Bond, including errors and omissions insurance coverage with an aggregate limit of 125 million Euro. The financial insurer is a company which, as of the most recent renewal of its coverage, was rated A++ by A.M. Best. Deutsche Bank annually assesses the adequacy of its policy limits through extensive



analysis of historical loss data, exposure to loss and internal company controls. Deutsche Bank's limits are reviewed annually by its Board of Directors. The Bank has provided documentation of the bond and policy coverage to the Commission staff, which has deemed the coverage not unacceptable.

21. The Plan Administrator will use its best efforts to complete distribution within nine months of the Distribution Start Date.

#### **E. FINAL ACCOUNTING**

22. Upon distribution of all monies in the Fund, the Plan Administrator will make arrangements for the final payment of taxes by Respondent and shall submit a final accounting ("**Final Accounting**") to the Commission in an SEC standard accounting format provided by the Commission staff. The Fund shall be eligible for termination after all of the following have occurred: (1) the Final Accounting by the Plan Administrator has been submitted and approved by the Commission, (2) all taxes and fees have been paid, and (3) any undistributed funds have been transferred to the Commission for transfer to the United States Treasury. Commission staff shall seek an order from the Commission to (a) approve the Final Accounting; (b) approve sending any undistributed funds to the United States Treasury after the final tax payment has been made; and (c) authorizes the Secretary of the Commission, upon receipt of a written notification from an Associate Director of the Commission staff that all funds have been expended, to issue an order terminating the Fund and discharging the Plan Administrator from further responsibilities under the Plan.

#### **F. ELIGIBLE INVESTORS**

23. The Order found that MS & Co. failed to seek to obtain best execution for certain orders for OTC securities that were processed through Respondent's automated order-handling

programs. In particular, the orders at issue were handled as "riskless principal"<sup>2</sup> transactions in accordance with certain automated programming features of the order-handling programs (the "Code") resulting in execution prices to customers that were inferior to the execution prices MS & Co. received on the transactions. The Order requires the IDC to develop a Plan that addresses how the Fund "shall be distributed to recompense customers whose orders were adversely affected by the [Code]."

24. Investors eligible to receive monies from the Fund ("**Eligible Investors**") are those investors whose order(s) were handled by MS & Co's automated order-handling programs during the Relevant Period and satisfy the following criteria: (i) the order was executed on a riskless principal basis and was not an order for a proprietary account; (ii) the order was subject to the Code; (iii) the order resulted in a "**Differential Amount**" (as that term is defined in **Section G**).<sup>3</sup> Each order satisfying these criteria is considered an "**Identified Order**."

25. Eligible Investors are MS & Co. account holders ("**Account Holders**") which include: (i) accounts held by MS & Co.; (ii) accounts held by an affiliated broker-dealer of MS & Co.;<sup>4</sup> (iii) IRA Accounts as defined in **Section L**,¶38; (iv) Retirement Plans as defined in **Section L**,¶38; and (v) accounts maintained by MS & Co. for unaffiliated broker-dealers

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<sup>2</sup> An order executed on a riskless principal basis essentially involves two executions. After receiving an order to buy (sell) a security, a broker-dealer firm purchases (sells) the security from (to) another broker-dealer or market center and then sells to (buys from) the customer.

<sup>3</sup> There were several other categories of orders excluded from the categorization, including certain institutional orders, orders resulting in a Differential Amount of less than one cent, and orders processed through an error account.

<sup>4</sup> On or about April 1, 2007, the affiliated broker-dealer (formerly known as Morgan Stanley DW Inc.) merged into MS & Co. For these accounts, the Account Holder is such affiliated broker-dealer, and the Identified Orders represent orders transmitted by the affiliated broker-dealer to MS & Co. for execution.

("Third-Party Brokers")<sup>5</sup> where the Identified Orders represent orders transmitted to MS & Co. for execution.

#### **G. PAYMENT CALCULATION**

26. The methodology for calculating each Eligible Investor's share of the Fund is intended to result in a recompense of the monies on each order adversely affected by the Code, in other words each Identified Order (as defined in **Section F., ¶24**). For each Identified Order, a "**Differential Amount**" will be calculated in accordance with the "**Differential Methodology**," as set forth below in ¶27.

27. For buy orders, where the execution price to the Account Holder is greater than MS & Co.'s execution price (i.e., the price received by MS & Co. in the transaction constituting the "other side" of the riskless principal transaction), the difference between the two execution prices is calculated. The difference is then multiplied by the number of shares purchased.<sup>6</sup> For sell orders, where the execution price to the Account Holder is less than MS & Co.'s execution price, the difference between the two execution prices is calculated. The difference is then multiplied by the number of shares sold.<sup>7</sup> The results of the above calculations for each Identified Order constitute the Differential Amount associated with each order.

28. The payments made to Eligible Investors will be computed and distributed on an account-by-account basis, aggregating by Account Holder where legally appropriate and

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<sup>5</sup> In certain instances, the Eligible Investor may be the customer (or account held by such customer) of the Third-Party Broker. Such customers may be referred to herein as Account Holders. **Section K (Third-Party Broker Outreach Process)** sets forth these distribution processes.

<sup>6</sup> On buy orders, where the Account Holder execution price is less than the MS & Co. execution price, no calculation is made.

<sup>7</sup> On sell orders, where the Account Holder execution price is greater than the MS & Co. execution price, no calculation is made.

practical.<sup>8</sup> For purposes of the aggregation, an "**Account Differential Amount**" will be calculated by aggregating the Differential Amounts for Identified Orders by account.

29. In the view of the IDC, the above methodologies are fair and reasonable for purposes of determining the harm to each investor as a result of the Code. MS & Co. will be assisted with performing these calculations by PricewaterhouseCoopers LLP (the "**PwC**"), which was not unacceptable to the staff, that also assisted with identifying specific order information using MS & Co. records and those of its affiliated broker-dealer.

#### **H. UNDISTRIBUTED FUNDS**

30. Any funds that are not distributed to Eligible Investors will be transferred to the Commission for transfer to the U.S. Treasury.

#### **I. DE MINIMIS ACCOUNT DIFFERENTIAL THRESHOLD**

31. Where the Account Differential Amount (as defined in **Section G., ¶28**) allocated to an Eligible Investor would be \$10 or less, such distribution amount will be treated as "undistributed" for purposes of this Plan, and processed pursuant to **Section H., ¶30**. This \$10 threshold will be applied to all Account Holders, including Third-Party Brokers and their underlying account distributions as discussed in **Section K**.

#### **J. DISTRIBUTION PROCESS**

32. The process of calculating the amounts to be distributed to investors and causing those distributions to be made from the Fund will be implemented through the following "**Nineteen Step Process**." With regard to the timing of the distribution process, the Tax Administrator will, as appropriate, issue a tax opinion or seek a private letter ruling from the Internal Revenue Service regarding certain tax information and related tax reporting treatment of

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<sup>8</sup> The ability to aggregate by account may be limited due to the availability of information. The IDC will provide oversight of the efforts made to identify common Account Holders based on the estimated costs and benefits of the activities required to do so.

distributions from the Fund. No money will be distributed pursuant to this Plan prior to (i) final approval of the Plan by the Commission; (ii) receipt of any tax opinion or IRS ruling, as deemed necessary by the Tax Administrator; and (iii) completion by the Plan Administrator and the IDC of final calculations and associated verifications for individual payees as described in **Section J., ¶32(h)**. Provided these conditions have been met, the Plan Administrator will use its best efforts to start the distribution within four weeks after completion of the latest of the events described in (i), (ii) and (iii) above,<sup>9</sup> and to complete the distribution within 120 days after the transfer of the final population of funds to the Escrow Account. The processes set forth in this Plan apply only to the specific facts of this case. Nothing herein should be construed as expressing any view regarding any other set of facts or any other matter that might come before the Commission.

- a. **Step One:** MS & Co., with the assistance of PwC, will determine the Identified Orders. This process will be performed by applying the order parameters set forth in **Section F. (Eligible Investors)** to orders that were handled by MS & Co.'s automated order-handling programs during the Relevant Period.
- b. **Step Two:** The IDC will verify the processes of determining Identified Orders for accuracy.
- c. **Step Three:** MS & Co., with the assistance of the PwC, will match Identified Orders to Account Holders, based upon MS & Co.'s books and records to determine the Eligible Investors.<sup>10</sup> MS & Co., with the assistance of the PwC, will also match the Identified Orders relating to Third-Party Brokers (as defined in **Section F., ¶25**) to individual brokers using a manual process whereby broker identification information

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<sup>9</sup> Distribution monies will be paid out in different stages in accordance with the outreach and distribution processes of **Section K**.

<sup>10</sup> All reasonable efforts to match Identified Orders to Account Holders will be undertaken.

in MS & Co.'s books and records will be used to determine the identity of such brokers by comparing such information to certain external sources, including publicly-available information maintained by national securities markets<sup>11</sup> and private parties, as well as MS & Co. records.

- d. **Step Four:** The IDC will verify the matching processes of Step Three for accuracy.
- e. **Step Five:** MS & Co., with the assistance of the PwC, will undertake processes to aggregate Identified Orders, excluding Identified Orders of Third-Party Brokers, on an account-by-account basis to create an initial aggregated list of Account Holders. The Account Differential Amounts (calculated in accordance with the methodology in **Section G. (Payment Calculation)**) will be allocated to such list to create an initial list of Account Holders with corresponding distribution amounts (the "**Initial Accounts Distribution List**"). The aggregation of Identified Orders of Third-Party Brokers will be performed in Step Eleven below.
- f. **Step Six:** The IDC will verify the aggregation processes of Step Five for accuracy.
- g. **Step Seven:** The Plan Administrator will implement an address identification process for all Account Holders.<sup>12</sup> The Plan Administrator will obtain from MS & Co., the most current address on MS & Co. books for open MS & Co. accounts.<sup>13</sup> The Plan Administrator will process all addresses for closed accounts against a national database to obtain the most current address information as may be available.

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<sup>11</sup> It is expected that the large majority of Third-Party Brokers will be identified through the Market Participant information (e.g., market participant identifier ("MPID") and symbol directories available on NASDAQTrader.com).

<sup>12</sup> Address identification processes for Third-Party Brokers and such brokers' underlying accounts will also be performed in connection with the outreach processes described in **Section K**.

<sup>13</sup> As discussed in footnote 4, the affiliated broker-dealer has merged into MS & Co., and thus the account information for such affiliated broker-dealer is now part of MS & Co.'s books and records.

This will be done in an effort to obtain the most valid and current address for each former Account Holder where possible. In order to enhance the quality of this information, the Plan Administrator will require that the search be conducted on a date as close to the mailing date as is commercially reasonable.

- h. Step Eight:** In order to distribute funds, a validated list of payees and the payment amounts will be submitted, with personal identifying information redacted, to the assigned Commission staff who will seek authorization from the Commission to make disbursements pursuant to Rule 1101(b)(6). The payees and amounts will be validated by the IDC and include a representation by the IDC that the list was compiled in accordance with the Plan and provides all information necessary to make disbursement to each payee. Unless otherwise directed by the Commission, the Commission staff will seek to obtain from the Secretary of the Commission an Order Directing Disbursement that releases funds to the Escrow Account based upon the validated list and representation by the Plan Administrator that checks or electronic transfers will be issued within fifteen business days following the release of funds to the Escrow Account.
- i. Step Nine:** The Plan Administrator will cause a check to be mailed to all identified accounts within fifteen business days of the Bank receiving custody of the verified disgorgement funds into the Escrow Account. The Plan Administrator will mail checks to the payees' last known address as determined in Step Seven above. All checks shall bear a stale date 90 days from the date of issue. Electronic transfers will be made only to cash equivalent accounts (e.g., money market accounts). As required in the Escrow Agreement, a positive payment system will be utilized to

honor checks as they are presented for payment, consistent with limitations as to date and time. All payments will be preceded or accompanied by a written communication that includes, as appropriate: (a) a statement characterizing the distribution; (b) a description of the tax information reporting and other related tax matters; (c) a statement that checks will be void after 90 days; and (d) the name of a person or entity to contact in the event there are any questions regarding the distribution. Any such communication to recipients will be submitted to the Commission staff for review and approval. Distribution checks, on their face or in the accompanying mailing, will clearly indicate that the monies are being distributed from an SEC disgorgement fund. Payouts to Account Holders relating to Third-Party Brokers are addressed in Step 13.

- j. **Step Ten:** The IDC will verify the processes of Step Nine for accuracy.
- k. **Step Eleven:** The Plan Administrator will undertake an "**outreach process**" in order to effect the distribution of monies allocated to Third-Party Brokers in a reasonable and expeditious manner. These distribution processes are intended to facilitate the distribution of funds to underlying accounts of Third-Party Brokers, to the extent possible. As described in **Section F.**, Third-Party Brokers routed certain Identified Orders (as defined in **Section F., ¶24**) to MS & Co. for execution. These Identified Orders were generally orders on behalf of accounts of the Third-Party Brokers. It can be expected that some of the Third Party Brokers' accounts<sup>14</sup> will themselves be

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<sup>14</sup> For purposes of the Plan, an "account holder" of a Third-Party Broker means the securities holder listed in such a firm's books with respect to the account. In many instances, such account holder may be a financial intermediary that holds the account on behalf of one or more underlying account holders.



financial intermediaries<sup>15</sup> holding accounts on behalf of their customers.<sup>16</sup> In some instances, these underlying customers may also be financial intermediaries. In order to address the multiple chains of account ownership that may exist with respect to Third-Party Brokers, the Plan includes a robust distribution process for Third-Party Brokers that are allocated the largest distribution amounts (i.e., over \$10,000). Processes to distribute funds to Third-Party Brokers allocated lesser distribution amounts will be balanced against the anticipated efforts and costs to be incurred by the underlying financial intermediaries and the Plan Administrator to attempt to identify accounts that are not held by intermediaries. Based on these considerations, distributions for Third-Party Brokers will be subject to the processes set forth in **Section K., ¶¶33-37.**

- l. Step Twelve:** The IDC will verify the processes of Step Eleven for accuracy.
- m. Step Thirteen:** The distribution of funds relating to Third-Party Brokers will occur on a rolling basis, in accordance with the distribution processes of this Plan.

Distributions relating to Third-Party Brokers will occur in accordance with the general processes and controls set forth in Step Eight, and in the discretion of the IDC.

- n. Step Fourteen:** Returned mail will be handled as follows:
  - (i) All mail returned by the United States Postal Service ("USPS") for which a new forwarding address has been provided by the USPS will be resent to the

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<sup>15</sup> Based on Respondent's books and records, and as an initial matter, it appears that some Third-Party Brokers are "clearing" brokers, a securities industry term that generally refers to broker-dealer firms that hold (or "carry") accounts for other broker-dealers, process securities transactions for such broker-dealers, and/or provide securities clearance and settlement services.

<sup>16</sup> The Respondent's account records generally reflect only the name of the Third-Party Broker, and not the identity of any underlying Account Holders.

new address. All mail returned by the USPS for the first time, without a new forwarding address, will be treated as returned mail and the check will be voided. Current account information about the Account Holder will be forwarded to a research firm ("**Research Firm**") for further research.<sup>17</sup> Additional efforts to identify the addresses of recipients will be conducted as is commercially reasonable in the view of the IDC, taking into account the costs of further research and the amount to be distributed. As a general matter, the costs should not exceed the amount to be distributed to each Eligible Investor.

(ii) All mail returned by the USPS after a second attempt mailing, for which a new forwarding address has been provided by the USPS, will be resent to that new address. All mail returned by the USPS after a second attempt mailing, without a new forwarding address, will be treated as returned mail and the check will be voided.

(iii) Additional efforts to identify the addresses of recipients will be conducted as is commercially reasonable in the view of the IDC, taking into account the costs of further research and the amount to be distributed. As a general matter, the costs should not exceed the amount to be distributed to each Eligible Investor.

- o. Step Fifteen:** The IDC will declare the implementation of the Distribution Process complete 120 days after completing the last mailing required pursuant to the protocol described in Steps Eight, Nine, Thirteen and Fourteen. This 120-day period is deemed to include the 90-day period during which a check is valid plus a 30-day

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<sup>17</sup> A suitable research firm will be selected by the Plan Administrator, subject to the approval of the IDC.

grace period. Checks that are not negotiated at the completion of the Distribution Process shall be voided by the Bank.

- p. **Step Sixteen:** The value of all checks not cashed, returned distributions, distributions to Account Holders who cannot be identified, and the additional compensation allotted to these accounts after the end of the 120-day period described in Step Fifteen, will be contributed to or remain in the Escrow Account at the Bank. Any monies remaining in the Escrow Account will be treated as "undistributed" for purposes of the Plan, and processed pursuant to **Section H., ¶30.**
- q. **Step Seventeen:** The IDC, with the assistance of the Plan Administrator, will verify the balance in the Escrow Account for accuracy.
- r. **Step Eighteen:** The Plan Administrator will conduct, and the IDC will confirm the transfer from the Escrow Account to the Treasury in Step Sixteen.
- s. **Step Nineteen:** After the final accounting is approved, the Plan Administrator, in coordination with the IDC, shall, in accordance with **Section E., ¶22,** make arrangements for the final payment of taxes by Respondent.

**K. THIRD-PARTY BROKER OUTREACH PROCESS**

**33. Third-Party Broker Allocations of \$10,000 or More**

In instances where the Account Differential Amount to be allocated to a Third-Party Broker will be \$10,000 or more, the Plan Administrator will conduct (or assist the Third-Party Broker in conducting) a "two-tier" distribution process. This means that reasonable efforts will be made to request information relating to Third-Party Brokers' underlying accounts to implement processes intended to make distributions to such accounts (or to the Third-Party

Broker itself, where appropriate), to the extent possible. The specific processes are set forth below.

- a. Not later than 30 days after Commission approval of the Plan, the Plan Administrator will, subject to IDC oversight, contact all Third-Party Brokers meeting this distribution criterion (i.e., Account Differential Amount of \$10,000 or more) to ask them to exercise commercially reasonable best efforts to provide the data and information necessary to allow the Plan Administrator to make distributions to accounts of such Third-Party Brokers (as well as their underlying customers in certain instances), to the extent reasonable and practical.<sup>18</sup>
- b. The Plan Administrator will provide the Third-Party Broker with specific information relating to Identified Orders (as described in **Section F.**) for the accounts of such Third-Party Brokers, as reflected in the books and records of the Respondent. This information is intended to assist the Third-Party Broker with matching Identified Orders to underlying accounts ("**Tier Two Accounts**").
- c. The Plan Administrator will request specific information from the Third-Party Broker relating to its Tier Two Accounts having Identified Orders ("**Tier Two Account Information**"). The requested Tier Two Account Information will include account information (e.g., name, address, taxpayer identification number, type of account, fiduciary or custodian of account and contact information), order information (e.g., details of Identified Orders, including share quantity, price, trade date and stock symbol), and tax and tax-related information. The Tier Two Account Information will be necessary to implement the distribution processes as

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<sup>18</sup> In considering whether efforts are "commercially reasonable," the IDC will consider all costs related to the gathering and utilizing of such data and the amount of the distribution.

described below. Because Third-Party Brokers may consider this information commercially sensitive, the data will be maintained by the Plan Administrator subject to commercially reasonable assurances of confidentiality, and MS & Co. will not have access to the data. The Plan Administrator will maintain in confidence all Tier Two Account Information, order information and any other information provided relating to accounts obtained from any Third-Party Broker or underlying accounts pursuant to this Plan, and shall not share such information with MS & Co. The Plan Administrator, however, may share such information with the Commission, the Plan Administrator's service providers or other parties to the extent necessary to perform their duties under this Plan, and the Plan Administrator will require that such service providers and other parties maintain such information in confidence.

- d. Not later than 120 days after Commission approval of the Plan, and after reasonable efforts are made by the Plan Administrator to obtain the Tier Two Account Information from Third-Party Brokers, the reasonableness of which will be determined by the IDC, the received Tier Two Account Information will be subject to the aggregation processes of Step Five of the Plan, however, the aggregation processes will be performed by the Plan Administrator. Underlying accounts will be matched on an account-by-account basis and an Account Differential Amount for each Tier Two Account will be determined. The IDC may grant a Third-Party Broker additional time in which to respond if, in the discretion of the IDC, such Third-Party Broker appears to be making reasonable efforts to provide the requested information.

e. Distribution processes on behalf of the Tier Two Accounts, the so-called "tier two" distributions, will be performed by the Plan Administrator for the matched Account Differential Amounts. The IDC will have the discretion to make case-by-case determinations with respect to distributions to Tier Two Accounts, and will have the discretion to make case-by-case determinations whether any account is a financial intermediary for purposes of the Plan.

(i) For any Tier Two Account that does not appear to be a financial intermediary, distributions to such accounts will be made by the Plan Administrator in accordance with Steps Seven through Ten of the Plan, where reasonable and practical.

(ii) For any Tier Two Account that appears to be a financial intermediary, the Plan Administrator will contact such Tier Two Account to essentially repeat the processes set forth in subparagraphs a. through c. of this **Section K., ¶33** with respect to the Tier Two Accounts' underlying accounts.<sup>19</sup>

This means that the Tier Two Accounts (for which an Account Differential Amount has been determined) will be provided with specific information relating to Identified Orders (as described in **Section F**) of its underlying accounts. This information is intended to assist the Tier Two Accounts with matching Identified Orders to such underlying accounts. In a manner similar to the Third-Party Broker processes, the Plan Administrator will request specific information (the "**Tier Two Sub-Account Information Request Date**") from Tier Two Accounts relating

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<sup>19</sup> It can be expected that during the transfer of Tier Two Account Information, the Plan Administrator, and, where necessary, the IDC, will have communications with Third-Party Brokers relating to the information.

to underlying accounts having Identified Orders ("**Tier Two Sub-Account Information**") necessary to implement the following distribution processes. The requested Tier Two Sub-Account Information will include the specific information described in **Section K., ¶33(c)**. Not later than 120 days after the Tier Two Sub-Account Information Request Date, and after reasonable efforts are made by the Plan Administrator to obtain the Tier Two Sub-Account Information, the Tier Two Sub-Account information received will be subject to the aggregation processes of this Plan, and will be subject to the confidentiality provisions of **Section K., ¶33(c)**. Underlying accounts will be matched on an account-by-account basis and an Account Differential Amount for each account ("**Tier Two Sub-Account**") will be determined. The following distribution processes will be implemented for Tier Two Sub-Accounts. The IDC will have the discretion to make case-by-case determinations with respect to distributions to Tier Two Sub-Accounts.

(iii) For any Tier Two Sub-Account that does not appear to be a financial intermediary, distributions to such accounts will be made by the Plan Administrator in accordance with Steps Seven through Ten of the Plan, where reasonable and practical.

(iv) If any Tier Two Sub-Account is determined to be the account of a financial intermediary, then the Account Differential Amount for such account will be treated as "undistributed" for purposes of this Plan, and processed pursuant to **Section H., ¶30**.

f. Alternate Distribution Process. Any Third-Party Broker meeting the distribution criterion of this **Section K., ¶33** (i.e., Account Differential Amount of \$10,000 or more) can suggest an alternate distribution process provided that the process is acceptable to the IDC. Any alternate distribution process will require that the proceeds be distributed with the exercise of reasonable discretion and in a manner deemed to be consistent with the legal, fiduciary and contractual obligations of the Third-Party Broker or other party involved in the distribution of monies<sup>20</sup> (the "**Distribution Party**").<sup>21</sup> When contact is made with a Distribution Party, it will also be notified that the distribution payment monies are designated solely for Eligible Investors, should be deposited into a separate account, and are not to be used for expenses relating to the identification of Eligible Investors. In addition, the Distribution Party will be required to certify that it has complied with the terms of the Plan in making any distributions, and will be required to provide certain tax and tax-related information to the Plan Administrator, as appropriate. Specifically, the Plan Administrator will ask each Distribution Party to certify that it will use commercially reasonable efforts consistent with its legal, fiduciary, and contractual duties, as applicable, to disburse Fund payments to its affected Account Holders in accordance with the terms of the Plan. The certifications are intended to provide reasonable assurances that distribution monies are being distributed to Eligible Investors in accordance with the terms of the Plan when

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<sup>20</sup> If deemed acceptable to the IDC, a party other than the Third-Party Broker may assume responsibility for making distributions directly to their underlying Account Holders. Such distribution party will be required to fully assume the responsibilities and obligations of Third-Party Brokers under the terms of the Plan.

<sup>21</sup> Where more than one Distribution Party is utilized, each Distribution Party will be required to provide the herein certifications.



such distributions are not made by the Plan Administrator. Distribution Parties will also be required to certify that they will return any undistributed monies to an account that has been established to hold otherwise undistributed funds for ultimate disposition in accordance with this Plan. After each Distribution Party has provided the required certification, which the Plan Administrator, working with the IDC, will use commercially reasonable efforts to obtain under the direction of the IDC, the distribution of funds to such Distribution Party will be made in accordance with Step Thirteen of the Plan so that the funds can be distributed to affected Account Holders. If a Third-Party Broker does not respond to an outreach request for Account Holder information (Tier Two Account Information) or if a Distribution Party refuses or fails to provide a certification of an alternative distribution, then such Third-Party Broker or Distribution Party will no longer be considered eligible for a distribution and will be assigned a distribution amount of zero. After funds have been distributed in the manner set forth herein, the Distribution Party will be required to provide the IDC with a certification that it has complied with such terms and conditions. By electing an alternate distribution option deemed acceptable to the IDC, the Third-Party Broker acknowledges that the sole recourse of any account holder in the event of a dispute or complaint is to the Third-Party Broker, and/or any other party making the distribution, and not to the Commission, IDC, Plan Administrator or MS & Co. The Plan Administrator will keep records of each contact attempt for a Third-Party Broker and each contact attempt for a Distribution Party, each response received, if any, and the reason given for not providing the Tier Two Account

Information or for not providing the certification required to receive the distribution funds, if any. These records will be provided to the Commission staff at least 45 days before the scheduled distribution is to be made.

- g. A Third-Party Broker may request the assistance of the Plan Administrator and/or the IDC on a case-by-case basis.

**34. Third-Party Broker Allocations Between \$1,000 and \$9,999**

In instances where a Third-Party Broker is allocated an Account Differential Amount between \$1,000 and \$9,999, the distribution process will be conducted on a case-by-case basis in accordance with the parameters set forth below, after considering relevant information received from the Third-Party Broker.

- a. Not later than 30 days after Commission approval of the Plan, the Plan Administrator will, subject to IDC oversight, contact all Third-Party Brokers meeting this distribution criterion to ask such brokers to exercise commercially reasonable best efforts to provide data and information with respect to certain underlying accounts. The Plan Administrator will provide the Third-Party Broker with specific information relating to Identified Orders (as described in **Section F.**) for the accounts of such Third-Party Brokers, as reflected on the books and records of the Respondent. This information is intended to assist the Third-Party Broker with matching Identified Orders to underlying accounts, the **Tier Two Accounts** as defined in **Section K., ¶33(b)**. The Plan Administrator will request specific information - the **Tier Two Account Information** as defined in **Section K., ¶33(b)** from the Third-Party Broker relating to its Tier Two Accounts. The requested Tier Two Account Information will include account information (e.g.,

name, address, taxpayer identification number, type of account, fiduciary or custodian of account and contact information), order information (e.g., details of Identified Orders, including share quantity, price, trade date and stock symbol), and tax and tax-related information. The confidentiality provisions of **Section K., ¶33(c)** will apply to any information received from Third-Party Brokers.

- b.** Not later than 120 days after Commission approval of the Plan, and after reasonable efforts are made by the Plan Administrator to obtain the Tier Two Account Information from the Third-Party Brokers, the reasonableness of which will be determined by the IDC, the Tier Two Account Information will be subject to the aggregation processes of Step Five of the Plan, however, the aggregation processes will be performed by the Plan Administrator. Underlying accounts will be matched on an account-by-account basis and an Account Differential Amount for each Tier Two Account will be determined. As noted above, the IDC may grant a Third-Party Broker additional time in which to respond if, in the discretion of the IDC, such Third-Party Broker appears to be making reasonable efforts to provide the requested information.
- c.** The IDC will review and evaluate, on a case-by-case basis, the Tier Two Account information received from the Third-Party Broker in an effort to allow the Plan Administrator to make distributions to such accounts, to the extent reasonable and practical.<sup>22</sup> Any distributions to Tier Two Accounts will be made by the Plan Administrator in accordance with the terms of the Plan. The IDC shall exercise discretion when making determinations regarding whether distributions will be

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<sup>22</sup> In considering whether efforts are "commercially reasonable," the IDC shall consider all costs related to the gathering and utilizing of such data and the amount of the distribution.

made to Tier Two Accounts, after considering information received from Third-Party Brokers relating to such accounts. If any Tier Two Account is determined to be the account of a financial intermediary, the Account Differential Amount for such account will be treated as "undistributed" for purposes of this Plan, and processed pursuant to **Section H., ¶30**. The IDC will have the discretion to make case-by-case determinations whether any account is a financial intermediary for purposes of the Plan.

**35. Third-Party Broker Allocations Less Than \$1,000**

In instances where the Account Differential Amount allocated to a Third-Party Broker would be less than \$1,000, the distribution funds will be treated as "undistributed" for purposes of this Plan, and processed pursuant to **Section H., ¶30**.

**36. \$10 Account Differential Amount**

The \$10 Account Differential Amount described in **Section I., ¶31** shall apply to all distributions to Third-Party Brokers and any underlying accounts, and any such distributions will be treated as "undistributed" for purposes of this Plan, and processed pursuant to **Section H., ¶31**.

**37. Timeframes**

The Plan Administrator shall request that Third-Party Brokers provide the requested information to the Plan Administrator in connection with the processes relating to the distribution categories of **Section K., ¶¶33 and 34** no later than 120 days<sup>23</sup> after final Commission approval of the Plan. The Plan Administrator will communicate the date by which

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<sup>23</sup> Third-Party Brokers meeting the first distribution criterion of **Section K., ¶33** (i.e., Account Differential Amount of \$10,000 or more) that desire to propose an alternative distribution process in accordance with **Section K., ¶33(f)**, must provide notice of such intention to the Plan Administrator within the 120-day timeframe of **Section K., ¶37**.

data from Third-Party Brokers, where relevant, must be provided. The Plan Administrator will maintain records of its efforts to obtain the cooperation of Third-Party Brokers and of the responses received to these efforts. Distribution funds attributed to Third-Party Brokers who are unresponsive or cannot supply the necessary data and information relating to the distribution processes of **Section K., ¶¶33 and 34** shall be treated as "undistributed" for purposes of this Plan, and processed pursuant to **Section H., ¶30**. The IDC may, at its discretion, grant Third-Party Brokers an extension of any time period specified in the Plan.

**L. RETIREMENT PLANS**

**38. "Retirement Plan"** as used in this Distribution Plan means an "benefit plan" as such plans are defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 USC 1001, et seq. ("**ERISA**"), which is not (i) an individual retirement account (IRA), including a traditional IRA, a Roth IRA, a SEP IRA, a SARSEP IRA, or a SIMPLE IRA, or (ii) a Section 403(b)(7) custodial account under a program not established or maintained by an employer, whether or not the employee benefit plan is subject to Title I of ERISA (collectively "**IRA Accounts**"). Under this Plan, IRA Accounts are treated as Eligible Investors, and distributions to IRA Accounts will be made in accordance with **Section F.** of this Plan.

**39.** Assets of Retirement Plans are held in trust by a trustee, and the trust is the legal owner of the assets. This Plan requires the plan fiduciaries and intermediaries, as defined in 13 Department of Labor Field Assistance Bulletin No. 2006-01, April 19, 2006 (the "**Field Assistance Bulletin**"), of Retirement Plans to distribute or use the monies received in

accordance with their legal, fiduciary, and contractual obligations and consistent with guidance issued by the Department of Labor, including, but not limited to, the Field Assistance Bulletin.<sup>24</sup>

40. For purposes of the Plan, a distribution to a Retirement Plan will be made to the Retirement Plan itself (and not to any individual plan participant) and the Retirement Plan (whether a defined contribution or defined benefit plan) will be treated as the beneficial owner.

41. The fiduciary of a Retirement Plan receiving a distribution or an intermediary to one or more Retirement Plans may distribute it pursuant to one of the following four alternatives:<sup>25</sup>

- a. Allocate the distribution pro rata (based on total account balance) among the accounts of all persons who are currently participants in the Retirement Plan (whether or not they are currently employees).
- b. Allocate the distribution amount per capita among the accounts of all persons who are currently participants in the Retirement Plan (whether or not they are currently employees).
- c. Allocate the distribution among one or more Retirement Plans utilizing a per capita or pro rata manner or some combination thereof. Individual plan fiduciaries may allocate the distribution amount received in accordance with alternatives One or Two of this paragraph or some combination thereof.

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<sup>24</sup> While some Retirement Plans may be established with respect to "defined contribution plans" (where each participant has an account), substantial numbers of Retirement Plans are held with respect to "defined benefit plans" for which no individual participant account is established, or required to be established.

<sup>25</sup> These alternatives are intended to take into consideration the difficulty in trying to allocate to any particular participant the precise amount of a settlement payment, and the difficulty of trying to allocate payments to both current and former participants (many of whom may no longer have accounts or accrued benefits under a plan).

- d. To the extent that none of the preceding alternatives is administratively feasible, or, with respect to a defined benefit Retirement Plan,<sup>26</sup> that no participant accounts exist, plan fiduciaries may, to the extent permitted by the terms of the particular Retirement Plan, use the distribution amount to pay the reasonable expenses of administering the Retirement Plan, provide enhanced retirement benefits to Retirement Plan participants, or use the funds to offset any shortfalls in Retirement Plan funding, again consistent with the requirements of applicable law and the terms of the respective Retirement Plan.

**M. EXTENSIONS AND AMENDMENTS**

42. For good cause shown, the Commission's staff may approve an extension of any of the procedural dates set forth in this Plan.

43. This Plan is subject to approval by the Commission. The Commission retains jurisdiction over the implementation of the Plan.

Submitted on 6/18/09

By: Elizabeth A. Coley  
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<sup>26</sup> The Internal Revenue Service has recently revised the regulatory guidance applicable to Section 403(b) retirement vehicles, which is also applicable to Section 403(b)(7) custodial accounts, indicating that these arrangements should generally be treated as "plans" subject to employer direction (including, for example, employer-issued plan documentation). However, since (a) most broker-dealers historically holding these accounts have only participant information because the participants were, in effect, the individuals exercising investment control over the accounts, and (b) the accounts have been set up as individual participant accounts, rather than co-mingled vehicles, it is more appropriate to treat them like IRA Accounts.