

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STEVE SHERESKY, JEFFREY SAMSEN, and
NICHOLAS SUTRO,

Plaintiffs,

v.

UNITED STATES OF AMERICA;

LORI CHAVEZ-DEREMER, in her official
capacity as Secretary of the United States
Department of Labor;

DANIEL ARONOWITZ, in his official
capacity as Assistant Secretary of the United
States Department of Labor; and

JANET DHILLON, in her official capacity as
Principal Deputy Assistant Secretary of the
United States Department of Labor,

Defendants.

No. 25-cv-08935

Related to Shafer v. Morgan Stanley,
No. 1:20-cv-11047 (S.D.N.Y.)

COMPLAINT

1. Plaintiffs Steve Sheresky, Jeffrey Samsen, and Nicholas Sutro are former employees of Morgan Stanley Smith Barney (“Morgan Stanley”), who are challenging Morgan Stanley’s cancellation of their deferred compensation in FINRA arbitrations. Sheresky and Samsen’s FINRA arbitration is anticipated to commence in 2026 on a date to be determined, and Nicholas Sutro’s FINRA arbitration is scheduled to commence on May 26, 2026. Plaintiffs allege in their arbitrations that certain Morgan Stanley deferred compensation plans for financial advisors (the “Plans”) are governed by the Employee Retirement Income Security Act of 1974 (“ERISA”),

and that the cancellation of their deferred compensation when they left Morgan Stanley violates ERISA.

2. This Court in *Shafer v. Morgan Stanley*, in which Sheresky and Samsen were plaintiffs, found—*twice*—that the Plans were governed by ERISA. *Shafer v. Morgan Stanley*, No. 20-cv-11047-PGG, 2023 WL 8100717 (S.D.N.Y. Nov. 21, 2023) (“*Shafer I*”),¹ and 2024 WL 4697235 (S.D.N.Y. Nov. 5, 2024) (“*Shafer II*”).

3. Without notice to Plaintiffs—or the hundreds of other former Morgan Stanley financial advisors currently challenging the cancellation of their deferred compensation in FINRA arbitrations—and after the *Shafer* Court had ordered the parties to arbitrate their claims, Morgan Stanley improperly sought and obtained an advisory opinion from the Department of Labor (“DOL”) addressing whether ERISA covered the exact same Plans at issue in these arbitrations. Morgan Stanley sought this advisory opinion to circumvent this Court’s detailed decisions in *Shafer I* and *Shafer II* and to prevent Plaintiffs and other arbitration claimants from vindicating their rights in the very arbitrations Morgan Stanley fought to compel.

4. The DOL knew that this Court had concluded in *Shafer I* and *Shafer II* that the Plans were governed by ERISA because Morgan Stanley told the DOL so when it requested the advisory opinion. The DOL also knew about the dozens of pending arbitrations involving hundreds of claimants where the central issue is whether ERISA covered the Plans. Indeed, Morgan Stanley’s law firm that also represented Morgan Stanley before this Court in *Shafer I* and *Shafer II* told the DOL that a “very sloppy district court”² issued *Shafer I* and that “[d]ozens of very expensive claims have been filed against Morgan Stanley since this strange district court opinion,” Ex. 7 at 2.

¹ *Writ denied and appeal dismissed* by 2025 WL 1890535 (2d Cir. July 9, 2025).

² Ex. 1 at 2.

5. In contravention of both the law and its own policies, the DOL issued an advisory opinion on September 9, 2025.³ In many ways, the Advisory Opinion is a textbook example of an arbitrary and capricious agency action that violates the Administrative Procedures Act (“APA”), 5 U.S.C. § 701 *et seq.*

6. The DOL erred and exceeded its regulatory authority by: (i) creating an impermissible “purpose test” under ERISA, 29 U.S.C. § 1002(2)(A)(ii); (ii) incorrectly relying on the bonus regulation at 29 C.F.R. § 2510.3-2(c) (the “Bonus Regulation”), which is both inapplicable and invalid as applied; (iii) failing to follow its own procedural requirements by, *inter alia*, applying the Advisory Opinion retrospectively to 2015 through 2021 and intentionally interfering with pending litigation; and (iv) ignoring directly contradictory decisions in *Shafer I*, *Shafer II*, *Tolbert v. RBC Capital Markets Corp.*, 758 F.3d 619 (5th Cir. 2014), and *Paul v. RBC Capital Markets LLC*, 2018 WL 784577 (W.D. Wash. Feb. 8, 2018).

7. The Advisory Opinion creates immediate and concrete harm to financial advisors who are arbitrating their deferred compensation claims against Morgan Stanley, including Plaintiffs. Having obtained the flawed Advisory Opinion for impermissible purposes, Morgan Stanley now claims that the Advisory Opinion represents the DOL’s “official position,” argues that the Advisory Opinion shows that Plaintiffs’ and other claimants’ claims are frivolous, and threatens to use the Advisory Opinion to seek attorney’s fees and costs upwards of six figures or higher per arbitration against Plaintiffs and any other claimants who continue to pursue their claims.

³ Ex. 2, U.S. Dep’t of Labor, Emp. Benefits Sec. Admin., Advisory Opinion 2025-03A (September 9, 2025) (“Advisory Opinion”).

8. Accordingly, Plaintiffs ask the Court to (i) vacate and set aside the Advisory Opinion because it violates the APA on both substantive and procedural grounds; (ii) declare that the Bonus Regulation, 29 C.F.R. § 2510.3-2(c), is invalid as applied; and (iii) grant such other relief as may be proper.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 2201(a). Jurisdiction is proper under the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. §§ 702 and 704, which waives the sovereign immunity of the United States for judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704; *see, e.g., Data Mktg. P’ship, LP v. Dep’t of Labor*, 45 F.4th 846, 854-55 (5th Cir. 2022) (holding that a DOL advisory opinion is final agency action).

10. Venue is proper in this district under 28 U.S.C. § 1391(e)(1) because each Plaintiff resides in this judicial district. Venue is also proper under 29 U.S.C. § 1132(k) because the ERISA Plans’ principal office is in this judicial district.

PARTIES

11. Plaintiff Steve Sheresky resides in Rye, New York. Sheresky worked as a financial advisor at Morgan Stanley from 2013-2020. Morgan Stanley cancelled more than \$200,000 of his deferred compensation under the Plans when he left Morgan Stanley. Sheresky has a pending arbitration claim before FINRA against Morgan Stanley concerning his deferred compensation.

12. Plaintiff Jeffrey Samsen resides in Armonk, New York. Samsen worked as a financial advisor at Morgan Stanley from 2013-2020. Morgan Stanley cancelled more than \$50,000 of his deferred compensation under the Plans when he left Morgan Stanley. Samsen has a pending arbitration claim before FINRA against Morgan Stanley concerning his deferred compensation.

13. Plaintiff Nicholas Sutro resides in White Plains, New York. Sutro worked as a financial advisor at Morgan Stanley and its predecessors from 2005-2022. Morgan Stanley cancelled more than \$86,000 of his deferred compensation under the Plans when he left Morgan Stanley. Sutro has a pending arbitration claim before FINRA against Morgan Stanley concerning his deferred compensation.

14. Defendant United States of America has at all relevant times acted through the Department of Labor. The DOL is an agency of the United States government under 5 U.S.C. § 551(1).

15. Defendant Lori Chavez-DeRemer is the Secretary of the Department of Labor and is joined in this action solely in her official capacity.

16. Daniel Aronowitz was confirmed as Assistant Secretary of the Department of Labor for the Employee Benefits Security Administration (“EBSA”) on September 19, 2025, and is joined in this action solely in his official capacity. EBSA is an agency within the DOL. It is “responsible for administering and enforcing the fiduciary, reporting, and disclosure provisions of Title I” of ERISA.⁴ EBSA oversees “more than 837,000 private retirement plans, 2.8 million health plans, and 521,000 other welfare benefit plans, which collectively hold about \$14.6 trillion in assets.”⁵

17. Janet Dhillon is Principal Deputy Assistant Secretary of the Department of Labor for EBSA and is joined in this action solely in her official capacity. At all relevant times, she was Acting Assistant Secretary of the Department of Labor for EBSA. Upon the confirmation of

⁴ *Employee Benefits Security Administration: About Us*, EMP. BENEFITS SEC. ADMIN., U.S. DEP’T OF LABOR, www.dol.gov/index.php/agencies/ebsa/about-ebsa (last visited Oct. 28, 2025).

⁵ *Id.*

Assistant Secretary Aronowitz, she became Principal Deputy Assistant Secretary of the Department of Labor for EBSA.

FACTUAL BACKGROUND

A. The DOL's Procedures for Issuing Advisory Opinions.

18. The Department of Labor issued its “Advisory Opinion Procedure” for ERISA-related inquiries in 1976, which is known as ERISA Procedure 76-1. *See* 41 Fed. Reg. 36281 (effective August 27, 1976). ERISA Procedure 76-1 describes the “general procedures of the Department of Labor in issuing information letters and advisory opinions under [ERISA].”⁶ *Id.* Requests for Advisory Opinions concerning ERISA are handled by the Office of Regulations and Interpretations, which falls within EBSA.⁷

19. An advisory opinion is defined as “a written statement issued to an individual or organization, or to the authorized representative of such individual or organization, by the Administrator of Pension and Welfare Benefit Programs⁸ or his delegate, that interprets and applies the Act to a specific factual situation. Advisory opinions are issued only by the Administrator of Pension and Welfare Benefit Programs or his delegate.” ERISA Procedure 76-1 at Sec. 3.02.

20. ERISA Procedure 76-1 sets forth specific rules for the issuance of advisory opinions. Among other things, it states that: “Generally, advisory opinions will be issued by the

⁶ The current version of the procedure is cited to herein as “ERISA Procedure 76-1” and is available at: *ERISA Procedure 76-1 For ERISA Advisory Opinions*, EMP. BENEFITS SEC. ADMIN., U.S. DEP’T OF LABOR, www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/filing-requests-for-erisa-aos (last visited Oct. 28, 2025).

⁷ *EBSA: What We Do*, EMP. BENEFITS SEC. ADMIN., U.S. DEP’T OF LABOR, www.dol.gov/agencies/ebsa/about-ebsa/about-us/what-we-do (last visited Oct. 28, 2025).

⁸ “The Pension and Welfare Benefits Program” became EBSA in 2003. *History of EBSA and ERISA*, EMP. BENEFITS SEC. ADMIN., U.S. DEP’T OF LABOR, www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa (last visited Oct. 28, 2025).

Department *only with respect to prospective transactions (i.e., a transaction which will be entered into).*” ERISA Procedure 76-1 at Sec. 5.01 (emphasis added).

21. When an individual or organization seeks an advisory opinion, the request “must contain ... [a] detailed description of the act or acts or transaction or transactions with respect to which an advisory opinion is requested.” *Id.* at Sec. 6.02(b). ERISA Procedure 76-1 also states that: “Generally, an advisory opinion will not be issued ... where all parties involved are not sufficiently identified and described, or where material facts or details of the transaction are omitted.” *Id.* at Sec. 5.01.

22. If the individual or organization requesting the advisory opinion does not adhere to ERISA Procedure 76-1’s requirements, the DOL will “acknowledge[]” the request and note “the requirements that have not been met.” *Id.* at Sec. 6.04.

23. ERISA Procedure 76-1 describes the import of an advisory opinion. “An advisory opinion is an opinion of the Department as to the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions. The opinion assumes that all material facts and representations set forth in the request are accurate, and applies only to the situation described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion.” *Id.* at Sec. 10.

24. On June 2, 2025, the DOL issued a press release about its opinion-letter program.⁹ It explained it intended to expand upon the “department’s longstanding commitment to providing

⁹ Press Release, U.S. Dep’t of Labor, US Department of Labor Launches Opinion Letter Program Across Five Agencies to Expand Compliance Assistance, www.dol.gov/newsroom/releases/osec/osec20250602 (June 2, 2025).

meaningful compliance assistance” across “five key enforcement agencies,” including EBSA. Press Release, note 9. As part of this effort, it launched an official landing page. *Id.* The landing page includes a section called “Tips for writing a request,” which asks requestors to: “[c]onfirm that the request is not related to an existing matter that requires the interpretation of federal law. *Note that we do not issue letters for use in any investigation or litigation matter that existed before submitting your request.*”¹⁰

B. The *Shafer v. Morgan Stanley* putative class action

25. At all times relevant to this Complaint, Morgan Stanley required financial advisors to defer a percentage of commissions they earned on revenue generated by their clients’ investment activities. The deferrals, which Morgan Stanley described as “Deferred Compensation,” were divided into a “cash-based deferred compensation award” paid six years later and restricted stock units of Morgan Stanley common stock that were paid four years later. In *Shafer I*, former Morgan Stanley financial advisors, including Plaintiffs Sheresky and Samsen, brought a putative class action to challenge Morgan Stanley’s practice of unilaterally canceling financial advisors’ deferred compensation under the Plans when they leave Morgan Stanley before the four and six-year periods described above.

26. Like Plaintiffs allege in their pending FINRA arbitrations, the plaintiffs in *Shafer* alleged that the Plans are “employee pension benefit plan[s]” under ERISA,¹¹ defined as:

any plan, fund, or program which . . . by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made

¹⁰ Opinion Letters, U.S. DEP’T OF LABOR, www.dol.gov/agencies/oasp/compliance-initiatives/opinion-letters (last visited Oct. 28, 2025) (emphasis added).

¹¹ Pls.’ Am. Class Action Compl. at ¶ 53, *Shafer I*, 1:20-cv-11047-PGG (Mar. 3, 2022), ECF 58.

to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A).

27. And like Plaintiffs in their FINRA arbitrations, the plaintiffs in *Shafer* alleged that the Plans fell within Subsection (ii) because they “result[ed] in” financial advisors deferring income “for periods extending to the end of covered employment or beyond.” *See* Pls.’ Am. Class Action Compl., *supra* note 11, at ¶¶ 3, 59-67.

28. On June 29, 2022, Morgan Stanley moved to compel arbitration in *Shafer*. On November 21, 2023, the Hon. Paul G. Gardephe granted Morgan Stanley’s motion. To decide if the plaintiffs’ claims were arbitrable, however, Judge Gardephe first had to determine whether ERISA covered the Plans. *Shafer I*, 2023 WL 8100717 at *15.

29. Judge Gardephe concluded the Plans were an “employee pension benefit plan” under ERISA, 29 U.S.C. § 1002(2)(A)(ii), because they “result[ed] in a deferral of income by employees for periods extending to the termination of covered employment or beyond.” *Id.* at *6-20. This Court also found that the DOL’s Bonus Regulation, 29 C.F.R. § 2510.3-2(c), did not apply to the Plans because they were not “bonus programs.” *Id.* at *18-19.

30. *Shafer I* was consistent with the Fifth Circuit’s decision in *Tolbert*, 758 F.3d 619, which applied a “results in” test to determine whether § 1002(2)(A)(ii) covered Royal Bank of Canada’s deferred compensation plan for financial advisors. *Shafer I* was also consistent with the district court’s decision in *Paul*, 2018 WL 784577, which agreed with the *Tolbert* court.

31. Morgan Stanley moved for reconsideration or clarification of *Shafer I* on December 5, 2023, arguing that the Court’s ruling on ERISA had improperly intruded into the

“ultimate question presented by plaintiffs’ lawsuit” that “must be decided by the arbitrators[.]”¹² The Court denied Morgan Stanley’s motion, explaining that it had to decide whether ERISA governed the Plans in order to determine whether the plaintiffs’ claims must be arbitrated. *Shafer II*, 2024 WL 4697235 at *11.

32. Morgan Stanley appealed the *Shafer* Court’s ERISA ruling, even though the Court had *granted* its motion to compel arbitration, and petitioned for a writ of mandamus seeking to force the judge to vacate his ERISA ruling. On July 9, 2025, the Second Circuit dismissed the appeal and denied the petition.¹³

33. Consistent with the Court’s decision compelling arbitration in *Shafer*, approximately 300 former Morgan Stanley financial advisors have commenced arbitrations before FINRA. Upon information and belief, there are at least fifty pending arbitration cases filed by different law firms on behalf of former Morgan Stanley financial advisors.

34. The primary issue before the arbitrators in these arbitrations is whether the Plans are covered by ERISA.

C. Morgan Stanley lobbied the DOL extensively for over a year.

35. On August 1, 2024, Morgan Stanley, through Greg Jacob of O’Melveny Myers LLP, submitted its request for an advisory opinion to the DOL. Many of the arbitrations against Morgan Stanley were proceeding in discovery at this time. Morgan Stanley’s motion for reconsideration was still pending in *Shafer*.

36. O’Melveny Myers LLP represented Morgan Stanley in *Shafer*. O’Melveny also represents Morgan Stanley in many of the FINRA arbitrations.

¹² Mem. of Law in Supp. of Defs.’ Mot. for Recons. or Clarification at 7, *Shafer I*, 1:20-cv-11047-PGG (Dec. 5, 2023), ECF 88.

¹³ Summ. Order, *Shafer v. Morgan Stanley*, 2025 WL 1890535 (2d Cir. July 9, 2025), ECF 103.1.

37. The August 2024 letter was addressed to then Assistant Secretary for EBSA, Lisa Gomez, and explained the “purpose” of the Plans. Ex. 3 at 1. It explained that “[f]or many years, Morgan Stanley has issued . . . awards under [the Plans] to eligible financial advisors,” and requested an advisory opinion “confirming that (i) the deferred incentive compensation awards are not an ‘employee pension benefit plan’ under ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and (ii) the awards qualify as an ERISA-exempt ‘bonus program’ under 29 C.F.R. § 2510.3-2(c).” *Id.* It explained that “the Department’s guidance would help **put to rest** questions that have recently been raised about whether ERISA applies to these awards....” *Id.* at 2 (emphasis added).

38. Upon information and belief, the attachments to the letter included the following: MSCIP award certificate for years 2015-2021; EICP award certificates for 2015-2021; MSCIP award summary 2015-2021; EICP stock unit summaries for 2015-2021; and financial advisor compensation plans for 2015-2021. Upon information and belief, Morgan Stanley submitted no current or prospective versions of the Plans.

39. The request was assigned to Janet Song. Ex. 4 at 5.

40. On August 13, 2024, Jacob emailed Timothy Hauser, asking for a call on the “time sensitive” request filed by Morgan Stanley. *Id.* at 4-5. Hauser is the Deputy Assistant Secretary for Program Operations and chief operating officer of EBSA.¹⁴ Hauser was also a personal acquaintance of Jacob, who is a former Solicitor of Labor, the third highest ranking position in the DOL. Hauser responded to attorney Jacob within minutes, agreed to speak with him, and gave him his cell phone number. Ex. 4 at 4.

¹⁴ *EBSA: Organization Chart*, EMP. BENEFITS SEC. ADMIN., U.S. DEP’T OF LABOR, www.dol.gov/agencies/ebsa/about-ebsa/about-us/organization-chart (last visited Oct. 28, 2025).

41. In November, Jacob reached out again to Hauser about the advisory opinion: “Morgan Stanley is going to be appealing to the Second Circuit the issue that is the subject of the Advisory Opinion Request that we discussed back in August; the attached opinion of the District Court that was entered on November 5, 2024 is the decision that will be appealed.” Ex. 4 at 4. Jacob also noted that “Morgan Stanley would like to discuss with the Department the possibility of filing a brief in support of our appeal at the appropriate time next year.” *Id.* Jacob also invited Hauser to lunch. *Id.* Hauser replied that he would be happy to have lunch and set up a meeting with the DOL’s Plan Benefits Security Division (PBSD) about Morgan Stanley’s advisory opinion request. *Id.* at 3. They scheduled lunch for December 5, 2024, and a meeting between Morgan Stanley and the PBSD for December 19, 2024. *Id.* at 2-3.

42. In addition to DOL employees, attendees at the December 19, 2024 meeting appear to have included Jacob, Brian Boyle, and Meaghan VerGow of O’Melveny Myers LLP, and Mark Greenfield and Tom D’Elisa of Morgan Stanley’s in-house legal team. *Id.* at 1. VerGow was one of the lead attorneys for Morgan Stanley in *Shafer*, along with her colleagues from O’Melveny, Brian Boyle and Pamela Miller. VerGow and Boyle are also the lead O’Melveny attorneys representing Morgan Stanley in many of the FINRA arbitrations.

43. On January 6, 2025, Song and Eric Berger from the DOL and Jacob, VerGow, and Alex Reed from O’Melveny held a follow-up Teams meeting. Ex. 5. Berger heads the Division of Coverage, Reporting and Disclosure, one of three divisions in EBSA’s Office of Regulations and Interpretations.¹⁵

44. In April 2025, while Morgan Stanley’s appeal to the Second Circuit was pending, Jacob again wrote the DOL about Morgan Stanley’s request for an advisory opinion. This time

¹⁵ *EBSA: Organization Chart*, *supra* note 14.

Jacob emailed the Deputy Director of EBSA, Jeffrey Turner, attaching a letter in which Jacob claimed an advisory opinion was necessary “*given ongoing legal challenges that have created a cloud of uncertainty concerning ERISA’s application to Morgan Stanley’s awards*” Ex. 6 at 1-2 (emphasis added). He copied the DOL’s Wayne Berry, the Associate Solicitor for Plan Benefits Security,¹⁶ on this email. *Id.* at 1.

45. Jacob also corresponded with Jonathan Snare, the Deputy Solicitor of the DOL,¹⁷ claiming EBSA agreed “after we met with Jeff Turner and Wayne Berry back in December 2024 that this request was meritorious, and Eric Berger told me two weeks ago that getting this letter out is now the office’s top interpretive priority.” Ex. 1 at 2. “What we’re hoping for is *a little Front Office nudge* to get this really important ‘*tort reform*’ type of letter over the finish line and out.” *Id.* (emphasis added). “The timing is getting increasingly important given the confusion sown by a very sloppy district court,” referring to this Court’s decisions in *Shafer*. *Id.* Jacob followed up again later in July. *Id.* at 1.

46. Upon information and belief, Morgan Stanley hired Kent Mason, a Washington D.C. lawyer and lobbyist, in or about July 2025, to ramp up its lobbying efforts with the DOL about the advisory opinion.

47. On July 25, 2025, Mason emailed Acting Assistant Secretary of Labor Janet Dhillon and Jack Lund, Senior Policy Advisor at EBSA, referencing the DOL’s June 2, 2025 announcement of its revamped opinion letter program. Ex. 7 at 1-2; *see also supra* ¶ 24. Mason claimed “one district court” (i.e., this Court in *Shafer*) had, “contrary to law,” applied ERISA to the Plans and that “[d]ozens of very expensive claims have been filed against Morgan Stanley since this strange

¹⁶ SOL: Office Leadership, U.S. DEP’T OF LABOR, www.dol.gov/agencies/sol/about/leadership (last visited Oct. 28, 2025).

¹⁷ *Id.*

district court ruling. The law really needs to be clarified quickly....” Ex. 7 at 2. That was why Mason contacted the DOL and “the Hill” for help. *Id.*

48. A Teams meeting was held on July 31, 2025, between Mason, DOL officials, and Morgan Stanley government relations personnel. *Id.* at 1. It appears that attendees at this meeting included Dhillon, Lund, Mason, another attorney at Mason’s firm, Morgan Stanley’s in-house counsel, and two Morgan Stanley employees in government relations. *Id.*

49. After the Teams meeting, Mason emailed Dhillon to thank her for an “excellent meeting earlier today.” Ex. 8 at 1. Mason told Dhillon there was “real urgency on this issue” posed in the Advisory Opinion “for two reasons, one being the growing amount of litigation/arbitration spurred by the strange decision in New York,” including “*literally hundreds of individual disputes*” against Morgan Stanley. *Id.* (emphasis added).

50. Following up on August 12, 2025, Mason stated that Morgan Stanley was considering asking trade associations to weigh in with EBSA “on the importance of this issue and the need for a fast and clear confirmation of the DOL’s longstanding position that such long-term incentive programs are not subject to ERISA.” Ex. 9 at 2.

51. O’Melveny had previously made the same argument on behalf of just such a trade organization. With Jacob as lead attorney, it filed an *amicus* brief on behalf of the Securities Industry and Financial Markets Association (SIFMA), a trade association in which Morgan Stanley is a member,¹⁸ with the Fifth Circuit in *Tolbert*, 758 F.3d 619. In its *amicus* brief, O’Melveny (on behalf of SIFMA) argued that the issue of whether ERISA covered RBC’s deferred compensation plan for financial advisors was “vitally important to the operation and continued viability of

¹⁸ Member Directory, SIFMA, my.sifma.org/Directory/Member-Directory#M (last visited Oct. 28 2025).

deferred compensation arrangements of the sort used by its members.”¹⁹ SIFMA’s *amicus* in *Tolbert* referenced Morgan Stanley’s “financial advisor deferred compensation programs,” stating that these programs are entirely about “employee retention.”²⁰

52. The Fifth Circuit, however, had rejected the SIFMA’s policy-based argument that “financial services firms face a problem with retaining financial advisors and that plans such as [RBC’s deferred compensation plan] are designed to combat that problem,” stating that it “decline[d]...to engage in any policy debate that would affect how we interpret this statute....[w]e instead apply ERISA as written.” *Tolbert*, 758 F.3d at 627 n.6.

53. In response to Mason’s August 12, 2025, email, Dhillon asked whether the DOL should send its “draft of the statement of facts” for its advisory opinion to Mason or Jacob. Ex. 9 at 1. Berger emailed Mason the draft facts for his review. Ex. 12 at 9-10.

54. Mason replied that the “draft looks great” and sent “minor clarifications.” *Id.* at 3. He attached a redlined version of the draft facts. *See id.* at 3; Ex. 10.

55. Notably, Morgan Stanley concealed a factual discrepancy from the DOL in pursuit of a favorable advisory opinion. The Advisory Opinion states that the Plans’ disclosures “clearly state” every year that the program is a “bonus program and not a retirement plan.” Ex. 2 at 2. But the 2015-2020 disclosures do not use the phrase “bonus program” at all. *See, e.g.*, Ex. 11 at 7 (“This program is not a retirement plan.”). Rather than correcting this misrepresentation, however, Morgan Stanley obscured it by suggesting footnote text stating that “the exact language in the description of this program has changed over the years, but the substance of the program has not changed.” Ex. 10 at 3 n.5.

¹⁹ Br. of SIFMA as Amicus Curiae in Supp. of Appellees and Affirmance at 1, *Tolbert*, 758 F.3d 619, ECF 57-1 (Nov. 1, 2013).

²⁰ *Id.* at 3, 14.

56. The erroneous statement that Morgan Stanley “annually” disclosed to its employees that the Plans were “bonus plans” was included in the Advisory Opinion along with the footnote language added by Morgan Stanley.

57. Throughout the entire Advisory Opinion drafting process, the DOL never notified Morgan Stanley’s former financial advisors, whom the DOL knew had pending arbitration claims against Morgan Stanley, about its upcoming advisory opinion, and the DOL never sought their views on the ERISA issue, despite knowing that Morgan Stanley intended to use its Advisory Opinion to try to defeat those pending arbitrations. The process was entirely one-sided. The financial advisors did not learn about the Advisory Opinion until it was issued.

58. As discussed, the DOL knew Morgan Stanley sought an Advisory Opinion in this landscape and for the specific purpose of using such Advisory Opinion in those cases in order to defeat its former financial advisors’ cases, and yet weighed in on the exact issue decided twice by this Court and pending before the arbitrators, putting its thumb on the scale in Morgan Stanley’s favor by disregarding the law and its own internal procedures. *See* Ex. 3 at 6-7; *supra* ¶¶ 37, 41, 44-45, 47, 49.

59. In effect—as the DOL was well aware—the Advisory Opinion request was an *ex parte* process intended to deprive those financial advisors of their rights without their knowledge of, much less participation in, such process, a gross violation of their due process rights.

D. The Advisory Opinion is riddled with legal errors.

60. On September 9, 2025, Turner emailed a copy of the final Advisory Opinion to Mason, who replied, “This was a perfect example of government at its best[.]” Ex. 12 at 1.

61. The Advisory Opinion began by restating Morgan Stanley’s questions from its August 2024 letter request and briefly describing the Plans. Ex. 2 at 1-2.

62. The Advisory Opinion improperly relied on the Plans’ “purposes” even though ERISA establishes a “*results in*” test to determine whether a plan is covered by its statutory scheme. 29 U.S.C. § 1002(2)(A)(ii); *see, e.g., Pasternack v. Shrader*, 863 F.3d 162, 170 n.5 (2d Cir. 2017) (“The word ‘results’ calls for an effects-based inquiry rather than one based on purpose.”); *Tolbert*, 758 F.3d at 624 (finding subsection (ii) applies when a “‘deferral of income’ arises as an ‘effect issue, or outcome’ from that plan.”); *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 435 (6th Cir. 2019) (“§ 1002(A)(ii) covers plans containing terms that have as an effect, issue or outcome—even if not as a requirement—deferral of income...”); *Paul*, 2018 WL 784577 at *6 (finding ERISA applied because “the WAP resulted in the deferral of income by RBC employees for periods extending to the termination of covered employment or beyond”).

63. The DOL Advisory Opinion also relied on irrelevant and inapplicable materials. *See, e.g., Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015) (“agency action is lawful only if it rests on a consideration of the relevant factors.”). Rather than conducting its own analysis of guidance and proposed regulations authored by FINRA, the Federal Reserve, the Securities and Exchange Commission (“SEC”), and the Office of the Comptroller of the Currency (“OCC”), the DOL improperly adopted Morgan Stanley’s position that those entities “have issued guidance advising and proposed regulations *requiring* regulated entities to defer portions of employee incentive compensation....” Ex. 2 at 5 n.8 (emphasis added); *see also* Ex. 3 at 3 n.3.

64. The DOL’s reliance on Morgan Stanley’s representation concerning what proposed regulations²¹ require was arbitrary and capricious because a “proposed regulation has no legal effect.” *McCutcheon v. Colgate-Palmolive Co.*, 62 F.4th 674, 699 (2d Cir. 2023). “Proposed

²¹ *See* Ex. 3 at 3 n.3 (citing Office of the Comptroller of the Currency, Draft Notice of Proposed Rulemaking at 180-81, 192 (May 6, 2024), www.occ.treas.gov/news-issuances/news-releases/2024/nr-ia-2024-47a.pdf); Ex. 2 at 5 n.8 (referring to Ex. 3 at 3 n.3).

regulations are suggestions for comment; they modify nothing.” *LeCroy Rsch. Sys. Corp. v. Comm’r of Internal Revenue*, 751 F.2d 123, 127 (2d Cir. 1984). And regardless, the OCC’s notice of proposed rulemaking is not on point: it would not apply to financial advisors because it focuses on high-level employees who are in positions to jeopardize the firm’s own capital.

65. Further, the DOL’s reliance on the OCC’s “guidance”²² was arbitrary and capricious because the OCC is not a regulatory agency that interprets ERISA and did not interpret ERISA in its guidance. The OCC’s 2010 guidance does not apply to Morgan Stanley’s financial advisors or stand for the proposition that DOL advances. Instead, the guidance concerns the long-term credit, market liquidity, and compliance risks associated with investing the bank’s assets in securities like sub-prime mortgages. 75 Fed. Reg 36,395. Morgan Stanley financial advisors advise their clients on investing their assets, not Morgan Stanley’s assets.

66. It was arbitrary and capricious for the DOL to rely on Morgan Stanley’s representation about the SEC’s “Best Interest Regulation”²³ because the SEC is not an agency that interprets ERISA, the regulation does not interpret ERISA, and the regulation does not even apply to the Plans. The SEC’s Best Interest Regulation concerns managing conflicts of interest, and the “incentives provided” when an individual is “making a recommendation in a brokerage capacity and not when making a recommendation in an investment advisory capacity.” 84 Fed. Reg. 33,318, at 33,391. The SEC’s guidance mentions “adjusting compensation” when someone fails to disclose a conflict of interest when serving as a broker dealer as one of the “practices [that] could be used as mitigation methods,” *id.* at 33,292, but in no way “require[s] regulated entities to defer portions

²² See *id.* (citing 75 Fed. Reg. 36,395, 36, 396, 36,408-410 (June 25, 2010)); Ex. 2 at 5 n.8 (referring to Ex. 3 at 3 n.3).

²³ See *id.* (citing 84 Fed. Reg. 33,318, 33,392 (July 12, 2019)); Ex. 2 at 5 n.8 (referring to Ex. 3 at 3 n.3).

of employee incentive compensation.” Ex. 2 at 5 n.8. Indeed, compensation adjustment is one of the methods that are “*not* required” on a “non-exhaustive list of practices [that] could be used as potential mitigation methods.” *Id.* at 33,392. It was arbitrary and capricious for the DOL to rely on Morgan Stanley’s representation about what the SEC “requires” when the SEC itself says that adjusting compensation is “not required.” *Id.*

67. Nor did FINRA interpret ERISA in its Annual Regulatory Oversight Report,²⁴ which merely summarizes the SEC’s Best Interest Regulation and related nonbinding mitigation methods.

68. At the same time, the Advisory Opinion ignored authorities that are directly on point. The DOL failed to distinguish, or cite, *Shafer I* or *Shafer II*, despite the fact that these cases had already decided the precise legal issue Morgan Stanley asked the DOL to issue an opinion on.

69. The Advisory Opinion failed to distinguish, or cite, *Tolbert*, despite that decision’s precedential value and directly applicable holdings.

70. The Advisory Opinion failed to distinguish, or cite, *Paul*, despite that decision’s precedential value and directly applicable holdings.

71. Despite these errors, the DOL nevertheless concluded that it “has no reason to believe that the deferred incentive compensation program is an “employee benefit pension plan under ERISA [29 U.S.C. § 1002(2)(A)] as a result of such surrounding circumstances” and that the Plans qualified as exempt bonus plans under 29 C.F.R. § 2510.3-2(c). Ex. 2 at 3-4.

²⁴ See Ex. 3 at 3 n.3 (citing FINRA, 2024 FINRA Annual Regulatory Oversight Report 45 (Jan. 2024), www.finra.org/sites/default/files/2024-01/2024-annual-regulatory-oversight-report.pdf); Ex. 2 at 5 n.8 (referring to Ex. 3 at 3 n.3).

E. The Bonus Regulation, 29 C.F.R. § 2510.3-2(c), is invalid as applied.

72. The Bonus Regulation relied on by the Advisory Opinion, 29 C.F.R. § 2510.3-2(c), is legally invalid and should be held unlawful and set aside by this Court pursuant to the APA.

73. ERISA states that “any plan” that “results in a deferral of income by employees for periods extending to the termination of covered employment or beyond” is subject to ERISA’s statutory requirements. 29 U.S.C. § 1002(2)(A)(ii) (emphasis added). The Fifth Circuit held in *Tolbert* that subsection (ii) applies whenever “a ‘deferral of income’ arises as an ‘effect, issue, or outcome’ from that plan.” *Tolbert*, 758 F.3d at 625.

74. Nothing in ERISA’s text supports the Bonus Regulation’s additional requirement that the deferral must also be “systematic.” Rather, that additional element of § 2510.3-2(c) is wholly an invention of the DOL, with no statutory basis whatsoever.

75. A DOL regulation cannot supersede ERISA’s clear statutory command. *See Loper Bright Ent. v. Raimondo*, 603 U.S. 369, 394 (2024) (holding that it is the responsibility of courts—and not administrative agencies—to “exercise independent judgment in determining the meaning of statutory provisions”).

76. The Advisory Opinion relies on the improper and illegal Bonus Regulation to wrongly conclude that Morgan Stanley’s deferred compensation Plans are not governed by ERISA. Accordingly, the DOL’s promulgation of the Bonus Regulation has caused concrete harm to each of the Plaintiffs. Other than an action in this Court, Plaintiffs have no alternative means by which they may seek redress for the Bonus Regulation.

F. The Advisory Opinion causes concrete harm to Plaintiffs because it unlawfully deprives them of their deferred compensation.

77. As described above, ERISA Procedure 76-1 states that “[o]nly the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the

extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion.” ERISA Procedure 76-1, Sec. 10.

78. Morgan Stanley insists that it may rely on the Advisory Opinion, and it has been doing so in the pending FINRA arbitrations, to undermine its former financial advisors’ position and arguments.

79. Permitting Morgan Stanley to “rely” on the Advisory Opinion directly results in Plaintiffs being denied their Deferred Compensation. This is because, contrary to the DOL’s policy, the Advisory Opinion is not exclusively guiding Morgan Stanley’s *future* behavior. Instead, the DOL determined, *retrospectively*, that the Plans from 2015- 2021 were not governed by ERISA.

80. Morgan Stanley is thus using the Advisory Opinion as a sword in the FINRA arbitrations, just like it told the DOL it would do. In its pre-hearing brief in a recent arbitration, Morgan Stanley argued that the DOL “rejected” the former financial advisors’ “very argument” to the arbitrators. In motion practice, it argued that the Advisory Opinion is “the official position of DOL on whether ERISA applies to its deferred compensation program” and “controverts the very premise of Claimants’ case.” Plaintiffs anticipate that Morgan Stanley will advance the same arguments in their upcoming arbitrations.

81. Similarly, in a recent “settlement” letter to Plaintiffs and other arbitration claimants, Morgan Stanley explicitly cited the Advisory Opinion as grounds to demand dismissal with prejudice of their arbitrations. Relying in part on the Advisory Opinion, the letter—which was unsolicited and not the result of any settlement-related discussions between the parties—argued that Plaintiffs are not pursuing their claims in good faith and threatened to seek six figures in attorneys’ fees and costs against Plaintiffs unless they dismiss their arbitrations with prejudice.

82. Plaintiffs have suffered a legal wrong and have been adversely affected and aggrieved by the DOL's Advisory Opinion.

LEGAL STANDARD

83. Under the APA, the reviewing court “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706.

84. The court “shall ... hold unlawful and set aside agency actions, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law....” 5 U.S.C. § 706(2)(A)-(D).

85. “Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

86. In assessing whether an agency decision is “not in accordance with law,” “courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.” *Loper Bright*, 603 U.S. at 391, 412. Rather, courts must “exercise independent judgment in construing the statute.” *Novartis Pharms. Corp. v. Becerra*, 2024 WL 4492072, at *6 (D.D.C. Oct. 15, 2024) (cleaned up). A reviewing court must not uphold an agency’s decision unless “it is: (1) devoid of legal errors; and (2) supported by any rational review

of the record.” *Am. Pub. Health Ass’n v. Nat’l Institutes of Health*, 2025 WL 1822487, at *19 (D. Mass. July 2, 2025) (cleaned up).

CLAIMS FOR RELIEF

Count One

5 U.S.C. §§ 702, 706(2)(A)

87. Plaintiffs incorporate the preceding allegations by reference.

88. The Advisory Opinion is final agency action. 5 U.S.C. § 704.

89. ERISA defines an “employee pension benefit plan” to include any plan that “results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.” 29 U.S.C. § 1002(2)(A)(ii).

90. This statutory provision establishes a clear “results” test that focuses on the plan’s actual effects, not its stated purposes or intentions.

91. The DOL’s Advisory Opinion improperly imports a “purpose test” into ERISA, § 1002(2)(A)(ii), by focusing on the Plan’s purported purposes rather than its actual results.

92. This interpretation directly contradicts the Second Circuit’s analysis in *Pasternack*, 863 F.3d 162, which rejected a purpose-based test under ERISA Section 3(2)(A)(ii).

93. The Advisory Opinion’s interpretation is contrary to law and constitutes an impermissible construction of the statute.

94. Plaintiffs respectfully request that this Court hold the Advisory Opinion unlawful and set it aside.

Count Two

5 U.S.C. §§ 702, 706(2)(A)

95. Plaintiffs incorporate the preceding factual allegations by reference.

96. The Advisory Opinion is final agency action. 5 U.S.C. § 704.

97. The DOL failed to reasonably consider “the relevant factors and important aspects of the problem.” *Data Mktg. P’ship*, 45 F.4th at 856 (quoting *Michigan v. EPA*, 576 U.S. 743, 750, 752 (2015)).

98. The DOL’s failure to cite, discuss, or distinguish the directly controlling *Shafer I* and *Shafer II* decisions constituted arbitrary and capricious action under the APA.

99. The Advisory Opinion’s failure to acknowledge *Tolbert*, *Paul*, *Shafer I*, *Shafer II*, and other relevant precedent further demonstrates that the DOL failed to consider an important aspect of the problem.

100. Its failure to acknowledge relevant precedent was arbitrary and capricious and not in accordance with the law.

101. The DOL further adopted Morgan Stanley’s mischaracterization about guidance and proposed regulations in its Advisory Opinion. Its failure to independently assess those sources led it to erroneously conclude that FINRA, the Federal Reserve, the SEC and the OCC either advise or require Morgan Stanley to defer employee incentive compensation.

102. The Advisory Opinion’s reliance on Morgan Stanley’s characterization of FINRA, Federal Reserve, SEC, and OCC publications was arbitrary and capricious and not in accordance with the law.

103. Plaintiffs respectfully request that this Court hold the Advisory Opinion unlawful and set it aside.

Count Three

5 U.S.C. §§ 702, 706(2)(A), 706(2)(D)

104. Plaintiffs incorporate the preceding factual allegations by reference.

105. The Advisory Opinion is final agency action. 5 U.S.C. § 704.

106. The DOL issued the Advisory Opinion in 2025 as to Plan years 2015-2021 in violation of ERISA Procedure 76-1, which generally requires the DOL to issue advisory opinions only with respect to “prospective” transactions.

107. The DOL issued the Advisory Opinion even though its landing page for opinion letter requests states that the DOL does not issue letters “for use in any investigation or litigation matter that existed before submitting your request.”

108. The DOL issued the Advisory Opinion in violation of its policy not to issue such opinions where there are “inherently factual” problems.

109. The DOL issued the Advisory Opinion in violation of its policies not to issue such opinions where all parties involved are not sufficiently identified and described—namely, the Plaintiffs and the many claimants in arbitration.

110. These procedural violations independently render the Advisory Opinion arbitrary and capricious under the APA.

111. Plaintiffs respectfully request that this Court hold the Advisory Opinion unlawful and set it aside.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. Declare that the Advisory Opinion’s interpretation of ERISA Section 3(2)(A)(ii) is contrary to law;
- b. Declare that the Advisory Opinion is arbitrary, capricious, and not in accordance with law;
- c. Declare that the Advisory Opinion was issued in violation of Department of Labor procedures and is therefore invalid;
- d. Set aside and vacate the Advisory Opinion;

- e. Set aside and vacate 29 C.F.R. § 2510.3-2(c) as invalid to the extent it conflicts with or limits the statutory “results” test in ERISA Section 3(2)(A)(ii);
- f. Award Plaintiffs their costs, expenses, and reasonable attorneys’ fees pursuant to the Equal Access to Justice Act and other applicable law; and
- g. Grant such other relief as the Court deems just and proper.

Dated: October 28, 2025

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Respectfully submitted,

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**Application for Pro Hac Vice admission
forthcoming*
***Application for admission to the bar
forthcoming*

EXHIBIT 1

From: [Snare, Jonathan - SOL](#)
To: [Jacob, Greg](#)
Subject: RE: Morgan Stanley Opinion Letter (drafting already underway)
Date: Tuesday, July 22, 2025 7:07:40 PM

Hi Greg:

I understand this AO request is in the decision queue and the EBSA Front office is aware of this request. I have also been told the EBSA Front Office is navigating a number of priorities so not sure when this will be done. I will be happy to keep you posted. I also touched base briefly with Janet Dhillon and she told me that she would be happy to discuss this with you as well.

Thanks

Jonathan L. Snare, Deputy Solicitor
S-2002
(office direct) 202-693-5263
(work cell) 771-241-2914
Snare.jonathan@dol.gov

From: Jacob, Greg
Sent: Tuesday, July 22, 2025 9:08 AM
To: Snare, Jonathan - SOL
Subject: RE: Morgan Stanley Opinion Letter (drafting already underway)

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Jon,

Thanks so much again for looking into this. I know you've got a rolling avalanche on your desk!

If you've heard anything further, I'd love to get a status update. I plan to check in again with Eric/Jeff in the Office of Regulations and Interpretations later this week, and it would be helpful to know if they've been up through the front office yet, as they indicated last month was in the works. Also, of course, if the EBSA front office would benefit from a briefing or from any materials on how necessary and helpful this opinion letter will be from both a business and anti-frivolous-litigation perspective, we'd be very happy to provide that.

Greg

Gregory F. Jacob

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O'Melveny

O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
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From: Snare, Jonathan - SOL <Snare.Jonathan@dol.gov>
Sent: Tuesday, July 1, 2025 12:01 PM
To: Jacob, Greg <gjacob@omm.com>
Subject: RE: Morgan Stanley Opinion Letter (drafting already underway)

Greg:

Confirming receipt. Great to catch up with you this morning. I will follow up on this matter and we will get back to you.

Jonathan L. Snare, Deputy Solicitor

S-2002

(office direct) 202-693-5263

(work cell) 771-241-2914

Snare.jonathan@dol.gov

From: Jacob, Greg <gjacob@omm.com>
Sent: Tuesday, July 1, 2025 11:02 AM
To: Snare, Jonathan - SOL <Snare.Jonathan@dol.gov>
Subject: Morgan Stanley Opinion Letter (drafting already underway)

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Jon,

Following up on our call, please find attached Morgan Stanley's pending opinion letter request (A01533).

EBSA's Office of Regulations and Interpretations agreed after we met with Jeff Turner and Wayne Berry back in December 2024 that this request was meritorious, and Eric Berger told me two weeks ago that getting this letter out is now the office's top interpretive priority. What we're hoping for is a little Front Office nudge to get this really important "tort reform" type letter over the finish line and out. The timing is getting increasingly important given the confusion sown by a very sloppy district court in *Shafer v. Morgan Stanley*, 2023 WL 8100717 (S.D.N.Y. Nov. 21, 2023), and the industry really needs DOL to speak clearly and promptly, as they are planning their go-forward compensation structures at the halfway point into 2025; *Shafer* would require the entire industry to redo everything in ways that would materially hurt the interests of employees, as well as good governance principles articulated by the industry's financial regulators.

Best,

Greg

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EXHIBIT 2

Opinion No. 2025-03A (E.R.I.S.A.), 2025 WL 2642870

OFFICE OF PENSION AND WELFARE BENEFIT PROGRAMS (E.R.I.S.A.)

U.S. DEPARTMENT OF LABOR

Kent A. Mason

*1 Davis & Harmon LLP
1455 Pennsylvania Avenue
Suite 1200
Washington, DC 20004

September 9, 2025

3(2)

Dear Mr. Mason:

This is in response to your request on behalf of Morgan Stanley Smith Barney LLC (Morgan Stanley or the Firm) for an advisory opinion from the Department of Labor (Department) regarding the applicability of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, you ask whether the Firm's deferred incentive compensation program, comprised of the Equity Incentive Compensation Plan (EICP) and Morgan Stanley Compensation Incentive Plan (MSCIP), (i) is not an "employee pension benefit plan" under section 3(2)(A) of Title I of ERISA; and (ii) qualifies as an exempt "bonus program" under 29 C.F.R. § 2510.3-2(c).

You represent that the Firm's financial advisors receive a guaranteed base salary and are eligible to earn cash incentive compensation which is paid throughout the year. In addition, financial advisors are eligible to earn deferred incentive compensation, with 25% issued as an unsecured deferred stock award under theEICP and the remaining 75% percent as an unsecured deferred cash-based award under the MSCIP.¹ The deferred stock units are converted to shares of Morgan Stanley common stock and deposited into a brokerage account, while cash-based awards are deposited into the financial advisors' payroll accounts, on the "scheduled vesting date" only when all conditions are met, as described below.

All incentive compensation is calculated based on "Total Credits." The financial advisor's Total Credits for each month are determined by the applicable "Credit Rate" multiplied by the creditable revenue generated by the financial advisor. The Credit Rate is a percentage between 28% and 55.5% that increases with the financial advisor's revenue and length of service with the Firm. A portion of the Total Credits is allocated to "Deferred Credits" (between 1.5% and 15.5% of the financial advisor's total incentive compensation), based on the level of revenue the financial advisor generates. The cumulative value of the monthly Deferred Credits for the year is granted to the financial advisor in the form of deferred incentive compensation (deferred stock and cash awards) shortly after the year-end. Deferred incentive compensation awards are generally contingent, among other things, upon the advisor remaining continuously employed through the grant and vesting dates. Accordingly, if the financial advisor terminates employment during the year, there is no award of the Deferred Credits granted for that year. The rest (between 84.5% and 98.5%) of the Total Credits are allocated to "Cash Credits," which are used to calculate and pay cash incentive compensation monthly.

Both cash and deferred incentive compensation reward good performance by calculating the amount, in part, based on a financial advisor's generation of revenue for the Firm. Deferred incentive compensation, however, serves additional purposes: to reward financial advisors for their "continued employment and service to the Firm in the future and [advisor] compliance with the

Firm's policies (including the Code of Conduct).” In this regard, you represent that by conditioning payment on continuous employment and good guardianship, the deferred compensation awards are designed to motivate advisors to stay with the Firm and to comply with firm policies that require advisors to act as good stewards of client assets. Accordingly, with five exceptions described below, financial advisors are generally eligible for payment of the deferred incentive compensation awards only if they remain continuously employed and in good standing on the “scheduled vesting date,”² which occurs after four years (for stock awards) or six years (for cash awards) of continuous service following the grant date of such awards.

***2** The deferred incentive compensation awards are canceled if a financial advisor: (1) terminates employment before the scheduled vesting date; or (2) engages in prohibited activity, such as violating securities rules and regulations, engaging in dishonest or fraudulent conduct, disclosing privileged or confidential information or trade secrets, making disparaging or defamatory comments about the Firm before the scheduled award distribution date, soliciting customers the financial advisor serviced while employed by the Firm for a competitor without the Firm's consent before the earlier of the three years after termination or the scheduled award distribution date, taking employment with a competitor within 100 miles without the Firm's consent before the earlier of one year after termination or the scheduled award distribution date, or engaging in other conduct that is cause for termination.³ The awards are not cancelled if a financial advisor's employment terminates due to: (1) death; (2) disability; (3) retirement; (4) involuntary termination not involving any prohibited activity; or (5) termination due to government service not involving any prohibited activity. In these cases, the payment schedule depends on the exception clause under which the awards are paid.⁴ You represent that payments under these relatively uncommon situations are designed to uphold the awards' primary purposes of encouraging long-term retention of financial advisors and promoting good conduct.

Financial advisors do not have the option to extend or delay the distribution date. From 2009-2019,⁵ 89.9% to 95.2% of deferred incentive stock awards issued under EICP were distributed to current employees; in the aggregate over that period 91.8% of such distributions were made to current employees (compared to 8.2% for former employees). Similarly, from 2009 to 2017, 80.1% to 92.6% of cash distributions were ultimately paid to current employees; in the aggregate over that period current employees were paid 85.3% of deferred incentive cash awards issued under the MSCIP (compared to 14.7% for former employees).⁶

The award conditions are disclosed annually in the award certificates, summary descriptions and other communications. These disclosures also clearly state that the deferred incentive compensation awards are “contingent and unsecured” and that the program is a:

bonus program and not a retirement plan. Its purposes are to reward and retain key employees of the Firm and to align their interests with those of the shareholders. Participants should not look to this bonus program as a source of retirement income. This bonus program is not subject to the Employee Retirement Income Security Act of 1974.⁷

You also state that the awards are structured to meet the expectations of the Firm's financial regulators regarding the use of deferred compensation to motivate good conduct and penalize bad conduct.⁸

***3** Section 3(2)(A) of ERISA defines the terms “employee pension benefit plan” and “pension plan” as follows: [T]he terms “employee pension benefit plan” and “pension plan” means any plan, fund, or program established or maintained by an employer to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program —(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

The Department's regulation at 29 C.F.R. § 2510.3-2(c) “clarifies the limits” of the term pension plan for purposes of Title I of ERISA by describing certain arrangements that will not constitute an employee pension benefit plan within the meaning of ERISA section 3(2). Specifically, 29 C.F.R. § 2510.3-2(c) provides:

For purposes of Title I of [ERISA], the term ... “pension plan” shall not include payments made by an employer to some or all its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees.

The EICP and MSCIP do not, by their express terms, make payment of deferred incentive compensation awards contingent on termination of employment or retirement. Financial advisors earn the right to award payments only upon satisfying the award conditions, which require them to remain continuously employed and in good standing through the scheduled vesting date (four or six years of continuous service after the award is granted). On the scheduled vesting date, the award payments are made automatically, and financial advisors are not permitted to defer the payments to a later date. If a financial advisor terminates employment or engages in prohibited activities before vesting, the awards are cancelled, except under limited circumstances. These conditions are disclosed annually to the financial advisors. These annual disclosures also expressly state that financial advisors “have no right to ... [the] award until it is ‘earned,’” the awards are “contingent upon the [financial advisor] remaining employed through the grant and vesting dates of the award,” the awards are “not intended to provide for retirement income,” and that the program is “not a retirement plan subject to [ERISA].” Accordingly, we find the program, by its express terms, not to be an employee pension benefit plan within the meaning of ERISA section 3(2)(A).

Although the deferred incentive compensation program does not, by its express terms, defer income to termination of employment or beyond or provide retirement income, awards may be paid after the end of employment in limited circumstances where financial advisors are unable to remain employed through the awards' vesting dates due to death, disability, retirement, involuntary termination or government service. The Department has previously expressed the view that, even though a program allows payments, which would otherwise be made on a specified date, to be paid earlier in the event an employee terminates employment, allowing such earlier payment does not automatically mean that the arrangement is a pension plan. Instead, the Department considers such provisions as one factor to be considered along with other surrounding circumstances in determining whether the program may be providing retirement income or results in a deferral of income for periods extending to the termination of covered employment or beyond. Advisory Opinion 83-46A (Sept. 8, 1983). *See also* Advisory Opinion 2002-13A (Dec. 6, 2002); Advisory Opinion 82-29A (July 8, 1996); Advisory Opinion 81-74A (Sep. 29, 1981).⁹

*4 The question of whether a plan, fund, or program is a pension plan within the meaning of ERISA section 3(2)(A) “as a result of surrounding circumstances,” is inherently factual in nature and the Department generally does not issue advisory opinions on purely factual questions under ERISA. *See* Section 5.01 of ERISA Procedure 76-1, 41 Fed. Reg. 36281 (Aug. 27, 1976). In this case, however, the materials you submitted do not appear to indicate the existence of any of the surrounding circumstances that the Department has previously said would tend to support the finding that an arrangement constitutes a pension plan. For example, there is no evidence suggesting any of the following: (i) an inordinate percentage of the award recipients were at or near retirement age when the benefits were to be paid; (ii) distributions were skewed toward the last years of the participants' careers; (iii) amounts were distributed with a relatively long payout schedule; (iv) individuals not otherwise eligible were selected to receive the award based on being at or near retirement age; (v) participation was limited to individuals ineligible for the Firm's retirement plan (which might suggest that the program is meant to replace the Firm's retirement plan); or (vi) the program was communicated to participants in a manner that caused them to defer income until retirement. *See* Advisory Opinion 98-02A (Mar. 6, 1998); Advisory Opinion 83-46A (Sept. 8, 1983); Advisory Opinion 83-42A (Sept. 8, 1983); Advisory Opinion 81-27A (Mar. 9, 1981). Taking into account both the program's design and operative provisions, its annual disclosures, the data on when most awards were received, and all other materials you provided, in the Department's view, the mere fact that the terms of the program contemplate limited situations where an award *could* be paid after termination of employment does not implicate a deferral of income of the kind contemplated by ERISA section 3(2)(A). Thus, the Department has no reason to believe that the deferred incentive compensation program is an employee benefit pension plan under ERISA section 3(2)(A) as a result of such surrounding circumstances.

At any rate, the deferred incentive compensation program qualifies as an exempt “bonus program” under 29 C.F.R. § 2510.3-2(c), which clarifies the definition of the term employee benefit pension plan for purpose of Title I of ERISA by

describing certain arrangements that will not constitute an employee pension benefit plan within the meaning of ERISA section 3(2)(A). The Department has applied the “bonus program” regulation to programs that calculate bonuses in diverse ways, including an incentive plan that calculates bonus as a percentage of revenue generated by the participants, much like the Firm’s deferred incentive compensation program, as well as a percentage of revenue generated by the Company, a percentage of a company’s net revenue interest, royalties from oil and gas leases and the safe conduct of an employer’s business. *See e.g.*, Advisory Opinion 2002-13A (Dec. 6, 2002); Advisory Opinion 98-02A (March 6, 1998); Advisory Opinion 83-42A (Aug. 17, 1983); Advisory Opinion 82-29A (Jul. 2, 1982).

*5 The express purposes of the deferred incentive compensation program are to reward financial advisors for their long-term tenure and incentivize good behaviors desired by the Firm. The program’s design and administration are tailored to achieve those goals and to meet the financial regulatory requirements regarding using deferred compensation to motivate good conduct and penalize bad conduct.¹⁰ The awards are unsecured and not guaranteed, unlike salary and commissions, there is no accrual (*i.e.*, no partial payouts for partial periods of performance) and financial advisors are notified annually about the express purposes and conditions of the program and informed that it is not a retirement plan subject to ERISA. Accordingly, the program’s express purposes, design, administration and the conditions on the award payments support the conclusion that the awards are bonuses. Moreover, the proportion of payments to current employees (over 85% for cash awards, over 91.8% for stock conversions) compared to former employees, clearly demonstrate that such payments are only incidental and not “systematically deferred” to termination of covered employment or beyond, or so as to provide retirement income. *See* Advisory Opinion 2002-13A (Dec. 6, 2002).

Accordingly, it is the Department’s view that the deferred incentive compensation program appears to be a bonus program within the meaning of 29 C.F.R. § 2510.3-2(c). The payment of a small percentage of awards to financial advisors who terminated employment before the awards’ vesting dates due to death, disability, involuntary termination or government service, is not the sort of deferral of income contemplated by ERISA section 3(2)(A). As described above, the program does not involve the systematic deferral of payments to the termination of covered employment or beyond, which would preclude the deferred incentive compensation program from being a bonus program.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of an advisory opinion.

Sincerely,

Jeffrey J. Turner
Director
Office of Regulations and Interpretations

Footnotes

- 1 The advisors have individual, notional accounts in the MSCIP, and they can invest their accounts in notional investments, with the value of their accounts tracking the performance of the selected investments.
- 2 Except as noted in footnote 4, the terms “scheduled vesting date,” “distribution date,” and “award distribution date” all refer to the same date on which, after meeting all conditions of the program, the benefits are paid to the financial advisors (payment is typically made within a matter of days due to administrative processing times).
- 3 The Department does not express any view on whether the non-disparagement, non-compete, and non-solicitation provisions under the program are reasonable.
- 4 For the exception due to death, the award is paid to a designated beneficiary upon notification to the Firm. For the exception due to retirement, 50% of the award is paid on the first anniversary after retirement, with the remaining 50% paid on the second anniversary,

if the retiree does not engage in specified prohibited activity. For the exception due to governmental service termination, the award is paid on the date of termination. For the exception due to disability or involuntary termination by the Firm, the award is paid on the scheduled vesting date (four years for EICP and six years for MSCIP).

- 5 You represent that for stock awards issued under the EICP, the most recent plan year to have vested (as of August 2024) was the 2019 plan year.
- 6 You represent that for cash awards issued under the MSCIP, the most recent plan year to have vested (as of August 2024) was the 2017 plan year.
- 7 *See, e.g.*, EICP 2021 Discretionary Retention Awards Stock Unit Summary Description and MSCIP 2021 Discretionary Retention Awards Summary Description. Per your submission, the exact language in the description of this program has changed over the years, but the substance of the program has not changed.
- 8 You noted that financial regulators, including Financial Industry Regulatory Authority, the Federal Reserve Board of Governors, the Securities and Exchange Commission, and the office of the Comptroller of the Currency, have issued guidance advising and proposed regulations requiring regulated entities to defer portions of employee incentive compensation, and to make that compensation contingent and cancelable, to address risk-taking and other behaviors that may be harmful to customers and the public markets.
- 9 The courts have similarly rejected the notion that all post-employment payments trigger ERISA coverage under ERISA section 3(2)(A). *See e.g., Murphy v. Inesco Oil Co.*, 611 F.2d 570, 574-75 (5th Cir. 1980) (“[ERISA] does not embrace all plans that may incidentally result in the payment of benefits after death or disability but only plans established for the purpose of providing those benefits Under the statutory definition, the mere fact that some payments under a plan may be made after an employee has retired or left the company does not result in ERISA coverage.”); *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 436 (6th Cir. 2019) (“[t]o determine if the Safelite Plan is covered, we look to its design and administration, applying the language of the statute to the Plan's express terms and/or its surrounding circumstances”); *Oatway, Inc. v. Am. Int'l Grp., Inc.*, 325 F.3d 184, 189 (3d Cir. 2003) (“post-retirement payments were only incidental to the goal of providing current compensation”); *Milligan v. Bank of America Corp.*, 2025 WL 892972, *5 (W.D.N.C March 11, 2025) (In interpreting ERISA section 3(2)(A), the “mere fact that some payments under a plan may be made after an employee has retired or left the company does not result in ERISA coverage”).
- 10 *See* footnote 8.

Opinion No. 2025-03A (E.R.I.S.A.), 2025 WL 2642870

End of Document

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EXHIBIT 3



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File Number:

August 1, 2024

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CONFIDENTIAL

U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue, NW, Suite N-5655
Washington, DC 20210

Re: Request for Advisory Opinion on Application of ERISA to Deferred Incentive Compensation Awards Issued to Morgan Stanley Financial Advisors

Dear Assistant Secretary Gomez:

On behalf of Morgan Stanley Smith Barney LLC ("Morgan Stanley"),¹ I write to request an advisory opinion from the U.S. Department of Labor ("the Department") regarding whether ERISA applies to deferred incentive compensation awards that Morgan Stanley issues to financial advisors.

For many years, Morgan Stanley has issued deferred stock awards under the Equity Incentive Compensation Plan ("EICP") and deferred cash awards under the Morgan Stanley Compensation Incentive Plan ("MSCIP") to eligible financial advisors. The awards are designed to promote retention and good conduct as well as to reward good performance: Payment under the awards is contingent on the advisor remaining employed and in compliance with Morgan Stanley's Code of Conduct through a vesting period of four or six years. The awards are generally canceled if the advisor fails to meet the express vesting and other conditions of the awards, except that advisors (or their estate) may still receive payment on the awards if their Morgan Stanley employment ends on account of death, disability, retirement, not-for-cause termination, or government service—circumstances that Morgan Stanley considers important for humanitarian reasons. Consistent with the awards' primary purpose of promoting employee retention and good conduct, the substantial majority of payments under the awards has historically been to financial advisors who remain employed in good standing with Morgan Stanley through the scheduled vesting date.

Through this letter, Morgan Stanley seeks an advisory opinion confirming that (i) the deferred incentive compensation awards are not an "employee pension benefit plan" under ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), and (ii) the awards qualify as an ERISA-exempt "bonus program" under 29 C.F.R. § 2510.3-2(c). While Morgan Stanley believes that conclusion follows clearly from the Department's regulatory guidance and the caselaw considering similarly

¹ Morgan Stanley's EIN is 26-4310844. I am authorized to submit this letter on Morgan Stanley's behalf.

structured employee compensation programs, the Department's guidance would help put to rest questions that have recently been raised about whether ERISA applies to these awards, and ensure that Morgan Stanley can continue to provide this form of incentive compensation to its financial advisors.

I. Background

A. Morgan Stanley's Deferred Incentive Compensation Awards

1. *Morgan Stanley Issues Contingent Deferred Incentive Compensation Awards to Promote Retention and Good Conduct*

Morgan Stanley financial advisors are eligible to earn incentive compensation. This includes cash incentive compensation, and deferred incentive compensation (in the form of cash or stock). Cash incentive compensation is paid throughout the year and makes up the vast majority of the total incentive compensation that an eligible advisor may receive. Deferred incentive compensation is issued as a contingent award under the EICP (for stock) or the MSCIP (for cash). All of the incentive compensation is based on the financial advisor's revenue generation and tenure at the firm: advisors earn "total credits" based on those metrics, and the portion of "total credits" allocated to "deferred credits" (anywhere between 1.5% and 15.5% of an eligible advisor's total incentive compensation) is based on the level of revenue an advisor generates. The rest of the advisor's "total credits" (between 98.5% and 84.5%) is allocated to "cash credits." "Cash credits" are used to compute the advisor's cash incentive compensation, and "deferred credits" are used to compute the advisor's deferred incentive compensation award.

Insofar as all of the incentive compensation is calculated in part based on an advisor's generation of revenue for Morgan Stanley, the incentive compensation rewards advisors for good performance. But the deferred compensation awards serve additional purposes: to reward advisor retention and good conduct. The Award Certificates issued to advisors each year state this explicitly:

"The purposes of the . . . award are, among other things . . . **to reward you for your continued Employment and service to the Firm in the future and your compliance with the Firm's policies** (including the Code of Conduct)"²

Under the express terms of the deferred incentive compensation awards, and subject to the limited exceptions detailed below, advisors are eligible for payment under the awards only if they remain employed and in good standing on the scheduled vesting date. If the advisor leaves Morgan Stanley before the scheduled vesting date, the awards are subject to cancellation. The awards may also be canceled if the advisor engages in misconduct.

By conditioning payment on vesting and good guardianship, the deferred incentive compensation awards are designed to motivate advisors to stay with the firm and to comply with firm policies that require advisors to act as good stewards of client assets. In particular, the awards are structured to meet the expectations of Morgan Stanley's financial regulators

² See, e.g., MSCIP 2015 Discretionary Retention Awards Award Certificate, at 2 (emphasis added).



regarding the use of deferred compensation to motivate good conduct and to penalize bad conduct.³

If and when the award conditions are met, the award payment is generally deposited in the advisor's payroll account (for cash awards) or brokerage account (for stock awards), and taxes are withheld at the time of distribution.⁴ Advisors do not have the option to receive payment on the awards before vesting, nor can they defer payment on the awards beyond the vesting date, though advisors can allocate award payments after vesting and at the time of delivery to voluntary deferral programs at Morgan Stanley, such as the Morgan Stanley 401(k) plan, just as they could with any payroll distribution.

2. *Structure of Deferred Incentive Compensation Awards*

To fulfill their dual primary purposes, Morgan Stanley's deferred incentive compensation awards are subject to vesting and guardianship conditions. *First*, the awards vest upon four years of continuous service (for stock awards issued under the EICP) or six years of continuous service (for cash awards issued under the MSCIP).⁵ As a general rule, if an advisor terminates his or her employment before the scheduled vesting date, the awards are canceled. *Second*,

³ In addition to the Department, Morgan Stanley's many regulators include the Financial Industry Regulatory Authority ("FINRA"), the Federal Reserve Board of Governors, the U.S. Securities and Exchange Commission ("SEC"), and the Office of the Comptroller of the Currency. Financial regulators have issued and also proposed guidance advising regulated entities to use deferred compensation (and its cancellation) to address risk-taking and other harmful behaviors. See, e.g., Guidance on Sound Incentive Compensation Policies, 75 Fed. Reg. 36,395, 36,396, 36,408-410 (June 25, 2010) (identifying as best compensation practice a system of deferring incentive compensation awards for multi-year periods and providing for cancellation of unvested awards for conduct violations); Notice of Proposed Rulemaking, "Incentive-Based Compensation Arrangements," Office of the Comptroller of the Currency, Notice of Proposed Rulemaking on Incentive-Based Compensation (May 6, 2024), <https://www OCC.gov/news-issuances/news-releases/2024/nr-ia-2024-47a.pdf>, at pp. 180-81, 192 (proposing regulation implementing Section 954 of the Dodd-Frank Act requiring banks to maintain a system whereby portions of incentive compensation awarded to "significant risk-takers" are deferred for multi-year periods and subject to forfeiture and downward adjustments in cases of inappropriate risk-taking and violations of applicable standards of conduct, among other things); FINRA, 2024 FINRA Annual Regulatory Oversight Report 45 (Jan. 2024), <https://www.finra.org/sites/default/files/2024-01/2024-annual-regulatory-oversight-report.pdf> (asking whether, in meeting conflict of interest obligations, FINRA member firms "adjust[] compensation for financial professionals who fail to adequately manage conflicts of interest associated with account recommendations"); Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318, 33392 (July 12, 2019) (SEC: "best practices" for compliance with Regulation Best Interest include "adjusting compensation for associated persons who fail to adequately manage conflicts of interest").

⁴ FICA taxes are drawn on the awards and paid to the Internal Revenue Service before the vesting date and before distribution if the advisor reaches retirement age, in good standing, under the terms of the awards. The remainder of the award is paid to the advisor upon vesting.

⁵ Before 2016, the deferred incentive cash awards issued under the MSCIP were subject to an eight-year vesting period.

the awards are contingent on the advisor remaining in good standing with the firm through the vesting dates. If the advisor engages in prohibited activity—for example, violating securities rules or regulations, engaging in dishonest or fraudulent conduct, disclosing confidential client information or trade secrets, or other conduct that is cause for termination—the awards are also subject to cancellation. As noted above, this condition is paramount to Morgan Stanley's business, including compliance with applicable laws and the responsible stewardship of client assets.

These conditions are expressly disclosed each year in award documentation and other communications. For instance, the award Term Sheets, which summarize the key terms of the awards, disclose the following in a section titled "Earning Award":

"You have **no right to your . . . award until it is 'earned.'** Generally, to earn your award, **you must (1) remain in continuous Employment** through the Scheduled Vesting Date, [and] **(2) even if your award is vested, not engage in any activity that constitutes Prohibited Activity**"⁶

The Award Certificates contain a similar disclosure:

"[Y]ou will earn your . . . award **only if you (1) remain in continuous Employment** through the Scheduled Vesting Date (subject to limited exceptions set forth below), [and] **do not engage in any Prohibited Activity**"⁷

Similarly, the Compensation Guide, which details the components and core terms of advisor compensation in advance of each year, discloses that:

"Deferred compensation awards are **contingent** upon the [financial advisor] **remaining employed** through the grant and vesting dates of the award."⁸

The disclosures provided to advisors each year also expressly state that the awards are "not intended to provide for retirement income,"⁹ that advisors "should not look to this program as a source of retirement income," and that the program under which the awards are issued is "not a retirement plan . . . subject to [ERISA]."¹⁰

By their terms, the deferred incentive compensation awards generally are not canceled upon the termination of employment under certain special circumstances—the awards may still be paid if an advisor's employment terminates due to (i) death, (ii) disability, (iii) involuntary not-

⁶ See, e.g., MSCIP 2015 Discretionary Retention Award Summary Description, at 1 (emphasis added).

⁷ See, e.g., MSCIP 2015 Discretionary Retention Awards Award Certificate, at 1 (emphasis added).

⁸ See, e.g., 2015 Financial Advisor/Private Wealth Advisor Compensation Plan, Growth Award and Recognition Programs, at 5 (emphasis added).

⁹ See, e.g., *id.*

¹⁰ See, e.g., MSCIP 2015 Discretionary Retention Award Summary Description, at 7.



for-cause termination, (iv) retirement, or (v) government service, though the schedule for payment may depend on the exception under which the award is paid.¹¹ Payment under those special circumstances does not frustrate the awards' primary purposes of promoting advisor retention and good conduct.

B. Deferred Incentive Compensation Award Distribution and Conversion Data

Morgan Stanley has paid billions of dollars in deferred incentive compensation to eligible financial advisors over the last decade. The vast majority of those payments has been made to current employees, consistent with the awards' primary retention purpose.

For deferred incentive stock awards issued under the EICP from 2009 to 2019,¹² between 89.9% and 95.2% of eventual stock conversions went to current employees; in the aggregate, current employees received **91.8%** of such conversions (compared to 8.2% for former employees).

Plan Year	EICP Share Conversions to Current Employees	EICP Share Conversions to Former Employees
2009	1,267,841.00	93,492.00
2010	4,425,582.69	353,472.43
2011	5,374,074.99	590,060.24
2012	3,318,644.50	166,198.20
2013	1,728,358.59	89,000.89
2014	1,827,752.88	112,110.42
2015	3,488,805.91	353,277.69
2016	2,020,318.47	209,792.94
2017	1,692,476.87	191,086.32
2018	2,433,967.39	280,758.90
2019	2,024,127.03	216,772.81

Similarly, for deferred incentive cash awards issued under the MSCIP from 2009 to 2017,¹³ between 80.1% and 92.6% of eventual cash distributions went to current employees; in the aggregate, current employees received **85.3%** of such distributions (compared to 14.7% for former employees).

¹¹ If an eligible advisor dies, all unvested awards immediately vest and are paid to the designated beneficiary upon notification to Morgan Stanley. For qualifying retirees, 50% of the unvested awards is paid on the first anniversary after retirement, with the remaining 50% paid on the second anniversary, so long as the retiree does not engage in specified prohibited activity. If an advisor qualifies for governmental service termination, all unvested awards immediately vest and are paid on the date of termination. Under the other exceptions, the awards are paid on the scheduled vesting date.

¹² For stock awards issued under the EICP, the most recent plan year to have vested was the 2019 plan year; for cash awards issued under the MSCIP, the most recent plan year to have vested was the 2017 plan year.

¹³ See *supra* n.12.

Plan Year	MSCIP Cash Distributions to Current Employees	MSCIP Cash Distributions to Former Employees
2009	\$223,916,979	\$21,903,655
2010	\$159,074,985	\$12,748,728
2011	\$233,478,724	\$25,937,804
2012	\$292,812,811	\$53,966,359
2013	\$201,233,519	\$42,992,679
2014	\$200,204,568	\$49,603,685
2015	\$347,491,105	\$78,744,353
2016	\$299,009,091	\$51,892,800
2017	\$314,670,042	\$53,596,885

This data reflects that current employees receive the substantial majority of payments under these deferred incentive compensation awards, with former employees receiving a minority of payments pursuant to the exceptions to cancellation detailed above.

II. Relevant Authority

A. Pension Plan and Bonus Program Defined

ERISA defines a “pension plan” as any plan, fund, or program that “by its express terms or as a result of surrounding circumstances” (i) “provides retirement income to employees” or (ii) “results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.” ERISA § 3(2)(A)(i)-(ii), 29 U.S.C. § 1002(2)(A)(i)-(ii). Careful analysis of the relevant program’s “primary purpose” is a “paramount consideration” in determining coverage under the statute. *Rich v. Shrader*, 823 F.3d 1205, 1210 (9th Cir. 2016).

The Department has, by regulation, clarified that certain programs are exempt from ERISA’s pension rules. Relevant here, the Department has stated that the definition of a pension plan “shall *not* include payments made by an employer to some or all of its employees as bonuses for work performed, *unless* such payments are *systematically* deferred to the termination of covered employment or beyond, so as to provide retirement income to employees” (*i.e.*, a “bonus program”). 29 C.F.R. § 2510.3-2(c) (emphasis added).

B. Need for Additional Guidance from the Department

The Department has issued a series of advisory opinions over the last few decades that, in Morgan Stanley’s view, confirm that the EICP and MSCIP deferred incentive compensation awards are not subject to ERISA simply because some payments may be made to former employees under exceptions to cancellation, as detailed above. *See, e.g.*, Op. No. 79-15A (Mar. 12, 1979); Op. No. 79-20A (Mar. 19, 1979); Op. No. 82-29A (July 2, 1982); Op. No. 89-07A (Apr. 27, 1989); Op. No. 98-02A (Mar. 6, 1998); Op. No. 2002-13A (Dec. 6, 2002). Based on these opinions, Morgan Stanley has understood that the deferred incentive awards do not qualify as a “pension plan” under ERISA, either by their express terms (which state the awards are not intended to provide retirement income), ERISA § 3(2)(A)(i), 29 U.S.C. § 1002(2)(A)(i), or by their surrounding circumstances (which show, *inter alia*, that there is no deferral of earned income “by employees” under the terms of the awards, and that the vast majority of payments is made to current employees, with only incidental payments made to former employees who fall

within the limited humanitarian exceptions), ERISA § 3(2)(A)(ii), 29 U.S.C. § 1002(2)(A)(ii). Morgan Stanley likewise has understood that the deferred incentive awards come within the Department's "bonus program" exemption at 29 C.F.R. § 2510.3-2(c), because they provide bonuses that are not systematically deferred to the termination of employment or beyond.

The Department's existing guidance is reinforced by caselaw recognizing that "retention bonuses" like the Morgan Stanley deferred incentive compensation awards qualify as "bonuses" under the Department's bonus regulation. See, e.g., *Oatway v. A.I.G., Inc.*, 325 F.3d 184, 188-89 (3d Cir. 2003); *McKinsey v. Sentry Ins.*, 986 F.2d 401, 406 (10th Cir. 1993); *Faris v. S. Ute Indian Tribe*, 2023 WL 7386870 (D. Colo. Nov. 8, 2023); *Cashman v. GreyOrange, Inc.*, 2023 WL 2652789, at *5 (N.D. Ga. Mar. 27, 2023); *Hester v. Whatever It Takes*, 2022 WL 89176, at *5 (W.D. Ky. Jan. 7, 2022); *Pilkington v. CGU Ins. Co.*, 2000 WL 33159253, at *1, *3 (E.D. Pa. Feb. 9, 2001); *Killian v. McCulloch*, 850 F. Supp. 1239, 1246 (E.D. Pa. 1994). Courts have similarly recognized, consistent with decades of Department guidance, that incentive compensation that is contingent on continued employment is not a "pension plan" under ERISA even if some compensation may be paid to former employees in circumstances such as death, disability, layoff, or retirement in the ordinary course. See, e.g., *Oatway*, 325 F.3d at 189; *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 574-75 (5th Cir. 1980); *Faris*, 2023 WL 7386870, at *5, *8-9; *Albers v. Guardian Life Ins. Co. of Am.*, 1999 WL 228367, at *3-4 (S.D.N.Y. Apr. 19, 1999); *Killian*, 850 F. Supp. at 1246; *Depew v. MNC Fin., Inc.*, 819 F. Supp. 492, 494 (D. Md. 1993).

Nevertheless, litigation and numerous arbitrations have been brought against Morgan Stanley contending that the deferred incentive compensation awards are subject to ERISA on account of the payments incidentally issued to former employees under the exceptions to cancellation. Confusion over whether the deferred incentive awards qualify as ERISA-exempt bonuses has been exacerbated by a district court order compelling arbitration but opining that the deferred incentive compensation awards are subject to ERISA. See *Shafer v. Morgan Stanley*, 2023 WL 8100717 (S.D.N.Y. Nov. 21, 2023). In the *Shafer* proceeding the court did not have the benefit of the full evidentiary record (including the data outlined above)—because the district court was deciding only a motion to compel arbitration, the court based its unsolicited merits commentary exclusively on the plaintiffs' complaint and certain award documents incorporated therein. Morgan Stanley did not file a responsive pleading, much less any dispositive motion, nor did it have an opportunity to present complete evidence and argument to facilitate a fair and reliable merits determination. As a result of that procedural posture, the district court's ERISA commentary was not well-grounded in the facts or the law. With the benefit of a complete evidentiary hearing, some arbitration panels have reached the opposite conclusion, finding that the deferred incentive compensation awards are *not* subject to ERISA. See, e.g., *Award, Rude et al. v. Morgan Stanley*, FINRA Arb. No. 22-02183 (June 14, 2014), https://www.finra.org/sites/default/files/aa0_documents/22-02183.pdf ("In the full context of the facts, a majority of the Panel determined [the awards] were a bonus . . . [and] was not persuaded that [Morgan Stanley's] FA Deferred Compensation Program was a 'pension plan' under ERISA.").

The pending challenges and contradictory outcomes are jeopardizing Morgan Stanley's ability to use this deferred compensation element to incentivize retention and good conduct—and thus threatening this element of compensation altogether. They are likewise jeopardizing Morgan Stanley's ability to continue incorporating the exceptions to cancellation that Morgan Stanley considers important for humanitarian reasons—exceptions that ultimately result in incidental payments beyond employment and do not conflict with the awards' primary retention and good guardianship purposes. Morgan Stanley accordingly believes that additional guidance

is important to ensure that it may continue to employ deferred incentive compensation structures that align with federal law and that support its efforts to retain advisors and ensure they conduct themselves consistently with the Firm's standards and values.¹⁴

III. Request for Conference and Expedited Processing

Morgan Stanley is providing with this letter the award certificates, summary descriptions, and compensation guides pertaining to awards issued for compensation years 2015 to 2021, and respectfully requests confidential treatment of these materials pursuant to 5 U.S.C. § 552 and 29 C.F.R. § 70.26. We would be happy to provide the Department with additional materials pertinent to its consideration of this request.

Morgan Stanley respectfully requests a conference with the Department regarding this request, including in the event that the Department contemplates issuing an opinion advising that Morgan Stanley's deferred incentive compensation awards may be subject to ERISA. Morgan Stanley would consider such an opinion adverse to its interests. See ERISA Procedure 76-1, Section 6.05. Morgan Stanley further suggests that before issuing such an opinion the Department may also find it useful and important to consult with the federal agencies that encourage financial services firms to use deferred incentive compensation to promote good employee conduct and other important purposes.

Morgan Stanley also respectfully requests that the Department expedite its consideration of this request and the issuance of an advisory opinion regarding the same, given the pending arbitrations presenting this legal question. See ERISA Procedure 76-1, Section 6.06.

Thank you in advance for considering this request. Please do not hesitate to contact me with any questions or requests for additional information.

Sincerely,



Greg Jacob

¹⁴ Absent additional guidance from the Department, the *Shafer* order, while not binding and presently under review, threatens to undermine the status of countless other long-term deferred incentive compensation programs offered by employers in the brokerage business—which could have a chilling effect on the use of these programs broadly as a critical tool for advisor retention and compliance. Indeed, the *Shafer* order has already prompted litigation over similar deferred compensation structures by another financial services firm. See, e.g., Complaint, *Milligan v. Merrill Lynch, Pierce, Fenner & Smith Inc., et al.*, 3:24-cv-00440-KDB-DCK (W.D.N.C. Apr. 30, 2024), ECF No. 1.

EXHIBIT 4

From: [Hauser, Timothy - EBSA](#)
To: [Jacob, Greg](#)
Subject: Re: EBSA Advisory Opinion Request (A01533)
Date: Tuesday, December 17, 2024 8:33:25 PM

[REDACTED]

From: Jacob, Greg
Sent: Tuesday, December 17, 2024 6:40:27 PM
To: Hauser, Timothy - EBSA
Subject: RE: EBSA Advisory Opinion Request (A01533)

CAUTION: This email originated from outside of the Department of Labor. Do not click (select) links or open attachments unless you recognize the sender and know the content is safe. Report suspicious emails through the "Report Phishing" button on your email toolbar.

Tim,

[REDACTED]

I think that the client will elect to proceed with Wayne and the rest of the crew, but if I'm wrong about that I'll let you know.

Greg

From: Hauser, Timothy - EBSA
Sent: Tuesday, December 17, 2024 6:16 PM
To: Jacob, Greg
Cc: Hauser, Timothy - EBSA
Subject: RE: EBSA Advisory Opinion Request (A01533)

Greg, I'm sorry for the last-minute notice, but I won't be able to make the Thursday meeting. [REDACTED]. I don't know that I'm necessarily critical to the meeting, but please let me know if you'd like to reschedule.

Thanks,
Tim

From: Jacob, Greg <gjacob@omm.com>
Sent: Thursday, December 5, 2024 10:44 AM
To: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>
Subject: RE: EBSA Advisory Opinion Request (A01533)

Always elegant! If you prefer somewhere else, just name it (I imagine you might well be tired of Hamilton's!); otherwise I'll see you at Hamilton's at noon.

Here is our list:

Greg Jacob (O'Melveny)
Brian Boyle (O'Melveny)
Meaghan Vergow (O'Melveny)
Mark Greenfield (Morgan Stanley)
Tom D'Elisa (Morgan Stanley)

It's possible one more might be added, if so I'll supplement. See you soon!

Greg

From: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>
Sent: Thursday, December 5, 2024 10:40 AM
To: Jacob, Greg <gjacob@omm.com>
Cc: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>
Subject: RE: EBSA Advisory Opinion Request (A01533)

A list of attendees would be great.

Looking forward to see you, assuming we are still on. Just meet you across the street at the always elegant Hamilton's?

From: Jacob, Greg <gjacob@omm.com>
Sent: Wednesday, December 4, 2024 12:56 PM
To: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>
Subject: RE: EBSA Advisory Opinion Request (A01533)

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Tim, that is perfect; we'll be there then. Should I get you a list of attendees? And I'm very much looking forward to catching up tomorrow!

Greg

From: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>
Sent: Wednesday, December 4, 2024 11:01 AM
To: Jacob, Greg <gjacob@omm.com>
Cc: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>
Subject: RE: EBSA Advisory Opinion Request (A01533)

Greg, sorry for the delayed response on the Morgan Stanley meeting – usual cat herding exercise. The afternoon of 12/19 works for us. Around 1:00 would be best if that's good for you and your client.

From: Jacob, Greg <gjacob@omm.com>
Sent: Tuesday, November 26, 2024 11:49 AM
To: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>
Subject: RE: EBSA Advisory Opinion Request (A01533)

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Tim,

Let's plan for our catch-up lunch at noon on December 5 if that works for you, then. I'll send a calendar invite.

If PBSD can be available any time on Tuesday December 17, or before 3 pm on Thursday December 19, those would be ideal for the Morgan Stanley folks' travel schedules.

Greg

From: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>
Sent: Monday, November 25, 2024 4:59 PM

To: Jacob, Greg <gjacob@omm.com>

Cc: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>

Subject: RE: EBSA Advisory Opinion Request (A01533)

Thanks, Greg.

December 5 seems great. I'll check with PBSB on the week of December 16, but doubt it's a problem if you have suggested dates that are particularly good for the Morgan Stanley folks.

Tim

From: Jacob, Greg <gjacob@omm.com>

Sent: Monday, November 25, 2024 3:47 PM

To: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>

Subject: RE: EBSA Advisory Opinion Request (A01533)

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Tim,

Would December 2 or 5 work for you for a catch-up lunch? Both days are open for me, and I can readily come your way.

Separately, if PBSB would be able to meet during the week of December 16, our Morgan Stanley team could make any time that week work for a meeting.

Greg

Gregory F. Jacob

gjacob@omm.com

O: +1-202-383-5110

O'Melveny

O'Melveny & Myers LLP

1625 Eye Street, NW

Washington, DC 20006

[Website](#) | [LinkedIn](#) |

[Twitter](#)

From: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>

Sent: Wednesday, November 20, 2024 5:56 PM

To: Jacob, Greg <gjacob@omm.com>

Cc: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>

Subject: RE: EBSA Advisory Opinion Request (A01533)

Greg,

Congratulations on your progress with the book!

I'll be around in December and would love to have lunch. It would be nice to catch up. The first week in December looks a bit less crowded than the second week if you have some dates that work for you that week.

I'd be happy to set up a meeting with PBSB on the AO, as well. What do you think is a good timeframe for that?

Tim

From: Jacob, Greg <gjacob@omm.com>

Sent: Wednesday, November 20, 2024 10:52 AM

To: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>

Subject: RE: EBSA Advisory Opinion Request (A01533)

Tim,

I hope all is well. Morgan Stanley is going to be appealing to the Second Circuit the issue that is the subject of the Advisory Opinion Request that we discussed back in August; the attached opinion of the district court that was entered on November 5, 2024 is the decision that will be appealed. I checked with Janet Song, who reports that our Advisory Opinion request is "under review" but no further status update is possible at this time.

There will be a long runway before any amicus brief would be due, but Morgan Stanley would like to discuss with the Department the possibility of filing a brief in support of our appeal at the appropriate time next year. Normally I would go direct to Wayne with such a request, and I am happy to do so now, but I wanted to check in with you first since we briefly previously discussed the underlying subject matter, and I'm sure that whatever thinking may have been done internally on the subject matter in the intervening time would bear on the amicus participation request. We'd be eager to come in and discuss with DOL the strong reasons it should support our merits position in the appeal (I think the Second Circuit could just vacate the district court's ERISA analysis and not reach the merits, but if it does reach the merits, it will be important that it get it right).

Entirely separately – I just finished my seventh of eight book chapters and should be finished with a full first draft by the end of November, so my schedule is at last freeing up. I'd love to get together for lunch the first two weeks of December if you have a convenient time, to talk about everything other than ERISA.

Greg

Gregory F. Jacob

gjacob@omm.com

O: +1-202-383-5110

O'Melveny

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1625 Eye Street, NW

Washington, DC 20006

[Website](#) | [LinkedIn](#) |

[Twitter](#)

From: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>

Sent: Tuesday, August 13, 2024 4:22 PM

To: Jacob, Greg <gjacob@omm.com>

Cc: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>

Subject: RE: EBSA Advisory Opinion Request (A01533)

[EXTERNAL MESSAGE]

Nice to hear from you, Greg. I'll be around for a couple more hours tonight if you want to reach me. I'll be here tomorrow too, but my calendar looks grim. My office number is 202-693-8316. Cell is 202-674-5029.

From: Jacob, Greg <gjacob@omm.com>

Sent: Tuesday, August 13, 2024 4:06 PM

To: Hauser, Timothy - EBSA <Hauser.Timothy@dol.gov>

Subject: EBSA Advisory Opinion Request (A01533)

Tim,

I hope all is well! You and I were both on panels for the ABA's Fiduciary Institute a couple of months ago, and I thoroughly enjoyed yours, but in the new world of online conferences

it didn't afford the opportunity to say hello directly.

I attach here an Advisory Opinion request that I've submitted on behalf of Morgan Stanley (A01533, assigned to Janet Song). It's more time sensitive than most AO requests, and I was hoping to bend your ear for just five minutes. Would there be a convenient time tomorrow for me to give you a brief call?

Greg

Gregory F. Jacob

Partner

O'Melveny

gjacob@omm.com

O: +1-202-383-5110

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Washington, DC 20006

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EXHIBIT 5

From: Song, Janet - EBSA
To: Jacob, Greg; VerGow, Meaghan; Reed, Alexander; Berger, Eric - EBSA
Subject: Advisory Opinion request Case ID No. A01533
Start: Monday, January 6, 2025 11:00:00 AM
End: Monday, January 6, 2025 12:00:00 PM
Location: Microsoft Teams Meeting

To discuss Advisory Opinion request Case ID No. A01533

[Microsoft Teams Need help? <https://aka.ms/JoinTeamsMeeting?omkt=en-US>](https://aka.ms/JoinTeamsMeeting?omkt=en-US)

Join the meeting now <[https://teams.microsoft.com/l/meetup-join/19%3ameeting_MDfB0GRJOTkMDIxYy00MmMwLTg2ODtkMmYwNThkMTA1ZjZm%40thread.v2/0/?context=%7b%22Id%22%3a%2275a63054-7204-4e0c-9126-adab971d4aca%22%2c%22Oid%22%3a%229fd36d35-e4cb-4b65-95e4-3e89b55252de%22%7d](https://teams.microsoft.com/l/meetup-join/19%3ameeting_MDfB0GRJOTkMDIxYy00MmMwLTg2ODtkMmYwNThkMTA1ZjZm%40thread.v2/0/?context=%7b%22Id%22%3a%2275a63054-7204-4e0c-9126-adab971d4aca%22%2c%22Oid%22%3a%229fd36d35-e4cb-4b65-95e4-3e89b55252de%22%7d&)>

Meeting ID: 285 138 528 264
Passcode: g8bW3om2

Dial in by phone
+1 202-735-3644,,304417682# <tel:+12027353644,,304417682#> United States, Washington
Find a local number <https://dialin.teams.microsoft.com/6fa250d2-bb98-414b-b289-8c30fad5cb00?id=304417682>
Phone conference ID: 304 417 682#
Join on a video conferencing device
Tenant key: teams@meet.dol.gov
Video ID: 119 016 017 1
More info <https://dialinfo.pexgov.com/?conf=1190160171&ivr=teams&d=meet.dol.gov>
For organizers: Meeting options <https://teams.microsoft.com/meetingOptions/?organizerId=9f436d35-e4cb-4b65-95e4-3e89b55252de&tenantId=75a63054-7204-4e0c-9126-adab971d4aca&threadId=19_meeting_MDI3OGRIOTktMDIxYy00MmMwLTg2ODktMmYwNThkMTA1ZjZm@thread.v2&messageId=0&language=en-US> | Reset dial-in PIN <https://dialin.teams.microsoft.com/usp/pstnconferencing>
<https://www.dol.gov/sites/dolgov/files/general/images/DOL-Logo.png>
Privacy and security <https://www.dol.gov/general/privacynotice>

EXHIBIT 6

From: [Jacob, Greg](#)
To: ["Turner, Jeffrey - EBSA"](#)
Cc: ["Berry, Wayne - SOL"; "Song, Janet - EBSA"; "Berger, Eric - EBSA"; VerGow, Meaghan; Boyle, Brian](#)
Subject: Morgan Stanley Advisory Opinion Request
Date: Wednesday, April 9, 2025 7:20:02 AM
Attachments: [2025.04.05.Ltr.from.G.Jacob.to.Deputy.Director.Turner.pdf](#)

Jeff,

I hope all is very well. Somehow I think it is colder today than it was when we met in December!

Please find attached correspondence following up on our meeting on December 19, and follow-up call with Eric Berger and Janet Song on January 6.

Sincerely,

Greg

Gregory F. Jacob

Partner

O'Melveny

gjacob@omm.com

O: +1-202-383-5110

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Washington, DC 20006
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April 8, 2025

Greg Jacob
D: +1 202 383 5110
gjacob@omm.com

CONFIDENTIAL

VIA EMAIL AND FIRST-CLASS MAIL

Deputy Director Jeffrey Turner
Employee Benefits Security Administration
U.S. Department of Labor
Office of Regulations and Interpretations
200 Constitution Avenue, NW, Suite N-5655
Washington, DC 20210

Re: Request for Advisory Opinion on Application of ERISA to Deferred Incentive Compensation Awards Issued to Morgan Stanley Financial Advisors

Dear Deputy Director Turner:

On behalf of Morgan Stanley Smith Barney LLC ("Morgan Stanley"),¹ I am following up on our December 2024 meeting and my August 1, 2024 letter requesting an advisory opinion from the U.S. Department of Labor ("the Department") regarding whether ERISA applies to the deferred incentive compensation awards that Morgan Stanley issues to financial advisors. As set forth in my prior letter, the Department's guidance is necessary and appropriate given ongoing legal challenges that have created a cloud of uncertainty concerning ERISA's application to Morgan Stanley's awards and similar compensation offered by other financial services firms.

As we have explained in our discussions, these efforts to expand ERISA's scope through litigation are premised on an interpretation of ERISA's "pension plan" definition and the Department's "bonus plan" exemption that longstanding Department guidance and caselaw do not support. Nevertheless, the mere existence of these challenges, including the divergent opinions they have prompted, is threatening the ability of financial firms—and employers more broadly—to continue offering deferred incentive compensation to employees in its current form, even though the compensation is designed to meet the expectations of various financial regulators. See August 1, 2024 Letter at n.3. The recent decision by a district court in North Carolina holding that ERISA's pension rules do not apply to Merrill Lynch's deferred compensation awards for financial advisors—dubbed "materially identical" to Morgan Stanley's awards by one plaintiffs' firm²—reinforces the Department's longstanding guidance, but does

¹ Morgan Stanley's EIN is 26-4310844. I am authorized to submit this letter on Morgan Stanley's behalf.

² *Milligan v. Merrill Lynch*, Civil Act. No. 3:24-cv-00440, Dkt. No. 70 at 2–3 (W.D.N.C. Feb. 14, 2025).

not resolve the uncertainty employers nationwide face in developing their deferred incentive compensation programs. See *Milligan v. Bank of America Corp.*, 2025 WL 892972, at *5 (W.D.N.C. Mar. 11, 2025) (rejecting “paradoxical” argument that incidental payments to former employees under humanitarian exceptions to cancellation triggered pension rules, and also holding that awards qualify as “bonuses”).

Because financial services firms across the industry offer very similar deferred incentives to their financial advisors, in part because of the influence of the principal regulators they share, an advisory opinion from the Department would not only assist Morgan Stanley in shaping its future deferred incentive awards but also provide helpful guidance to Morgan Stanley's peer firms. Morgan Stanley therefore respectfully reiterates its request that the Department issue an advisory opinion confirming that the deferred compensation award terms that Morgan Stanley would like to continue to offer do not implicate ERISA.

Please do not hesitate to contact me with any questions or requests for additional information. We are, of course, grateful for the Department's attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Greg Jacob", with a stylized, cursive script.

Greg Jacob

cc: Associate Solicitor of Labor Wayne Berry

EXHIBIT 7

Message

From: Kent A. Mason [kamason@davis-harman.com]
Sent: 7/28/2025 5:58:53 PM
To: 'Manning, Glenda - EBSA' [Manning.Glenda@dol.gov]
CC: 'Michael.Stein@morganstanley.com' [Michael.Stein@morganstanley.com]; 'PJ.Austin@morganstanley.com' [PJ.Austin@morganstanley.com]; Chris Gaston [CGaston@davis-harman.com]
Subject: RE: Meeting request regarding pending Morgan Stanley Advisory Opinion request submitted a year ago on critical issue needing fast resolution to clarify the law

Thanks very much. A Teams meeting at 12:30 on Thursday would work very well. The invitees (except one) are copied on this email. Michael Stein and PJ Austin are in government relations for Morgan Stanley. Chris Gaston is at Davis & Harman with me. And we will also forward the invite to Mark Greenfield, who is in Morgan Stanley's legal department. Thanks again.

From: Manning, Glenda - EBSA <Manning.Glenda@dol.gov>
Sent: Monday, July 28, 2025 10:11 AM
To: Kent A. Mason <kamason@davis-harman.com>
Subject: Meeting request regarding pending Morgan Stanley Advisory Opinion request submitted a year ago on critical issue needing fast resolution to clarify the law

Mr. Mason,
 Janet and Jack are available Thursday, July 31, 2025 to meet by:

Teams @ 12:30 – 1pm or
 at DOL or Teams at 5:00pm

Please let me know which works for you.
 Looking forward to hearing from you.

From: Kent A. Mason <kamason@davis-harman.com>
Sent: Friday, July 25, 2025 12:26 PM
To: Dhillon, Janet L - EBSA <Dhillon.Janet.L@dol.gov>; Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>
Cc: Michael.Stein@morganstanley.com; 'PJ.Austin@morganstanley.com' <PJ.Austin@morganstanley.com>; Chris Gaston <CGaston@davis-harman.com>
Subject: Meeting request regarding pending Morgan Stanley Advisory Opinion request submitted a year ago on critical issue needing fast resolution to clarify the law

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Janet and Jack, we wanted to touch base on a pending request for an Advisory Opinion from Morgan Stanley (copied on this email). We were hoping to have a chance to talk to you about the status of this request if you have time next week.

We were thrilled about the Department's June 2 announcement launching its opinion letter program, quoting Deputy Secretary Sonderling regarding the importance of such letters. <https://www.dol.gov/newsroom/releases/osec/osec20250602> Advisory Opinions have historically played a critical role in facilitating compliance, but their frequency has dropped off dramatically in recent years. We applaud the new program.

We note that EBSA's first two Opinions of 2025 were issued earlier this week. We are hoping that Morgan Stanley's request could be addressed in the coming few weeks, as the pressure on this issue has become intense. We have heard informal reports that our Advisory Opinion is done and is simply waiting for clearance, but that could take time. We are not sure how accurate those informal reports are.

The original request and a follow-up letter are attached. Here is the issue in a nutshell. It is very common in the financial services industry and in many other industries to have long-term incentive plans. (My guess is that both of you are familiar with these programs.) Under Morgan Stanley's plans, which are very similar to common industry practices, employees who stay for 4 to 6 years after the beginning of the incentive period can earn retention/performance awards at the end of the period. Again, under a standard industry practice, Morgan Stanley does not require employees to stay the whole period if the termination is based on death, disability, retirement, not-for-cause termination, or government service. The vast majority of the awards are paid to current employees but a small portion are paid under these exceptions.

To my knowledge, no one in the country has ever treated these arrangements as pension plans subject to ERISA (due to how clear the law is), and similar plans are simply everywhere in my experience. But one district court (referenced in the request) ruled, without even a response from Morgan Stanley, that ERISA applied to these incentive arrangements (contrary to the law and other court holdings) and sent them to arbitration. The court's strange reasoning was based on the fact that a few payments are made after termination of employment, due to the exceptions noted above. This ruling triggers huge problems due to, for example, ERISA's vesting rules, which the program does not comply with. The problems with the court's ruling are evidenced by the fact that four amicus briefs were filed on behalf of Morgan Stanley's appeal in this case by (1) the American Benefits Council, (2) the US Chamber of Commerce and The ERISA Industry Committee, (3) SIFMA, and (4) the Society for Human Resource Management.

Dozens of very expensive claims have been filed against Morgan Stanley since this strange district court ruling. The law really needs to be clarified quickly, which is why we are reaching out to you and also, on a very limited basis, to the Hill for help to expedite this matter. Thanks so much.

Kent A. Mason
Davis & Harman LLP



The Willard
1455 Pennsylvania Avenue, NW, Suite 1200
Washington, DC 20004

Main: 202-347-2230 Direct: 202-662-2288
Fax: 202-393-3310 kamason@davis-harman.com

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EXHIBIT 8

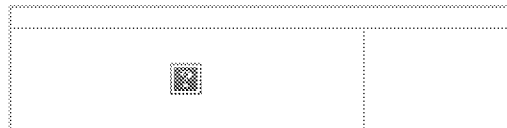
From: kamason@davis-harman.com
To: Dhillon.Janet.L@dol.gov; Lund.Jack.G@dol.gov; Lund.Jack.G@dol.gov; Killmond.James.J@dol.gov
Cc: Michael.Stein@morganstanley.com; PJ.Austin@morganstanley.com; Mark.Greenfield@morganstanley.com; CGaston@davis-harman.com
Subject: [EXTERNAL] Thank you and attached court case
Date: Thursday, July 31, 2025 2:58:15 PM
Attachments: [Milligan v. Merrill Lynch - Dkt. 7X - MSJ Order \(3.11.2025\).pdf](#)

Thanks so much for the excellent meeting earlier today. We so appreciated being able to meet with the team so quickly, and how much work you all had clearly done in advance. As I mentioned (too many times I am sure), there is a real urgency on this issue for two reasons, one being the growing amount of litigation/arbitration spurred by the strange decision in New York (literally hundreds of individual disputes filed not just against Morgan Stanley but others in the industry as well). The other is the fact that long-term incentive plans are typically reviewed and decided on in early fall for the following year. So, if there need to be material changes (such as eliminating some humanitarian exceptions to the forfeiture on termination of employment), those decisions are going to be made in the next six to eight weeks in many cases. There are many reasons no one wants to eliminate those exceptions, but employers are now in a period of uncertainty over whether they can maintain longstanding, carefully crafted incentive compensation structures. An Advisory Opinion in the immediate future would provide really useful guidance at a really important time.

As discussed, attached is the district court decision in the Fourth Circuit, which ruled favorably on the same issue.

I don't have all the DOL email addresses, so sorry for leaving some of the team off this email. Thanks again.

Kent A. Mason
Davis & Harman LLP



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1455 Pennsylvania Avenue, NW, Suite 1200
Washington, DC 20004

Main: 202-347-2230 Direct: 202-662-2288 Cell: 240-418-9813
Fax: 202-393-3310 kamason@davis-harman.com

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:24-CV-00440-KDB-DCK**

KELLY MILLIGAN,

Plaintiff,

v.

**BANK OF AMERICA
CORPORATION,
MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC., AND
JOHN/JANE DOE 1,**

Defendants.

ORDER

THIS MATTER is before the Court on Defendants’ Motion for Summary Judgment (Doc. No. 41). The Court has carefully considered this motion, the parties’ briefs and exhibits and oral argument on the motion from the parties’ counsel on March 4, 2025. For the reasons discussed below, the Court will **GRANT** the motion.

I. LEGAL STANDARD

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *United States v. 8.929 Acres of Land in Arlington Cnty., Virginia*, 36 F.4th 240, 252 (4th Cir. 2022) (quoting Fed. R. Civ. P. 56(a)); see *United States, f/u/b Modern Mosaic, LTD v. Turner Construction Co., et al.*, 946 F.3d 201, 206 (4th Cir. 2019). A factual dispute is considered genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *8.929 Acres of Land*, 36 F.4th at 252. “A fact is material if it might affect the outcome of the suit under the governing law.” *Id.* (quoting *Libertarian Party of Va. v.*

Judd, 718 F.3d 308, 313 (4th Cir. 2013)). In determining if summary judgment is appropriate, “courts must view the evidence in the light most favorable to the nonmoving party and refrain from weigh[ing] the evidence or mak[ing] credibility determinations.” *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (internal quotation marks omitted) (quoting *Lee v. Town of Seaboard*, 863 F.3d 323, 327 (4th Cir. 2017)).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact through citations to the pleadings, depositions, answers to interrogatories, admissions, or affidavits in the record. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (when the nonmoving party “has failed to make a sufficient showing on an essential element of [his] claim with respect to which [he] has the burden of proof,” summary judgment is warranted); *United States ex rel. Gugenheim v. Meridian Senior Living, LLC*, 36 F.4th 173, 178 (4th Cir. 2022). If the movant satisfies his initial burden to demonstrate “an absence of evidence to support the nonmoving party’s case,” the burden shifts to the nonmovant to “present specific facts showing that there is a genuine issue for trial.” *8.929 Acres of Land*, 36 F.4th at 252 (quoting *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 540 (4th Cir. 2015)). “The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Hixson v. Moran*, 1 F.4th 297, 302 (4th Cir. 2021). Rather, the nonmoving party must establish that a material fact is genuinely disputed by, *inter alia*, “citing to particular parts of the materials of record” and cannot rely only on “conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence.” Fed. R. Civ. P. 56(c)(1)(A); *8.929 Acres of Land*, 36 F.4th at 252 (quoting *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013)). In the end, the relevant inquiry on summary judgment is “whether the evidence presents a sufficient disagreement

to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251–52.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff Kelly Milligan worked as a financial advisor (“FA”) for Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill”), a wholly owned subsidiary of Bank of America (collectively, “Defendants”) from 2000-2021, at which point he voluntarily departed to start his own company and compete with Merrill. Doc. No. 1 at ¶¶ 1, 11. During his tenure, Plaintiff participated in the “Financial Advisor Incentive Compensation Plan” (“FAICP”).¹ Doc. No. 42-10 at 2. As outlined in the FAICP, FAs are paid a guaranteed monthly salary and are eligible to earn monthly incentive compensation. *Id.* In addition, Defendants offer “Long-Term Contingent Awards” which include restricted stock units (RSUs) and the WealthChoice Award (“WCA”). *Id.* at 10. FAs receive RSUs under this award scheme unless they elect to allocate a portion of their long-term contingent award in the form of a WCA. *Id.*

Over his tenure, Plaintiff elected and earned several WCAs. Plaintiff alleges that by departing, he forfeited over \$500,000 in “deferred compensation” because he and others similarly situated were forced to forfeit the value of their WCAs when they voluntarily left Merrill before their plans vested. Doc. No. 1 at ¶¶ 1, 11. Plaintiff further asserts that the WCA program is subject to the Employee Retirement Income Security Act of 1974 (“ERISA”) because it “provides for deferred commissions.” Doc. No. 54-2 at 5. More specifically, Plaintiff argues that each WCA is subject to ERISA because it is an “employee pension benefit plan” that “results in a deferral of income.” Doc. No. 1 at ¶ 3. The deferral of income allegedly results when FAs are “paid for the

¹ Plaintiff states that the FAICPs issued each year were substantively identical (Doc. No. 54-2 at 5), so the Court will primarily reference the 2020 guide (Doc. No. 42-10).

work years after they perform it.” *Id.* at ¶ 4. These payments occur for “periods extending to the termination of covered employment or beyond,” because in certain circumstance—such as death or retirement—participants receive the value of their plan after their employment ends. *Id.*

In Plaintiff’s view, this means that the plan violates ERISA’s vesting schedule, and he has filed a proposed class action suit against Defendants seeking declaratory and equitable relief, along with reformation of the compensation plan. In response, Defendants filed the pending motion for summary judgment, asserting that the WCA is not an employee pension benefit plan because it does not, by design, defer compensation to the end of covered employment or beyond, and because it is a bonus plan that is exempt from ERISA. Doc. No. 42-2 at 5. The motion has been fully briefed and argued and is now ripe for the Court’s ruling.

III. DISCUSSION

Congress passed ERISA in 1974, in an era when many long-term employees were not getting the pension benefits their employers promised would be there when they retired. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (ERISA “seek[s] to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits.”); *see also Murphy v. Inexco Oil Co.*, 611 F.2d 570, 574 (1980) (noting that ERISA was enacted to protect the retirement assets of workers). Congress sought to ensure that if employees were promised a benefit at retirement—and “fulfilled whatever conditions are required to obtain a vested benefit”—they “actually will receive it.” *Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980). The Supreme Court and others have cautioned, however, that ERISA does not dictate what benefits employers must offer, *Spink*, 517 U.S. at 887, nor is it intended to hamstring or dissuade an employer in designing other compensation programs, such as retention or other bonus programs, tailored to their particular workforce or industry. *See, e.g., Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

“To state a claim under ERISA, a plaintiff must allege and establish the existence of an ‘employee [pension] benefit plan’ that is governed by ERISA.” *Albers v. Guardian Life Ins. Co.*, No. 98 Civ. 6244, 1999 WL 228367, at *2 (S.D.N.Y. Apr. 19, 1999). An employee pension benefit plan is defined under ERISA as:

any plan, fund, or program . . . established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A). However, even if an employee pension benefit plan can be established, the Department of Labor (“DOL”) carves out an exception excluding bonus payments from ERISA’s definition of an employee pension benefit plan unless the payments are “systematically deferred to the termination of covered employments or beyond” or are designed for the purpose of providing retirement income. 29 C.F.R. § 2510.3–2(c). It is within this framework that the Court must consider the compensation structure at Merrill.

As previously noted, a FA’s income is comprised of a guaranteed monthly salary, monthly cash compensation, and long-term contingent incentive awards such as a WCA. Doc. Nos. 54-2 at 5; 42-2 at 8. The monthly cash compensation, which is akin to a commission, is calculated and paid monthly, using a “cash” grid that represents a percentage of “production credits” or revenue generated. Doc. No. 42-2 at 9. These percentages substantially increase as “production” or revenue generated increases. In contrast, the WCA program utilizes a separate “long-term” grid that reflects a much smaller percentage of production credits (starting at less than 10% of the “cash” grid

percentage) and is calculated only after a full performance year. *Id.* Also, unlike the cash compensation that begins with the first dollar of revenue generated, WCA eligibility does not begin until after a threshold amount of revenue is generated. Doc. No. 42-10 at 2. Significantly, FAs must also remain employed with the company until the vesting date for the award to become “earned and payable.” Doc. No. 42-2 at 19.

During oral argument, Defendants noted that, like *Callan v. Merrill Lynch & Co., Inc.*, No. 09 CV 0566 BEN (BGS), 2010 WL 3452371, at *8 (S.D. Cal. Aug. 30, 2010), which addressed Merrill’s predecessor plan to the WCA, there is nothing in the WCA that “would allow a reasonable person to calculate or determine the benefits of the plan or the procedure for receiving [them], as those matters are left to the sole discretion” of Defendants. In its FAICP, the WCA is described as:

The [WCA], as in effect from time to time, is intended to be **unfunded and maintained primarily for the purpose of providing long-term contingent incentive compensation**, subject to certain conditions, to a select group of Financial Advisors. By awarding a portion of a Financial Advisor’s incentive compensation in the form of a cash award which becomes earned and payable over time, **the Company intends to encourage the Financial Advisor to remain employed by the Company** and its Subsidiaries and to further align the interests of the Financial Advisor with the Company’s business objectives.

Doc. No. 41-3 at 3 (emphasis added). The final amount of each WCA award is further determined by “the Administrator” and “subject to the review and approval by the Company.” *Id.* at 6. Also, the company retains the right to adjust the amount of any award to align with the performance of both the company and individual lines or sub-lines of business. Doc. No. 41-10 at 39.

When a WCA is calculated, a notional account is created and the FA can select mutual funds or other investments to benchmark against. Doc. No. 41-1 at 11. The value of the account is indexed to the performance of the chosen fund or benchmark investment. *Id.* at 12. Both the FAICP and the Award Agreement state that the “Account Balance represents an unsecured, unfunded,

contingent promise . . . to pay the value of the account [] after the Vesting date.” *Id.* Again, the FAICP makes clear that the WCA becomes earned and payable only after an eight-year vesting period, and where the FA remains employed through the payment date. *Id.* at 11. After vesting, the FA is paid “as soon a[s] practicable . . . but in no event later than 2½ months following such vesting date” and there is no option to defer it. Doc. No. 41-3 at 8.

In most cases, when employment ends, the balance of any unvested accounts is cancelled, unless the employee dies, retires, or is involuntarily terminated. Doc. Nos. 41-7 at 7, 42-2 at 12-13. During oral argument, Defendant asserted that *not* cancelling WCAs in those relatively uncommon situations² upholds the purpose of the plan, which is, in large part, to reward company loyalty and longevity. FAs who depart under one of these circumstances (which are largely out of a FA’s control) must generally covenant to not compete in order to attain their WCA. Doc. No. 41-1 at 13. Involuntary terminations (with a non-competition agreement), death, and retirement do not render an employee adverse to the company the way a FA leaving to work for a competitor might.

The specific circumstances of the departure determine how and when a WCA vests. In the event of death, the FA’s estate is paid promptly. Doc. No. 41-1 at 12. If the termination is related to a workforce reduction, divestiture or disability, the award will “continue to become earned and payable on the stated vesting schedule,” so long as the FA agrees to certain covenants, including to not solicit clients and employees. *Id.* at 13. For changes in control, awards become immediately earned as of the termination date. *Id.* Finally, for retirement, WCAs become earned and payable in

² According to the parties, 18% of WCA recipients received some payment after their employment ended and 92.6% of the FAs who received WCAs between 2018 and 2024 were active employees, both of which demonstrate that receiving a WCA payment post-employment is uncommon. Doc. Nos. 42-2 at 13, 54-2 at 8.

two installments: first, after the end of the year the FA retires, and second, after the end of the next year. As a condition of payment, retiring FAs must also covenant to not solicit employees or clients and must not engage in competition. *Id.* According to Defendants, spacing retirement payments out this way gives the company some recourse in the event that the FA resumes working and engages in competition. Somewhat paradoxically, it is these unique circumstances that, in Plaintiff's view, bring WCAs under ERISA's narrow ambit.

A. Employee Pension Benefit Plan

Because it is possible for a WCA to be paid out, in certain limited circumstances, after the end of covered employment, the central dispute requires interpretation of subsection (ii) of the ERISA statute. Subsection (ii) addresses whether a plan's express terms or circumstances result in deferrals of income to or beyond the termination of employment. *See* 29 U.S.C. § 1002(2)(A)(ii). Plaintiff urges the Court to use a "results-based" test when considering whether the plan defers income to the end of employment or beyond, which at least one other court has considered. *See Pasternack v. Shrader*, 863 F.3d 162, 171 n.5 (2d Cir. 2017) (noting that the "word 'results' calls for an effects-based inquiry rather than one based on purpose"). However, adopting Plaintiff's view would mean that virtually *any* plan that allows for income to be paid after employment ends, even incidentally, could fall under ERISA's purview.

The Court disagrees with Plaintiff's interpretation. ERISA's "definition is not algorithmic" and its words should not be "read as an elastic girdle that can be stretched to cover any content that can conceivably fit within its reach." *Murphy*, 611 F.2d at 575. Plaintiff's expansive interpretation reaches far beyond Congress' intent and ignores ERISA's fundamental premise,

both of which are rooted in protecting the *retirement assets* of workers.³ See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (“[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy”) (quotations and citations omitted).

Indeed, courts routinely find, as the Court does here, that “the purpose of the plan must be to provide retirement income or to defer income until termination or beyond.” *Juric v. USALCO, LLC*, 659 F. Supp. 3d 619, 633 (D. Md. 2023). See also *Depew v. MNC Fin., Inc.*, 819 F. Supp. 492, 495 (D. Md. 1993) (finding no employee pension benefit plan under ERISA when the plans did not “require[] deferral of income until the termination of employment or thereafter”); *Rich v. Shrader*, 823 F.3d 1205, 1210 (9th Cir. 2016) (“[W]e agree with our sister circuits that have determined that the paramount consideration is whether the primary purpose of the plan is to provide deferred compensation or other retirement benefits.”). And the “mere fact that some payments under a plan may be made after an employee has retired or left the company does not result in ERISA coverage.” *Murphy*, 611 F.2d at 575. See also *Juric*, 659 F. Supp. 3d at 633 (finding the fact that some income “can or may be deferred” insufficient to sustain an ERISA claim); *Rich*, 823 F.3d at 1211 (finding the same).

The express purpose of the WCA program is to reward employees for performance and tenure, and both the plan structure and administration are tailored to achieve those ends. While the WCA contemplates rare situations under which an award might be paid after the end of employment, as is the case with retirement, in most circumstances, once the award is earned, it is

³ See U.S. Department of Labor, *ERISA*, <https://www.dol.gov/general/topic/health-plans/erisa> (last accessed January 30, 2025).

promptly paid out. In sum, this is the type of scenario around which the Court will decline to stretch the “elastic girdle.” *Murphy*, 611 F.2d at 575.

B. Department of Labor Bonus Plan Exemption

Even if the Court were to adopt Plaintiff’s results-based test and find that the WCA could be an employee pension benefit plan under ERISA, it is still subject to the Department of Labor’s (“DOL”) exemption for bonus plans, unless payments under the plan are “systematically deferred to the termination of covered employment or beyond.” 29 C.F.R. § 2510.3–2(c). By definition, “[a] bonus is ‘[a] premium paid in addition to what is due or expected[,] [especially] a payment by way of division of a business’s profits, given over and above normal compensation.’” *Shafer v. Stanley*, No. 20 CIV. 11047 (PGG), 2024 WL 4697235, at *7 (S.D.N.Y. Nov. 5, 2024) (quoting *Bonus*, Black’s Law Dictionary (11th ed. 2019)).

According to the DOL, a bonus plan “in operation,” must not be “a vehicle for the provision of retirement income,” DOL Advisory Op. 89-07A at 2, and a “significant operative factor” when considering whether a plan is a bonus plan under the regulation, is whether an “inordinate percentage of the bonus recipients were at . . . retirement age.” *Id.* See also *Oatway v. Am. Int’l Grp., Inc.*, 325 F.3d 184, 188–89 (3d Cir. 2003) (holding a plan was not subject to ERISA “because its purpose was to operate as an incentive and bonus program, and not as a means to defer compensation or provide retirement benefits”); *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929, 931–34 (8th Cir. 1999) (“Though the [plan’s] vesting requirement could result in the deferral of a portion of any earned incentive until a participant’s termination or retirement, ... such a deferral would only occur by happenstance. In fact, the stated purpose of the vesting requirement reinforces our conclusion that the [plan] is a non-ERISA bonus plan.”).

Here, the WCA is an unfunded, discretionary plan, devised for the express purpose of rewarding long-term FAs who also help the company meet financial goals. Awards are not guaranteed (the way salary and commission are); the employee must meet a minimum production threshold and stay at the company until the award vests, eight years later. Also, the award, while based on a small percentage of the FA's revenue generated over a performance year, is subject to adjustments by the company based on company and business line performance. Thus, the WCA is clearly a bonus plan, paid over and above normal compensation, and its intent and operation are not designed to provide retirement income.

Finally the plan does not "systematically defer income to the termination of covered employment or beyond." 29 C.F.R. § 2510.3–2(c). Generally, neither the company nor the FA may defer award payouts, and the few exceptions are intended to deter workforce reentry (in the case of retirement) and competition. Again, the vast majority of award payouts are to actively employed FAs. Thus, while it is possible in certain circumstances to receive a WCA payout after the end of employment, it is both limited in scope and uncommon in occurrence. It is, as the *Emmenegger* Court stated, "happenstance," 197 F.3d at 933, and plainly not systematic.

Consistent with the two courts that have found Defendants' functionally identical predecessor plans to be bonus plans exempt from ERISA,⁴ the Court finds that the WCA is not an

⁴ See *Mullett v. Merrill, Lynch, Pierce, Fenner & Smith*, No. CIV.A. 01-CV-2118, 2002 WL 32298599, at *2 (E.D. Pa. Feb. 26, 2002) (finding a bonus program exempt from ERISA where the plan was implemented to "establish and retain a strong salesforce," subject to a ten-year vesting period and paid promptly once vested; also concluding that the plan "provides neither 'retirement income' nor 'systematically deferred compensation until the termination of employment' merely because an employee might receive the benefits after he or she has retired or terminated employment"); *Callan*, WL 3452371, at *7-8 (finding a similar plan with similar criteria, vesting periods, and payment practices to be a bonus plan exempt from ERISA).

employee pension benefit plan; it is a bonus plan exempt from ERISA, and the Court will grant Defendants' Motion for Summary Judgment.

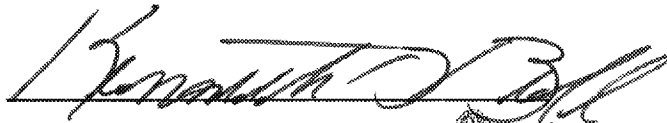
IV. ORDER

NOW THEREFORE IT IS ORDERED THAT:

1. Defendants' Motion for Summary Judgment (Doc. No. 41) is **GRANTED**; and
2. The Clerk is directed to close this matter in accordance with this Order.

SO ORDERED ADJUDGED AND DECREED.

Signed: March 10, 2025



Kenneth D. Bell
United States District Judge



EXHIBIT 9

From: Kent A. Mason <kamason@davis-harman.com>
Sent: Tuesday, August 12, 2025 6:06 PM
To: 'Dhillon, Janet L - EBSA'
Cc: 'Michael.Stein@morganstanley.com'; 'PJ.Austin@morganstanley.com'
Subject: RE: Morgan Stanley Advisory Opinion -- New Amicus Brief and Question

Thanks so much. We so appreciate the fast consideration and work on this. I checked with Morgan Stanley (copied here) and the draft should come to me. Have a great night.

From: Dhillon, Janet L - EBSA <Dhillon.Janet.L@dol.gov>
Sent: Tuesday, August 12, 2025 5:57 PM
To: Kent A. Mason <kamason@davis-harman.com>
Subject: RE: Morgan Stanley Advisory Opinion -- New Amicus Brief and Question

Kent

As is our usual practice, we send a draft of the statement of facts of an advisory opinion to the requestor for review. We are ready to proceed to that step. Should the draft be directed to you, Greg Jacob, or both of you?

Best,

Janet

Janet Dhillon
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
Dhillon.Janet.L@dol.gov



From: Kent A. Mason <kamason@davis-harman.com>
Sent: Tuesday, August 12, 2025 1:03 PM
To: Dhillon, Janet L - EBSA <Dhillon.Janet.L@dol.gov>; Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>; Bolton, Charles H - EBSA <Bolton.Charles.H@dol.gov>; Danhof, Justin G - EBSA <Danhof.Justin.G@dol.gov>
Cc: 'Michael.Stein@morganstanley.com' <Michael.Stein@morganstanley.com>; 'PJ.Austin@morganstanley.com' <PJ.Austin@morganstanley.com>; Chris Gaston <CGaston@davis-harman.com>
Subject: Morgan Stanley Advisory Opinion -- New Amicus Brief and Question

CAUTION: This email originated from outside of the Department of Labor. Do not click (select) links or open attachments unless you recognize the sender and know the content is safe. Report suspicious emails through the "Report" button on your email toolbar.

Thanks again for meeting with us on Morgan Stanley's request for an advisory opinion on its long-term incentive program. We wanted to provide two updates in case they are helpful. First, the American Benefits Council, the US Chamber of Commerce, and The ERISA Industry Committee (ERIC) [filed an amicus brief](#) supporting Merrill Lynch in the plaintiffs' appeal to the Fourth Circuit from a decision of the District Court for the Western District of North Carolina regarding a program virtually identical to Morgan Stanley's. We thought that the amicus brief linked above might be of interest.

Second with such strong support from trade associations on this issue, we are considering asking the trades to weigh in with EBSA with a brief letter on the importance of this issue and the need for fast and clear confirmation of DOL's longstanding position that such long-term incentive programs are not subject to ERISA. If you have any concerns with us doing that, please let us know. We just want to provide you with as much information as we can about the critical nature of this issue for a very wide range of businesses across the country, making this an ideal candidate for DOL's expanded and revived Advisory Opinion program.

The trades' amicus brief provides some insights into how important this issue is:

Distorting ERISA so that it reaches those [long-term incentive] programs would have destructive effects. Making those programs subject to ERISA's strict vesting and anti-forfeiture rules would expose employers to potentially astronomical liability for unexceptional cancellations of incentive awards that have not vested under those programs' terms. See 29 U.S.C. § 1053; 29 C.F.R. § 2530. That result would undermine employers' justifiable reliance on nearly fifty years of case law and regulatory guidance concluding that such programs fall outside ERISA's scope, making it more difficult for businesses to offer their employees attractive and flexible compensation programs. Indeed, it would induce some employers to eliminate their long-term incentive or deferred incentive compensation programs altogether, stripping them of a valuable tool with which to retain talented employees and denying employees access to a widely desired compensation arrangement. Nothing in ERISA requires such an unfortunate outcome. . . .

Employers across a variety of industries use these arrangements "to further enhance retention." . . . And employers are increasingly starting to offer long-term incentive awards to employees below the executive level. . . .

Plaintiff's theory is worse than legally wrong: if adopted, it would have enormously destructive practical consequences, harming both employers and employees. To begin, that approach, if valid, certainly would encourage a wave of litigation against employers in all sectors of the economy that use long-term incentive or deferred incentive compensation arrangements. . . .

And if their theory succeeds, these plaintiffs' firms will have no reason to stop with the financial services industry. It is not difficult for a single firm or set of firms to bring dozens of cookie-cutter lawsuits—that is already par for the course in ERISA litigation. . . .

Defending against such lawsuits challenging commonplace and useful compensation arrangements would impose substantial costs on employers in virtually all cases and sometimes would extract strike-suit settlements, as the prospect of “asymmetric” discovery for defendants in ERISA actions comes at an “ominous” price, entailing “probing and costly inquiries.”

Kent A. Mason

Davis & Harman LLP



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EXHIBIT 10B

Draft 8.12.25

Draft Supporting Representations (Case No. A01533)

The following summary is based on the materials and representations provided in support of the request and should not be treated as factual findings by the Department.

You represent that the Firm's financial advisors receive a guaranteed base salary and are eligible to earn cash incentive compensation which is paid throughout the year. In addition, financial advisors are eligible to earn deferred incentive compensation, with twenty-five percent issued as an unsecured deferred stock award under the EICP and the remaining seventy-five percent as an unsecured deferred cash-based award under the MSCIP.¹ The deferred stock units are converted to shares of Morgan Stanley common stock and deposited into a brokerage account, while cash-based awards are deposited into the financial advisors' payroll accounts, on the "scheduled vesting date" only when all conditions are met, as described below.

All incentive compensation is calculated based on "Total Credits". The financial advisor's Total Credits for each month are determined by the applicable "Credit Rate" multiplied by the creditable revenue generated by the financial advisor. The Credit Rate is a percentage between 28% and 55.5% that increases with the financial advisor's revenue and length of service with the Firm. A portion of the Total Credits is allocated to "Deferred Credits" (between 1.5% and 15.5% of the financial advisor's total incentive compensation), based on the level of revenue the financial advisor generates.

The cumulative value of the monthly Deferred Credits for the year is granted to the financial advisor in the form of deferred incentive compensation (deferred stock and cash awards) shortly after the year-end. Deferred incentive compensation awards are generally contingent, among other things, upon the advisor remaining continuously employed through the grant and vesting dates. Accordingly, if the financial advisor terminates employment during the year, there is no award of the Deferred Credits granted for that year. The rest (between 84.5% and 98.5%) of the Total Credits are allocated to "Cash Credits", which are used to calculate and pay cash incentive compensation monthly.

Both cash and deferred incentive compensation reward good performance by calculating the amount, in part, based on a financial advisor's generation of revenue for the Firm. Deferred incentive compensation, however, serves additional purposes: to reward financial advisors for their "continued employment and service to the Firm in the future and [advisor] compliance with the Firm's policies (Including the Code of Conduct)." In this regard, you represent that by conditioning payment on continuous employment and good guardianship, the deferred compensation awards are designed to motivate advisors to stay with the Firm and to comply with firm policies that require advisors to act as good stewards of client assets. Accordingly, other than as described below, financial advisors are generally eligible for payment of the deferred incentive compensation awards only if they remain continuously employed and in good standing

¹ The advisors have individual, notional accounts in the MSCIP, and they can invest their accounts in notional investments, with the value of their accounts tracking the performance of the selected investments.

on the “scheduled vesting date,” which occurs after four years (for stock awards) or six years (for cash awards) of continuous service.

With certain exceptions, the deferred incentive compensation awards are canceled if a financial advisor: (1) terminates employment before the scheduled vesting date; or (2) engages in prohibited activity, such as violating securities rules and regulations, engaging in dishonest or fraudulent conduct, disclosing privileged or confidential information or trade secrets, making disparaging or defamatory comments about the Firm before the scheduled award distribution date, soliciting customers the financial advisor serviced while employed by the Firm for a competitor without the Firm’s consent before the earlier of the three years after termination or the scheduled award distribution date, taking employment with a competitor within 100 miles without the Firm’s consent before the earlier of one year after termination or the scheduled award distribution date, or engaging in other conduct that is cause for termination. The awards are not cancelled if a financial advisor’s employment terminates due to: (1) death; (2) disability; (3) retirement; (4) involuntary termination not involving any prohibited activity; or (5) termination due to government service not involving any prohibited activity. In these cases, the payment schedule depends on the exception clause under which the awards are paid.² You represent that payments under these relatively uncommon situations are designed to uphold the awards’ primary purposes of encouraging long-term retention of financial advisors and promoting good conduct.

Financial advisors do not have the option to extend or delay the distribution date. From 2009-2019³, 89.9% to 95.2% of deferred incentive stock awards issued under EICP were awarded distributed to current employees (compared to 8.2% for former employees). Similarly, from 2009 to 2017, 80.1% to 92.6% of cash distributions were ultimately paid to current employees; in the aggregate over that period current employees were paid 85.3% of deferred incentive cash awards issued under the MSCIP ~~were awarded to current employees (compared to 14.7% for former employees)~~.⁴

The award conditions are disclosed annually in the award certificates, summary descriptions and other communications. These disclosures also clearly state that the deferred incentive compensation awards are “contingent and unsecured” and that the program is a:

“... bonus program and not a retirement plan. Its purposes are to reward and retain key employees of the Firm and to align their interests with those of the shareholders.

² For the exception due to death, the award is paid to a designated beneficiary upon notification to the Firm. For the exception due to retirement, 50% of the award is paid on the first anniversary after retirement, with the remaining 50% paid on the second anniversary, if the retiree does not engage in specified prohibited activity. For the exception due to governmental service termination, the award is paid on the date of termination. For the exception due to disability or involuntary termination by the Firm, the award is paid on the scheduled vesting date (four years for stock awards and six years for cash awards).

³ You represent that for stock awards issued under the EICP, the most recent plan year to have vested (as of August 2024) was the 2019 plan year.

⁴ You represent that for cash awards issued under the MSCIP, the most recent plan year to have vested (as of August 2024) was the 2017 plan year.

Participants should not look to this bonus program as a source of retirement income. This bonus program is not subject to the Employee Retirement Income Security Act of 1974.”⁵

You also state that the awards are structured to meet the expectations of the Firm’s financial regulators regarding the use of deferred compensation to motivate good conduct and penalize bad conduct.⁶

Financial advisors earn the right to award payments only upon satisfying the award conditions, which require them to remain continuously employed and in good standing through the scheduled vesting date (four or six years of continuous service after the end of the year for which the Deferred Credits are granted in the form of deferred stocks and cash awards~~award is granted~~). On the scheduled vesting date, the award payments are made automatically, and financial advisors are not permitted to defer the payments to a later date. If a financial advisor terminates employment or engages in prohibited activities before vesting, the awards are cancelled, except under limited circumstances. These conditions are disclosed annually to the financial advisors. These annual disclosures also expressly state that financial advisors “have no right to ... [the] award until it is ‘earned,’” the awards are “contingent upon the [financial advisor] remaining employed through the grant and vesting dates of the award,” the awards are “not intended to provide for retirement income,” and that the program is “not a retirement plan subject to [ERISA].”

The express purposes of the deferred incentive compensation program are to reward financial advisors for their long-term tenure and incentivize good behaviors desired by the Firm. The program’s design and administration are tailored to achieve those goals and meet the financial regulatory requirements regarding using deferred compensation to motivate good conduct and penalize bad conduct. The deferred incentive compensation awards are unsecured and not guaranteed, there is no accrual (*i.e.*, no partial payouts before the scheduled vesting date) and financial advisors are notified annually about the express purposes and conditions of the program and informed that it is not a retirement plan subject to ERISA.

⁵ See *e.g.*, EICP 2021 Discretionary Retention Awards Stock Unit Summary Description and MSCIP 2021 Discretionary Retention Awards Summary Descriptions. ~~Per your submission, the exact language in the description of this program has changed over the years, but the substance of the program has not changed.~~

⁶ You note that financial regulators, including Financial Industry Regulatory Authority, the Federal Reserve Board of Governors, the Securities and Exchange Commission, and the office of the Comptroller of the Currency, have issued ~~and proposed guidance advising and proposed regulations requiring~~ regulated entities to defer portions of employee incentive compensation, and to make that compensation contingent and cancelable, to address risk-taking and other behaviors that may be harmful to customers and the public markets.

EXHIBIT 11

Morgan Stanley

Morgan Stanley Compensation Incentive Plan Wealth Management Financial Advisor/Private Wealth Advisor Awards

2017 DISCRETIONARY RETENTION AWARDS MSCIP AWARD SUMMARY DESCRIPTION

The following is an abbreviated general description of the terms and conditions of 2017 awards under the Morgan Stanley Compensation Incentive Plan (“MSCIP”). This summary does not address all 2017 MSCIP award features. Your 2017 Award Certificate provides a full explanation of the terms and conditions of your 2017 MSCIP award, which may differ from the description in this summary. Unless otherwise defined herein, all capitalized terms shall have the meanings set forth in your 2017 Award Certificate. If there is any conflict between the terms of this summary and those of your 2017 Award Certificate, the latter will control. You will also be provided with a tax supplement that contains important information about your award.

IF YOU ARE A NON-U.S. BASED EMPLOYEE, PLEASE REFER TO YOUR 2017 INTERNATIONAL SUPPLEMENT FOR OTHER RELEVANT TERMS OF YOUR AWARD

Earning Award	You have no right to your 2017 MSCIP award until it is “earned.” Generally, to earn your award, you must (1) remain in continuous Employment through the Scheduled Vesting Date, (2) even if your award is vested, not engage in any activity that constitutes Prohibited Activity and (3) satisfy any obligations you owe to the Firm. The vesting requirements and Prohibited Activities are summarized below, and set forth in full in the 2017 Award Certificate that will be provided to you.
Initial Value	The initial value of your 2017 MSCIP award will be communicated to you independently.
Account	Your 2017 MSCIP award will be credited to a bookkeeping account in your name as of January 19, 2018. Pursuant to the section “Notional Allocation of Account” below, if a menu of notional investments is made available by Morgan Stanley, your account will be credited (or debited) with notional returns on the notional investments to which your account is allocated. This summary uses the term “ <i>Applicable Account Value</i> ” to refer to your 2017 MSCIP award and if applicable, any notional return (positive or negative) thereon.
Notional Allocation of Account	You may be permitted to notionally allocate your account among a menu of notional investments selected by Morgan Stanley in its sole discretion. If such allocation is made available, the notional value of your account will track the performance of the referenced funds underlying the notional investments that you select and any such allocation (and any subsequent reallocations, if applicable) will be subject to the rules and notional allocation requirements of your 2017 MSCIP award as in effect from time to time.

If applicable, the value of your account is subject at all times to risk based upon the performance of the notional investments to which your account is allocated. If the value of the notional investments to which your account is allocated decreases, the value of your account may be lower than your original award amounts. The Firm may provide you with a description of the referenced funds and their historical returns, as applicable, but this is, of course, no guide or representation as to their future performance.

The performance of your notional investments, if any, and the value of your account, will be impacted by all of the fees and costs of the referenced funds underlying your notional investments, including fees which the funds may pay to the Firm for services the Firm provides to the referenced funds.

Notwithstanding the foregoing, the notional allocation of your account will be at the sole discretion of Morgan Stanley.

Scheduled Vesting Date	Generally, your Applicable Account Value will vest on January 27, 2024 (“ Scheduled Vesting Date ”). Except as otherwise provided in your Award Certificate, your Applicable Account Value will vest only if you remain in continuous Employment through the Scheduled Vesting Date.
Scheduled Distribution Date	Generally, the Firm will pay you your Applicable Account Value, to the extent vested, in cash (minus applicable tax and other withholding liabilities) on January 27, 2024 (“ Scheduled Distribution Date ”). Until payment, your award constitutes a contingent and unsecured promise of the Firm to pay you your vested Applicable Account Value on the Scheduled Distribution Date. Notwithstanding the foregoing, subject to the “Timing of Payment” provision below, your Applicable Account Value may be paid following the Scheduled Distribution Date on the next administratively practicable payroll date.
Termination of Employment	If your Employment terminates other than for death, Disability, Retirement or Full Career Retirement (as applicable), involuntary termination not involving any Prohibited Activity, or Governmental Service Termination, your unvested Applicable Account Value will be canceled immediately. The special provisions that apply if your Employment terminates for death, Disability, Retirement or Full Career Retirement (as applicable), involuntary termination not involving any Prohibited Activity, or Governmental Service Termination are described below.
Death	If you die while Employed, the unvested portion of your Applicable Account Value will vest. Your Applicable Account Value will be paid to your beneficiary or estate upon your death, <i>provided</i> that your estate or beneficiary notifies the Firm of your death within 60 days following your death. If you die after your termination of Employment but prior to the Scheduled Distribution Date, the vested portion of your Applicable Account Value that you held as of the date of your death will be paid to your beneficiary or estate upon your death, <i>provided</i> that your estate or beneficiary notifies the Firm of your death within 60 days following your death.
Disability	If your Employment terminates due to Disability, then, subject to the cancellation provisions described below, your unvested Applicable Account Value will vest on your termination date and your Applicable Account Value will be paid on the Scheduled Distribution Date. Vesting of your Applicable Account Value upon, and distribution of your Applicable Account Value following, Disability is conditioned on your not engaging in any Prohibited Activity. “Disability” is defined as a medically determinable physical or mental incapacity which is reasonably expected to be of long-term duration or result in death. The determination of the Firm shall be conclusive on all parties as to whether you are disabled.
Retirement and Full Career Retirement	If your Employment terminates as a result of your Retirement or Full Career Retirement (as applicable), then, subject to the cancellation provisions described below, your unvested Applicable Account Value will vest upon your termination date and your Applicable Account Value will be paid on the Scheduled Distribution Date, <i>provided that</i> if you satisfy the conditions for a Retirement or Full Career Retirement (as applicable) upon your “Separation from Service” (as defined in Section 409A), 50% of your vested Applicable Account Value will be paid, and cancellation provisions will lift, on the first anniversary of your “Separation from Service” and the remaining vested portion of your Applicable Account Value will be paid, and cancellation provisions will lift, on the second anniversary of your “Separation from Service”, subject to earlier

payment on the Scheduled Distribution Date. Vesting of your Applicable Account Value upon, and distribution of your Applicable Account Value following, Retirement or Full Career Retirement (as applicable) is conditioned on your not engaging in any Prohibited Activity.

I. Financial Advisors

If you are a Financial Advisor, your termination will be treated as a “**Retirement**” if your termination is other than as a result of your death or Governmental Service Termination and your Employment terminates on or after the date:

- a) You have attained age 65;
- b) You qualify for the payment of any retirement benefit under Section 5 or Section 8 of the Morgan Stanley Employee Retirement Plan (as in effect on December 31, 2016), whether or not you are a participant therein; or
- c) Otherwise specified by written agreement between the Firm and you (as in effect on December 31, 2016, or if you were hired by the Firm after such date, as in effect 30 days following your commencement of employment).

II. Private Wealth Management Private Wealth Advisors (“PWAs”)

If you are a PWA, your termination will be treated as a “**Full Career Retirement**” if your termination is other than a result of your death or Governmental Service Termination and upon your termination you meet any of the following criteria:

- a) Age 50 and 12 years as a Managing Director or comparable officer; or
- b) Age 50 and 15 years as an officer; or
- c) Age 55 with 5 years of service and age plus years of service equals or exceeds 65; or
- d) 20 years with the Firm.

(Credit towards Full Career Retirement will be given for prior service with certain entities as described in the 2017 Award Certificate.)

Involuntary Termination not Involving Any Prohibited Activity

If the Firm terminates your employment under circumstances not involving any Prohibited Activity, then, *provided* that you sign an agreement and release satisfactory to the Firm, your unvested Applicable Account Value will vest on the date of your termination. Subject to the cancellation provisions described below, your Applicable Account Value will be paid, and cancellation provisions will lift, on the Scheduled Distribution Date.

Governmental Service

If your Employment terminates in a Governmental Service Termination and not involving any Prohibited Activity, then, *provided* that you sign an agreement satisfactory to the Firm relating to your repayment obligations summarized below, your unvested Applicable Account Value will vest, and your Applicable Account Value will be paid, on the date of your Governmental Service Termination.

If your Employment terminates other than in a Governmental Service Termination and not involving any Prohibited Activity and, following your termination of Employment, you accept employment with a Governmental Employer, then, *provided* that you sign an agreement satisfactory to the Firm relating to your repayment obligations summarized below, your outstanding vested Applicable Account Value will be paid upon your commencement of such employment, *provided* you present the Firm with satisfactory evidence that the divestiture of your continued interest in your Applicable Account Value is reasonably necessary to avoid the violation of U.S. federal, state or local or foreign ethics law or conflicts of interest law applicable to you at such Governmental Employer.

If your Applicable Account Value is paid due to this provision and you engage in any Prohibited

Activity within the period of time that would have resulted in cancellation of all or a portion of your Applicable Account Value, you will be required to pay to Morgan Stanley the amount distributed to you in accordance with this provision plus interest on such amount.

“Governmental Service Termination” means the termination of your Employment due to your commencement of employment at a Governmental Employer; *provided* that you have presented the Firm with satisfactory evidence demonstrating that as a result of such new employment, the divestiture of your continued interest in your Applicable Account Value is reasonably necessary to avoid the violation of U.S. federal, state or local or foreign ethics law or conflicts of interest law applicable to you at such Governmental Employer.

Specified Employees

If Morgan Stanley considers you to be one of its “specified employees” as defined in Section 409A of the Internal Revenue Code (**“Section 409A”**) at the time of your Separation from Service other than in the event of your employment at a Governmental Employer under circumstances described above, payment of your Applicable Account Value that otherwise would occur upon your Separation from Service will be delayed until the first business day following the date that is six months after your Separation from Service (subject to earlier payment in the event of your death or your employment at a Governmental Employer under the circumstances described above).

Cancellation

Prior to vesting, awards are cancelable for termination of Employment, other than due to death, Disability, Retirement, involuntary termination not involving any Prohibited Activity, or Governmental Service Termination.

The Firm may retain custody of your Applicable Account Value following the Scheduled Distribution Date pending any investigation or other review that impacts the determination as to whether your Applicable Account Value is cancellable under the circumstances set forth herein.

Your entire unpaid vested and unvested Applicable Account Value is also subject to cancellation in full, or in the case of a Cancellation Clawback Event described in clause (c) below, in full or in part, subject to applicable law, until the Scheduled Distribution Date if you engage in any Prohibited Activity, as defined below.

“Prohibited Activity” means you (1) without the written consent of the Firm, at any time prior to the Scheduled Distribution Date, (i) use for the benefit of any person or entity other than the Firm, or disclose to any third party Non-Public, Privileged or Confidential Information or Trade Secrets, (ii) remove Non-Public, Privileged or Confidential Information or Trade Secrets from the premises of the Firm in either original or copied form, except in the ordinary course of conducting business for, and subject to approval by, the Firm, (iii) engage in any other conduct in violation of any contractual or legal obligations to the Firm or (iv) following termination of Employment, fail or refuse to cooperate with or assist the Firm in connection with any investigation, regulatory matter, lawsuit or arbitration in which the Firm is a subject, target or party and as to which you may have pertinent information; or (2) (i) are terminated for Cause, or (ii) engage in conduct constituting Cause (either during or following Employment and whether or not your Employment has been terminated as of the Scheduled Distribution Date), or (iii) following termination of your Employment, the Firm determines that you could have been terminated for Cause; or (3) without the written consent of the Firm, before the earlier to occur of one year after your termination of Employment due to your resignation and the Scheduled Distribution Date, enter into an employment or consulting relationship with a firm offering Competitive Services to work, within one hundred (100) miles from any office to which you were assigned within the last three years preceding termination, in any capacity in a retail branch or in a retail sales or product representative position; or (4) without the written consent of the Firm, before the earlier to occur of two years after termination and the Scheduled

Distribution Date, solicit or attempt to solicit, directly or indirectly, for a firm engaging in Competitive Services (with or without the use or disclosure of Non-Public, Privileged or Confidential Information or Trade Secrets) (i) any of the Firm's customers who were serviced by you while employed by the Firm; or (ii) any of the Firm's customers whose names or accounts became known to you while employed by the Firm and who live or work within a radius of one hundred (100) miles from any office to which you were assigned within the last three years preceding termination; or (5) without the written consent of the Firm, before the earlier to occur of three years after termination and the Scheduled Distribution Date, solicit or attempt to solicit, directly or indirectly, any Firm employee for employment or other business relationship with any other firm engaging in Competitive Services (if the employee became known to you as a result of being employed by the Firm); or (6) without the written consent of the Firm, make Defamatory or Disparaging Comments or Unauthorized Disclosures about the Firm; or (7) engage in a Clawback Cancellation Event.

"Competitive Services" means services with respect to any line of business in which the Firm is engaged, including, but not limited to: securities, commodities, financial futures, insurance, tax advantaged investments and mutual funds.

"Cause" means:

- (x) any act or omission which constitutes a breach by you of your obligations to the Firm including, without limitation, (i) your failure to comply with any notice or non-solicitation restrictions that may be applicable to you or (ii) your failure to comply with the Firm's compliance, ethics or risk management standards, or your failure or refusal to perform satisfactorily any duties reasonably required of you; or
- (y) your commission of any dishonest or fraudulent act, or any other act or omission, which has caused or may reasonably be expected to cause injury to the interest or business reputation of the Firm; or
- (z) a violation of any securities, commodities or banking laws, any rules or regulations issued pursuant to such laws, or rules and regulations of any securities or commodities exchange or association of which the Firm is a member or of any policy of the Firm relating to compliance with any of the foregoing;

provided, that an act or omission shall constitute "Cause" for purposes of this definition if the Firm determines, in its sole discretion, that such action or omission is described in clause (c) of Clawback Cancellation Event below and is deliberate, intentional or willful.

You will be deemed to have made **"Defamatory or Disparaging Comments"** about the Firm if, at any time, you make, publish, or issue, or cause to be made, published or issued, in any medium whatsoever to any person or entity external to the Firm, any derogatory, defamatory or disparaging statement regarding the Firm, its businesses or strategic plans, products, practices, policies, personnel or any other Firm matter. Nothing contained herein is intended to prevent you from testifying truthfully or making truthful statements or submissions in litigation or other legal, administrative or regulatory proceedings or internal investigations.

You will be deemed to have made **"Unauthorized Disclosures"** about the Firm if, while Employed or following termination of Employment, without having first received written authorization from the Firm, you disclose, or participate in the disclosure of or allow disclosure of, any information about the Firm or its present or former clients, customers, executives, officers, directors, or other employees or Board members, or its business or operations, or legal matters involving the Firm and resolution or settlement thereof, or any aspects of your Employment with the Firm or termination of such Employment (which, for the avoidance of doubt, does not prevent you from confirming your employment status with the Firm), whether

written, oral or in electronic format, to any reporter, author, producer or similar person or entity or to any general public media in any form (including, without limitation, books, articles or writings of any other kind, as well as film, videotape, television or other broadcasts, audio tape, electronic/Internet or blog format or any other medium).

“Clawback Cancellation Event” means you take any action, or you fail to take any action (including with respect to direct supervisory responsibilities), where such action or omission:

- (a) causes a restatement of the Firm’s consolidated financial results;
- (b) constitutes a violation by you of the Firm’s Global Risk Management Principles, Policies and Standards (where prior authorization and approval of appropriate senior management was not obtained) whether such action results in a favorable or unfavorable impact to the Firm’s consolidated financial results; or
- (c) causes a loss in the current year on a trade or transaction originating in the current year or in any prior year for which revenue was recognized and which was a factor in your award determination, and violated internal control policies that resulted from your:
 - (i) violation of business unit, product or desk specific risk parameters;
 - (ii) use of an incorrect valuation model, method, or inputs for transactions subject to the “STAR” approval process;
 - (iii) failure to perform appropriate due diligence prior to a trade or transaction or failure to provide critical information known at the time of the transaction that might negatively affect the valuation of the transaction; or
 - (iv) failure to timely monitor or escalate to management a loss position pursuant to applicable policies and procedures.

In the event that the Firm determines, in its sole discretion, that your action or omission is as described in clause (c) and you do not engage in any other cancellation or clawback event described herein, the award will be reduced by a fraction, the numerator of which is the amount of the pre-tax loss, and the denominator of which is the total revenue originally recognized by the Firm which was a factor in your award determination.

Covenants and Certification

In the event you fail to acknowledge, within the time and in the manner prescribed by the Firm, a notice and non-solicitation or other restrictive covenant agreement required of you by the Firm, the Firm has a right to cancel your award.

You may be required to provide Morgan Stanley with a written certification or other evidence that it deems appropriate, in its sole discretion, to confirm that no Prohibited Activity has occurred. If you fail to submit a timely certification or evidence, Morgan Stanley will cancel your award.

Tax Withholding

Vesting and payment of your Applicable Account Value, whether on the Scheduled Vesting Date or Scheduled Distribution Date or some other date, shall be subject to withholding of all required United States federal, state, local and foreign income and employment/payroll taxes (including Federal Insurance Contributions Act taxes). You authorize the Firm to withhold such taxes from any payroll or other payment or compensation owed to you, including by canceling or accelerating payment of a portion of your Applicable Account Value in an amount not to exceed such taxes imposed upon vesting or payment and any additional taxes imposed as a result of such cancellation or acceleration, subject to limitations imposed under Section 409A.

Award Modification

Morgan Stanley generally has the right to modify or amend the terms of your award without your consent. However, Morgan Stanley may not make a modification that would materially impair your rights in such award without your consent unless such modification is necessary or advisable (i) to comply with any law, regulation, ruling, judicial decision, accounting standard or similar

pronouncement or (ii) to ensure that awards are not subject to federal, state or local income tax prior to payment.

Timing of Payment (Section 409A Rule of Construction)	With respect to any provision that provides for payment on a specified event or date, such payment will be considered to have been timely made as long as payment is made by December 31st of the year in which occurs the specified event or date or, if later, by the 15th day of the third calendar month following such specified event or date, or, in connection with any such payment due to death, to the extent permissible under Section 409A, by the end of the calendar year following the year of your death.
U.S. Taxation	In general, when your Applicable Account Value is paid, the amount of the payment will be taxed as ordinary income. FICA and Medicare tax apply at the time your Applicable Account Value is deemed to vest for tax purposes. Please refer to the tax supplement for a fuller discussion of these tax consequences.
Non-U.S. Taxation	Taxation on grant, vesting and payment depends on the tax laws and regulations in your jurisdiction.
Governing Law	New York Law.

By accepting this award, you acknowledge that you have received all 2017 deferred compensation to which you are entitled. Nothing in this summary or any correspondence related to this award should be construed as a guarantee of an MSCIP award or any particular level of compensation, bonus or benefits. Please note that the Firm does not commit to granting the award described in this summary in the future. These awards do not create a contract or guarantee of employment, or modify any agreement entered into by Morgan Stanley or any of its affiliates and you.

This program is not a retirement plan. Its purposes are to reward and retain key employees of the Firm and to align their interests with those of the shareholders. Participants should not look to this program as a source of retirement income. This program is not subject to the Employee Retirement Income Security Act of 1974.

You are required to keep confidential all matters relating to MSCIP to the fullest extent permitted by law. The provisions of the Firm's Code of Conduct regarding Confidential and Proprietary Information shall cover all aspects of MSCIP.

Morgan Stanley does not render advice on tax and tax accounting matters.

EXHIBIT 12

From: kamason@davis-harman.com
To: Turner.Jeffrey@dol.gov; Michael.Stein@morganstanley.com; Berger.Eric@dol.gov; Dhillon.Janet.L@dol.gov; Bolton.Charles.H@dol.gov
Cc: Lund.Jack.G@dol.gov; PJ.Austin@morganstanley.com; Mark.Greenfield@morganstanley.com; CGaston@davis-harman.com; Mihailovic.Tamara@dol.gov
Subject: RE: [EXTERNAL] Re: Draft Facts Supporting Morgan Stanley Advisory Opinion Request
Date: Tuesday, September 9, 2025 3:34:11 PM

Thanks very much. This was a perfect example of government at its best in our view – addressing a critical issue in a clear and very effective way and in a very timely manner to prevent adverse effects. Your hard work and dedication are greatly appreciated.

From: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>
Sent: Tuesday, September 9, 2025 12:48 PM
To: Kent A. Mason <kamason@davis-harman.com>; 'Michael.Stein@morganstanley.com' <Michael.Stein@morganstanley.com>; Berger, Eric - EBSA <Berger.Eric@dol.gov>; Dhillon, Janet L - EBSA <Dhillon.Janet.L@dol.gov>; Bolton, Charles H - EBSA <Bolton.Charles.H@dol.gov>
Cc: Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>; 'PJ.Austin@morganstanley.com' <PJ.Austin@morganstanley.com>; 'Mark.Greenfield@morganstanley.com' <Mark.Greenfield@morganstanley.com>; Chris Gaston <CGaston@davis-harman.com>; Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>; Mihailovic, Tamara - EBSA <Mihailovic.Tamara@dol.gov>
Subject: RE: [EXTERNAL] Re: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

Thank you for the follow up email, Kent, and the article below. Attached please find a pdf copy of AO 2025-03A, issued today in response to your request. A hard copy will be mailed to you at Davis and Harmon. The AO also will be posted on EBSA's website later this evening.

Thank you very much for your patience along the way. Please feel free to give me a call if you have any questions.

Sincerely,

Jeff

From: Kent A. Mason <kamason@davis-harman.com>
Sent: Thursday, September 4, 2025 3:01 PM
To: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>; 'Michael.Stein@morganstanley.com' <Michael.Stein@morganstanley.com>; Berger, Eric - EBSA <Berger.Eric@dol.gov>; Dhillon, Janet L - EBSA <Dhillon.Janet.L@dol.gov>; Bolton, Charles H - EBSA <Bolton.Charles.H@dol.gov>
Cc: Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>; 'PJ.Austin@morganstanley.com' <PJ.Austin@morganstanley.com>; 'Mark.Greenfield@morganstanley.com' <Mark.Greenfield@morganstanley.com>

<Mark.Greenfield@morganstanley.com>; Chris Gaston <CGaston@davis-harman.com>

Subject: RE: [EXTERNAL] Re: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

CAUTION: This email originated from outside of the Department of Labor. Do not click (select) links or open attachments unless you recognize the sender and know the content is safe. Report suspicious emails through the "Report" button on your email toolbar.

We just wanted to follow up on our emails below. Would any further information be helpful? We so appreciate all your work on our request.

In case it is helpful, we are pasting below a recent article on this issue highlighting its importance and time sensitivity as companies are working on their incentive plans early this fall and continue to face a steady stream of unwarranted litigation. The Department's guidance would advance the critical role advisory opinions serve in helping companies plan, and at this important juncture such guidance would be uniquely valuable. Thanks so much.

Morgan Stanley, Merrill Lynch snared in dueling courts' rulings on deferred pay as a bonus or a pension

Gift Article
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(Gabby Jones/Gabby Jones/Bloomberg)

By:
Robert Steyer

Last Updated
August 29, 2025 11:41 AM

Members of employee benefits, retirement services and financial services industries are up in arms over separate legal battles challenging how Morgan Stanley and Merrill Lynch pay deferred compensation to former employees.

The litigation jeopardizes the way companies incentivize workers, attract new employees and encourage loyalty, the trade groups say, noting that deferred pay policies are common especially among financial services companies.

The key issue for both companies is whether deferred compensation is a bonus or a pension.

If it's the former, employers can withhold bonuses from former workers who don't meet specific compensation contract guidelines.

If it's the latter, ex-employees say withholding the deferred compensation can be an ERISA violation.

Courts are divided. For Merrill Lynch, a federal district court has supported the company's bonus argument, and the case is now on appeal.

For Morgan Stanley, a federal court judge in New York ruled that deferred compensation is a pension and subject to ERISA. He said the dispute must be addressed by arbitration. A federal appeals court in New York said it lacked jurisdiction to rule on the ERISA question.

Needless to say, industry representatives are unhappy.

"The business community is concerned because it will force huge changes in the use of deferred compensation to meet specific goals if these programs are treated as ERISA plans," said Lynn D. Dudley, senior vice president for global retirement and compensation policy for the American Benefits Council.

As one council member told her, "It will upend our process."

Her organization, along with several others, has filed amicus briefs in the Merrill Lynch and Morgan Stanley cases advocating that deferred pay be treated as a bonus.

Dudley hopes the various industries can work with the Department of Labor to point out that deferred compensation programs should not be subject to ERISA guidelines. "I think DOL will be receptive to our appeals and be helpful," she said.

Despite the legal uncertainty, Dudley said employers shouldn't rewrite deferred compensation guidelines — at least not yet. "They are not prepared to do that," she said.

A short-term impact of the legal uncertainty may be a tightening of rules governing what Dudley called humanitarian compensation, in which, for example, employers have been less strict in instances where a former employee is disabled or terminally ill.

"This is an important issue winding its way through the courts and clarity is important," Andy Banducci, senior vice president for retirement and compensation policy at the ERISA Industry Committee, wrote in an email response to questions.

His organization joined the American Benefits Council in amicus briefs for the Merrill Lynch and Morgan Stanley litigation. "Employers need uniformity in the application of federal benefits law, particularly if they have employees across the country," he wrote. "Discretionary incentives based on performance just aren't retirement benefits, and so ERISA doesn't apply."

Merrill Lynch

Industry representatives pointed out that “long-term incentive and deferred incentive compensation programs are in widespread use,” according to their amicus brief filed Aug. 4 in support of Merrill Lynch, whose federal district court victory has been appealed to the 4th Circuit Court of Appeals, Richmond, Va.

“Employers offer them for a variety of reasons that have nothing to do with providing income after retirement or following departure from current employment,” the trade groups wrote in the case of Milligan vs. Merrill Lynch, Pierce Fenner & Smith Inc. et al. One defendant is Merrill Lynch’s parent, Bank of America.

“Those programs play a critical role in promoting retention of productive employees, encouraging workplace success, and deterring or penalizing misconduct,” said the document. “Distorting ERISA so that it reaches those programs would have destructive effects.”

In addition to the ERISA Industry Committee and the American Benefits Council, the U.S. Chamber of Commerce and the Center on Executive Compensation collaborated on the amicus brief.

Making deferred pay policies subject to ERISA could increase litigation risk and “undermine employers’ justifiable reliance on nearly 50 years of case law and regulatory guidance,” the amicus brief said.

Kelly Milligan was a Merrill Lynch financial adviser from 2000 until leaving voluntarily in 2021 to join another firm. He argued he was owed more than \$500,000 in deferred pay under Merrill Lynch’s WealthChoice awards program.

Milligan sued in April 2024, seeking class-action status, asserting that the program was a pension — not a bonus.

U.S. District Court Judge Kenneth D. Bell in Charlotte, N.C., supported defendants in a March 2025 ruling.

“Adopting plaintiff’s view would mean that virtually any plan that allows for income to be paid after employment ends, even incidentally, could fall under ERISA’s purview,” the judge wrote.

“Plaintiff’s expansive interpretation reaches far beyond Congress’ intent and ignores ERISA’s fundamental premise both of which are rooted in protecting the retirement assets of workers,” he wrote.

Milligan appealed, and the trade organizations reacted.

Deferred incentive-based compensation programs are common in many industries

and “ubiquitous in the financial sector” because they promote “long-term performance over short-term gains,” said a separate Aug. 4 amicus brief by the Securities Industry and Financial Market Association.

A ruling for Milligan, “would have an outsized and destabilizing effect on the entire financial sector,” the document said. Such a decision would create “a cloud of uncertainty over the status of deferred compensation programs for structuring contingent incentive-based compensation.”

Morgan Stanley

Although the Morgan Stanley dispute has a similar theme, it produced different results.

Matthew T. Shafer worked as a financial adviser from 2009 to 2018 and claimed he was owed more than \$500,000 in deferred compensation.

He sued in December 2020, saying the Financial Advisor/Private Wealth Compensation Plan at Morgan Stanley should be treated akin to a pension covered by ERISA rather than as a bonus. Several other former financial advisers joined in an amended complaint filed in March 2022 in the case of Shafer et al. vs. Morgan Stanley et al.

The defendants said the compensation plan was a bonus program and that disputes should be addressed through arbitration.

A federal judge in New York in November 2023 supported the arbitration request, but he also said the program was subject to ERISA.

“The deferred compensation programs at issue here are not bonus programs,” U.S. District Court Judge Paul G. Gardephe wrote on Nov. 21, 2023.

“Morgan Stanley’s deferred compensation programs result in the deferral of income to the post-employment period within the meaning of ERISA,” he wrote. “Morgan Stanley’s deferred compensation programs are ERISA plans.”

The defendants and the plaintiffs appealed to the 2nd U.S. Circuit Court of Appeals, New York, with the former seeking to reject ERISA coverage of the deferred and the latter seeking to reject arbitration for the dispute.

Several of the trade associations that filed amicus briefs in the Merrill Lynch case also filed comments here, warning that branding deferred compensation as a pension would disrupt and damage benefits programs.

A three-judge panel of the appeals court dismissed both arguments on July 9. For Morgan Stanley, the judges wrote “we lack jurisdiction over the underlying

appeal.” For the plaintiffs, the judges said they couldn’t address their appeal because it was contingent upon their accepting Morgan Stanley’s appeal.

This decision may not have closed the book on the dispute because the judges wondered why the district court judge ruled the deferred pay was covered by ERISA but then referred the case to arbitration.

“Though arbitrators may consider the district court’s opinion, Morgan Stanley is free to argue to those arbitrators that the district court’s conclusion that the plans were governed by ERISA was dictum and legally incorrect,” the judges wrote. “Indeed, Morgan Stanley admits that it has already done so — successfully — in some of the intervening arbitrations.”

Dictum is a legal term referring comments by judges that aren’t part of the legal reasoning in deciding a case and that can’t be used as legal precedent.

“The appellate court determined it lacks jurisdiction because the district court’s decision doesn’t bind the arbitration panels that will decide these cases,” a Morgan Stanley spokeswoman wrote in an email response to questions.

“These awards are not a pension, as multiple arbitration panels have now recognized,” she wrote. “We remain confident that as individual arbitrators see all the evidence, they will reach exactly the same result.”

From: Kent A. Mason

Sent: Tuesday, August 19, 2025 9:17 AM

To: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>; Michael.Stein@morganstanley.com; Berger, Eric - EBSA <Berger.Eric@dol.gov>

Cc: Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>; PJ.Austin@morganstanley.com; Mark.Greenfield@morganstanley.com; Chris Gaston <CGaston@davis-harman.com>

Subject: RE: [EXTERNAL] Re: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

Thanks again for all your work on this. Distribution and deposits occur as soon as practicable after vesting. For example, the cash awards get calculated, the data is given to Morgan Stanley’s payroll vendor, and then it is deposited on the next pay date. There is some processing time for transmission of the shares as well. So it all happens within a matter of days.

Is that what you need? We would of course be happy to jump on a call if there are any further questions.

From: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>

Sent: Monday, August 18, 2025 6:53 PM

To: Michael.Stein@morganstanley.com; Kent A. Mason <kamason@davis-harman.com>; Berger, Eric

- EBSA <Berger.Eric@dol.gov>

Cc: Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>; PJ.Austin@morganstanley.com;
Mark.Greenfield@morganstanley.com; Chris Gaston <CGaston@davis-harman.com>

Subject: Re: [EXTERNAL] Re: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

Thank you very much, Michael.

—Jeff

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From: Michael.Stein@morganstanley.com <Michael.Stein@morganstanley.com>

Sent: Monday, August 18, 2025 6:35:50 PM

To: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>; kamason@davis-harman.com
<kamason@davis-harman.com>; Berger, Eric - EBSA <Berger.Eric@dol.gov>

Cc: Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>; PJ.Austin@morganstanley.com
<PJ.Austin@morganstanley.com>; Mark.Greenfield@morganstanley.com
<Mark.Greenfield@morganstanley.com>; CGaston@davis-harman.com <CGaston@davis-harman.com>; Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>

Subject: Re: [EXTERNAL] Re: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

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Jeff -- thanks for note back. I'm tracking down Mark and Kent to get a firm answer for you. Will circle back ASAP via email. If we need to hop on the phone for deeper clarity - we'll get that together tomorrow. Back to you soon. Thanks. Michael

From: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>

Sent: Monday, August 18, 2025 5:35 PM

To: Kent A. Mason <kamason@davis-harman.com>; Berger, Eric - EBSA <Berger.Eric@dol.gov>

Cc: Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>; Stein, Michael J. (Government Relations) <Michael.Stein@morganstanley.com>; Austin, PJ (Government Relations) <PJ.Austin@morganstanley.com>; Greenfield, Mark (LEGAL) <Mark.Greenfield@morganstanley.com>; Chris Gaston <CGaston@davis-harman.com>; Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>

Subject: [EXTERNAL] Re: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

Much appreciated, Kent. Any chance to hop on the phone tonight. Eric and I are free any

time after 6:30 and before 9. Otherwise, tomorrow is fine too. The basic factual question we want to pin down is whether (1) distribution date, (2) deposit date, and (3) vesting date are all synonymous. Based on the case file and your edits of last week, it seems they are, but we want to be 100 percent sure.

—Jeff

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From: Kent A. Mason <kamason@davis-harman.com>

Sent: Monday, August 18, 2025 3:34 PM

To: Berger, Eric - EBSA <Berger.Eric@dol.gov>

Cc: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>; Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>;

'Michael.Stein@morganstanley.com' <Michael.Stein@morganstanley.com>;

PJ.Austin@morganstanley.com <PJ.Austin@morganstanley.com>;

Mark.Greenfield@morganstanley.com <Mark.Greenfield@morganstanley.com>; Chris Gaston

<CGaston@davis-harman.com>

Subject: RE: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

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Of course. Do you want to send us some times that work for the DOL team? We will do what we can to adjust our schedule to yours. Thanks very much.

From: Berger, Eric - EBSA <Berger.Eric@dol.gov>

Sent: Monday, August 18, 2025 3:11 PM

To: Kent A. Mason <kamason@davis-harman.com>

Cc: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>; Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>;

'Michael.Stein@morganstanley.com' <Michael.Stein@morganstanley.com>;

PJ.Austin@morganstanley.com; Mark.Greenfield@morganstanley.com; Chris Gaston

<CGaston@davis-harman.com>

Subject: RE: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

Thanks so much to you and the Morgan Stanley people for the fast response. Can we have a very short call to clarify one factual issue?

Eric

From: Kent A. Mason <kamason@davis-harman.com>
Sent: Wednesday, August 13, 2025 2:14 PM
To: Berger, Eric - EBSA <Berger.Eric@dol.gov>
Cc: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>; Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>; Dhillon, Janet L - EBSA <Dhillon.Janet.L@dol.gov>; 'Michael.Stein@morganstanley.com' <Michael.Stein@morganstanley.com>; PJ.Austin@morganstanley.com; Mark.Greenfield@morganstanley.com; Chris Gaston <CGaston@davis-harman.com>
Subject: RE: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

You don't often get email from kamason@davis-harman.com. [Learn why this is important](#)

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Thanks for sending us the draft facts to review. The draft looks great. We suggest minor clarifications in the attached for your consideration. We so appreciate all the work on this matter.

From: Berger, Eric - EBSA <Berger.Eric@dol.gov>
Sent: Tuesday, August 12, 2025 6:38 PM
To: Kent A. Mason <kamason@davis-harman.com>
Cc: Turner, Jeffrey - EBSA <Turner.Jeffrey@dol.gov>; Lund, Jack G - EBSA <Lund.Jack.G@dol.gov>
Subject: Draft Facts Supporting Morgan Stanley Advisory Opinion Request

Dear Mr. Mason:

Attached for your review are draft facts supporting the advisory opinion requested on behalf of Morgan Stanley.

Under Advisory Opinion Procedure 76-1 the parties described in an advisory opinion “may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the

situation described in the request for opinion.” Accordingly, as a routine matter, we ask opinion requesters to review and confirm the facts in support of the opinion. A redline of changes, if any, would be most helpful. We would appreciate a quick turnaround. We, of course are happy to chat by phone if you would like.

Thanks,

Eric Berger

Chief, Division of Coverage, Reporting & Disclosure
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor

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