

IN THE
UNITED STATES
PATENT AND TRADEMARK OFFICE

IN RE 401(k) Advisors, Inc.
APPLICATION OF:
CASE: 110744.014100
SERIAL NO: 76/713,315
FILING DATE: January 29, 2013
MARK: 401 K ADVISORS & Design

**RESPONSE TO FINAL OFFICE
ACTION AND REQUEST FOR
RECONSIDERATION**

COMMISSIONER FOR TRADEMARKS
P.O. Box 1451
Alexandria, VA 22313-1451

ATTENTION OF:
Samuel Paquin
Law Office 101

Dear Sir or Madam:

If any charges or fees must be paid in connection with the following communication, they may be paid out of our Deposit Account No. 50-2428.

This communication is in response to the Office Action mailed March 6, 2014. Please consider the following remarks toward reconsideration, passage to publication and, ultimately, the registration of Applicant's mark.

REMARKS

In the Examining Attorney's Office Action of March 6, 2014, he (1) noted that Applicant's Section 2(f) claim had obviated the earlier Section 2(e)(1) refusal; (2) noted that Applicant's disclaimer and description of the mark had been deemed acceptable; and (3) maintained the refusal to register Applicant's mark based on a purported likelihood of confusion with U.S. Reg. No. 2,593,209, for the mark 401(K) ADVISOR, for

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“financial services, namely, investment management, investment consultation and advice in the field of mutual funds” in International Class 36 (the “Cited Registration”).

While the Examining Attorney further noted that Applicant’s amendment to the identification of services was acceptable, Applicant has filed its Petition to Reinstate Wording Unintentionally Deleted from Applicant’s Identification of Services contemporaneously with this Response. As noted in the Petition, Applicant’s prior response merely intended to adopt the Examining Attorney’s suggestion to amend one of the terms—not to **replace** all of the services with the amended services. Particularly, the Examining Attorney had suggested incorporating the additional term “financial” before the wording “advisory services in the field of retirement planning.” Accordingly, the Petition requests that the rest of the wording from Applicant’s identification of services, as filed and without further amendments, be reinstated—including the Class 35 services, for which the Examining Attorney never raised any objection. As a result, the amended services, as a whole, should read:

--BUSINESS CONSULTATION SERVICES FOR FINANCIAL ORGANIZATIONS IN THE FIELDS OF BUSINESS PORTFOLIO MANAGEMENT, ANALYZING AND COMPILING DATA FOR MEASURING THE PERFORMANCE OF MUTUAL FUNDS, in International Class 35--

and

--CONSULTING SERVICES FOR EMPLOYEE BENEFITS CONCERNING RETIREMENT PLANS; FINANCIAL ADVISORY SERVICES IN THE FIELD OF RETIREMENT PLANNING; ADVISORY SERVICES IN THE FIELD OF MUTUAL FUNDS AND SEPARATE RETIREMENT ACCOUNT MANAGEMENT; AND FINANCIAL DUE DILIGENCE SERVICES FOR INVESTMENT PRODUCTS AND MANAGERS, in International Class 36--

I. Applicant's Mark is Unlikely to Result in Confusion with the Cited Registration

As noted previously, Applicant seeks to register the applied-for design mark as a whole. Applicant has disclaimed the wording "401," "K" and "ADVISORS," literally all of the text, and therefore submits that the distinctive character of Applicant's mark arises from its various design elements, namely, (1) the specific font, (2) the specific stacking of the elements "401" and "K" above the word "ADVISORS," (3) the specific five-pointed star positioned between the "401" and the "K" elements, (4) the specific stripes between the rows of the "401," "K" and "ADVISORS" elements, (5) the specific ratio between the size of the "401" and "K" elements on the upper line versus the size of the "ADVISORS" element on the lower line, (6) the specific contrasting field behind the text elements; and (7) the specific square border around the field and the framed region formed thereby (collectively, the "Seven Design Elements"). The Cited Registration, which exists on the Supplemental Register, consists solely of the admittedly descriptive wording 401(K) ADVISOR (with "ADVISOR" being disclaimed, with the "K" element existing between parentheses, and with "401(K)" (with parentheses) being acknowledged as descriptive in view of the services associated therewith). In contrast, Applicant cloaks its non-parenthetical, admittedly descriptive terms in the context of a "star and stripes" graphic that conveys a significantly different commercial impression.

With respect to the five-pointed star positioned between the "401" and the "K" elements, Applicant reiterates that the traditional usage of the term "401(K)"—with parentheses surrounding the "K" element, to denote a specific statutory subsection—arises from the common usage of the term "401(k)" as a type of defined contribution employment benefit set forth in section 401(k) of the Internal Revenue Code. See 26

U.S.C. 401(k). For that reason, Applicant's use of a distinct star design element to separate the "401" and "K" elements *without parentheses* departs from that "statutory subsection" impression. Further, that star design in combination with the stripes is further highly distinctive. Indeed, the Examining Attorney has not supplied, and Applicant is not aware of, *any* evidence suggesting that any other party has used a mark or designation incorporating a "401 K" element in which the "401" and "K" elements are separated first by a star, with those elements being further separated from the "ADVISOR" element by stripes. The star and stripes elements serve to do two things: (1) they suggest a "federal," "flag-like" feel to the mark—without unlawfully using the actual American flag—in keeping with the federal government's creation of employment pension plans, together with rules therefor and (2) they create a distinct commercial impression, an "American look," separate and apart from the descriptive wording "401," "K" and "ADVISORS." In the context of advisory services, the star—in combination with the word "ADVISORS"—also suggests that Applicant's employees are "star" advisors, i.e. that they are "distinguished" or "preeminent" advisors. That commercial impression is enhanced by placing the term "ADVISORS" on its own line, in between the stripes, and squarely under the star.

By contrast, the descriptive wording "401(K) ADVISOR" set forth in the Cited Registration does not present any such connotation. Simply put, the arrangement of Applicant's design elements—with particular emphasis on Applicant's use of the star and stripes graphics amongst the "401" and "K" elements on one level, and the "ADVISORS" element on an altogether separate level, together with Applicant's distinctive font, stacking, proportions, contrasting field and square framing—all serve to

collectively render Applicant's design mark inherently distinctive. See *In re Esso Standard Oil Co.*, 305 F.2d 495, 498, 134 U.S.P.Q. 402 (C.C.P.A. 1962) (holding "We consider the red, white and blue "ESSO" label with its distinctive proportions and arrangement of elements to be inherently distinctive").

The Examining Attorney's comparison of the marks suggests an improper "dissection" of the marks into their components parts.

The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used (citations omitted). It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark.

TMEP § 1207.01. Indeed, the Examining Attorney has simply compared the Cited Registration's wording "401(K)" to Applicant's wording "401" and "K," and the Cited Registration's wording "ADVISOR" to the Applicant's wording "ADVISORS," to reach the conclusion that the marks are highly similar. But that conclusion is erroneously based on the supposition that *any* of the elements in the Cited (Supplemental) Registration could possibly be dominant or distinctive when, in fact, each and every one of those cited text elements is utterly descriptive, when taken in combination. Accordingly, it would be improper to regard any of those elements as dominant. TMEP § 1213.10 ("Typically, disclaimed matter will not be regarded as the dominant, or most significant, feature of a mark"). Rather, the Cited Registration must be compared with Applicant's mark *in its entirety*, including the Seven Design Elements thereof, each of which is missing from the weak and descriptive mark 401(K) ADVISORS. Simply put, the Cited Registration is hopelessly incapable of creating the "American star and stripes" look or

commercial impression, much less the second “*double entendre*” impression generated by the “Star Advisors” imagery.

In its prior Response, Applicant relied on *Unitek Solvent Servs., Inc. v. Chrysler Group, LLC*, No. 1:12-cv-00704, 2013 WL 5503087 (D. Ha. Sept. 30, 2013), which involved a highly similar factual situation—an allegation of likelihood of confusion between the standard character mark ECODIESEL, registered on the Supplemental Register, and Chrysler’s mark ECODIESEL 3.0L & Design (wherein the “3.0L” element is admitted to be descriptive and the design elements merely comprise stylized wording, a leaf element, which is itself descriptive of the prefix “ECO,” and basic quadrilateral shapes, as shown in U.S. Appl. Ser. No. 85/660,232). In that case, the District Court of Hawaii found no likelihood of confusion in view of the inherent weakness of the registration on the Supplemental Register, the lack of secondary meaning acquired by the owner of that registration, and the fact that “the marks are readily distinguishable by the stylized characteristics unique to Chrysler’s mark.” *Id.* at *10-*11. The court further noted that because the terms “eco” and “diesel” are “used by many entities, coupled with the court’s conclusion here that the ECODIESEL mark is descriptive and has not acquired secondary meaning, ***Unitek cannot claim to have exclusive use of all forms of the word ‘ecodiesel.’***” *Id.* (emphasis added) (quoting *SunEarth, Inc. v. Sun Earth Solar Power Co., Ltd.*, 846 F. Supp. 2d 1063, 1078 (N.D. Cal. 2012) (stating that in cases where a ***shared word is a common industry term***, “the plaintiff is ***not permitted to claim rights to all variants on it***”) (emphases added). Here, for the very same reasons, without having established any secondary meaning in its mark, the owner of the Cited Registration cannot claim to have exclusive use over all forms of the

words “401(K) ADVISOR.” In the present case, had the owner of the Cited Registration established secondary meaning on that Cited Registration, it would not be registered on the Supplemental Register.

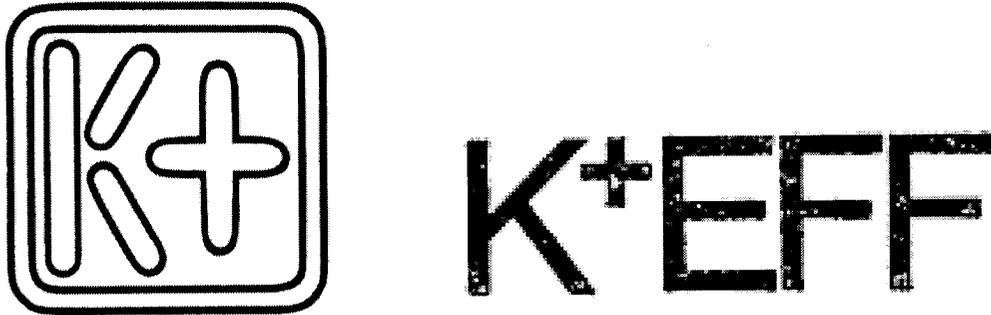
The Examining Attorney dismissed the *Unitek* case as “not probative” and purportedly “distinguishable because the court did not acknowledge that standard character marks and typed drawings may be displayed in an identical manner to the cited registration and that the identifications in applications and registrations are presumed to encompass all goods and/or services of the type described.” Respectfully, that statement fails to establish how the *Unitek* case is distinguishable. It is common knowledge that standard character marks (previously referred to as “typed drawings”) do not incorporate a claim as “to any particular font style, size, or color,” or “any claim as to the manner of display.” TMEP § 807.03. That the *Unitek* court failed to mention this well-known fact does not mean that the court failed to realize or consider the obvious. The court likely considered that fact to be entirely irrelevant. In so doing, the *Unitek* court properly held there to be no likelihood of confusion between those two marks in which—exactly as in the present application—the cited mark was a descriptive standard character mark existing on the Supplemental Register and the other mark was a distinguishable design mark, **despite** the ability of standard character marks to be displayed in an identical manner, **due to the inherently weak and descriptive nature** of the ECODIESEL mark.

Further, simply because a standard character mark **may be** displayed in an identical manner to another mark does not mean that it **is** so displayed.¹ In fact, in this case, the registered 401(K) ADVISOR mark **cannot possibly be displayed** in an **identical** manner to Applicant's mark because the Cited Registration uses parentheses to offset the "K" element from the "401" element, whereas Applicant uniquely uses the Seven Design Elements, including the star element, to first offset the "K" from the "401," together with the stripes to separate the "ADVISORS" elements from the "401" and "K" elements. As such, the Examining Attorney's offhanded dismissal of the *Unitek* case is improper, and fails to acknowledge how marks on the Supplemental Register, having no distinctive elements whatsoever, should properly be afforded the narrowest possible scope of protection—particularly relative to design marks that incorporate similar wording but which advance a distinctive design that serves to create a different commercial impression. *See id.* at 5 (noting that marks registered on the Supplemental Register are not entitled to any presumptions of validity or of the owner's exclusive right to use the mark, and that "Supplemental Registration creates no substantive rights") (quoting J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 19.37).

Moreover, *Unitek* is not the only case in which marks were found unlikely to be confused in view of the wholly weak and descriptive nature of the wording common to the marks. For example, in *In re Electrolyte Laboratories, Inc.*, the Federal Circuit reversed the Trademark Trial and Appeal Board's refusal to register an application for

¹ In fact, the mark shown in the Cited Registration has been used in a format that matches its standard character claim. See **Exhibit A**, the registrant's most recent specimen of use, showing the mark in a standard, typed display format.

the design mark, shown on the left below, based on a purported likelihood of confusion with even another “**design**” mark, as shown on the right below:



913 F.2d 930, 931-933 (Fed. Cir. 1990). Both of the marks were used on dietary potassium supplements—“K” is the chemical symbol for potassium, and the “+” symbol denotes that the potassium is soluble, that is, K+ is the symbol of the soluble potassium ion. *Id.* at 932. The applicant argued that K+ in each of the marks was descriptive and should be entitled to little weight, but the Federal Circuit held that “no feature of a mark is ignored and appropriate weight is given to the effect of features common to both marks.” *Id.* (citation omitted). Rather, while more dominant features

weigh heavier in the overall impression of a mark . . . [t]here is no general rule as to whether letters or design will dominate in composite marks; nor is the dominance of letters or design dispositive of the issue. **No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.**

The TTAB, explaining its holding that confusion was likely, stated that consumers would say “K-plus” and “K-plus-eff” when calling for the products. However, the spoken or vocalizable element of a design mark, taken without the design, need not of itself serve to distinguish the goods. The nature of stylized letter marks is that they partake of both **visual** and oral indicia, and both must be weighed in the context in which they occur. . . . A design is viewed, not spoken, and a stylized letter design can not be treated simply as a word mark.

We conclude that the TTAB erred in its **dominant focus on the K+** in both marks, to the substantial exclusion of the other elements of both

marks. Electrolyte's mark is a composite **of which the design is a significant feature thereof.**

Id. (emphases added).²

The same is true here: it is improper to grant a dominant focus to the weak and descriptive wording common to Applicant's mark and the Cited Registration, particularly when Applicant's design elements significantly serve to create a commercial impression separate and apart from the meaning of the wording alone. Again, Applicant's distinctive use of a star and stripes in between the "401" and "K" elements, and above and below the "ADVISORS" element, respectively, uniquely creates a *double entendre* suggesting both a federal, "all-American" feel relative to Applicant's services in providing advice for government-approved defined benefit contribution plans—while simultaneously suggesting that Applicant's employees are "star advisors," i.e., that they are "distinguished" or "preeminent" advisors.

While the Examining Attorney has properly stated that marks should be considered in their entireties, he has essentially ignored the star and stripes symbols (along with the other design elements) making up Applicant's mark. For example, in the most recent Office Action, the Examining Attorney stated that "[t]he word portions of the marks are nearly identical in appearance, sound, connotation, and commercial impression; therefore, the addition of a design element does not obviate the similarity of

² See also *First Savings Bank, F.S.B. v. First Bank System, Inc.*, 101 F.3d 645, 655 (10th Cir. 1996) (holding FIRST BANK is "weakly descriptive," acknowledging First Bank System's admission "that the term FIRST BANK is only descriptive," and holding "[w]hen the primary term is weakly protected to begin with, **minor alterations may effectively negate any confusing similarity between the two marks**") (emphasis added); *The Fleetwood Company v. Hazel Bishop, Inc.*, 352 F.2d 841, 843-845 (7th Cir. 1965) (finding that "[t]he only element of similarity in Plaintiff's mark TINTZ and Defendant's mark TINTSTIK is the descriptive word "tint," affirming the holding that the plaintiff's TINTZ mark is weak "**and cannot be given wide application**," and holding that marks will ordinarily "not be found to be confusingly similar on the basis of a descriptive word or symbol included in them") (emphasis added).

the marks in this case.” (March 6, 2014 Office Action, at 3.) To support that position, the Examining Attorney cited to *In re Shell Oil Co.*, 992 F.2d 1204 (Fed. Cir. 1993), but that case involved **two design marks**, both of which incorporate **not only** the same descriptive wording RIGHT-A-WAY, but also **the same (or similar) arrow design elements**. *Id.* at 1206. Unlike that case, the Cited Registration here does not incorporate any star or stripes symbols, or any of the other design elements, nor does it create the “American look,” “federal feel” or “star advisors” connotations present in Applicant’s mark.

Moreover, in the earlier Office Action dated May 24, 2013 (before Applicant was given the opportunity to explain the imagery created by its design elements), the Examining Attorney simply stated that since marks in typed or standard character formats “may be displayed in any lettering style, the rights reside in the **wording** or **other literal element** and not in any particular display or rendition,” and thus “a mark presented in stylized characters and/or with a design element **generally** will not avoid likelihood of confusion with a mark in typed or standard character because the marks could be presented in the same manner of display.” (May 24, 2013 Office Action, at 2). However, that general rule clearly does not apply here because, as set forth above, Applicant’s mark **cannot possibly be displayed** in an **identical** manner to the Cited Registration, which incorporates a parentheses (not present in Applicant’s mark), and which lacks the star and stripes elements of Applicant’s mark, together with lacking the rest of the Seven Design Elements.

Further, in the context of a prior Section 2(e)(1) refusal in Applicant’s co-pending application for a highly similar 401 K ADVISORS & Design mark (which merely lacks the

contrasting field and square frame present in the instant mark), U.S. Ser. No. 76/713,314, the Examining Attorney explained that:

the star and horizontal lines that make up the rest of the applicant's mark do not create a separate commercial impression and is [sic] not sufficient. **Most common geometric shapes, such as circles, ovals, triangles, diamonds, or stars, when used as a background for word or letter marks are not considered inherently distinctive.** *In re Benetton Group S.p.A.*, 48 USPQ2d 1214, 1216 (TTAB 1998). As the Board explained,

The rationale . . . is that designs of this character have been so commonly employed as background devices for word marks that composite marks of this type create but a single commercial impression with the result that purchasers would normally utilize the word portions of the marks to identify and distinguish the goods sold thereunder

Permatex Co. v. Cal. Tube Prods., Inc., 175 USPQ 764, 766 (TTAB 1972).

(May 24, 2013 Office Action at 5 (emphasis added).) First, as set forth above and in its prior Response, Applicant's star and stripes symbols **do create a separate, distinct commercial impression**. Second, *Permatex* is a TTAB case from 1972, and the Examining Attorney's emphasized statement that "common geometric shapes . . . are not considered inherently distinctive" directly contradicts the Federal Circuit's holding from 1990 in *In re Electrolyte Laboratories, Inc.* that "[n]o element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone." 913 F.2d at 932. Indeed, even if the star and stripes symbols might not have trademark significance on their own, the use of the star and stripes symbols in association with the word "ADVISORS," for financial advisory services, creates a trademark significance separate and apart from the commercial impression of the wording "401" "K" and "ADVISORS" on its own.

In addition, even if *Permatex* were correct that such stars and stripes designs are “commonly employed as background devices for word marks” such that “purchasers would normally utilize the word portions of the marks to identify and distinguish the goods sold thereunder,” 175 USPQ at 766, this is not the case here because the star and stripes symbols in Applicant’s mark are anything but a mere “background device”—it was Applicant’s deliberate choice to create the “federal” feel and “star advisors” meaning, separate from the meaning of the descriptive portions of the mark. In short, the Examining Attorney has failed to address, much less acknowledge, Applicant’s arguments regarding the additional “feel” and connotation presented by Applicant’s design elements. As such, it would be improper to maintain the refusal to register without any basis for ignoring Applicant’s star and stripes symbols (and other design elements) completely. *In re Electrolyte Laboratories*, 913 F.2d at 932 (stating: “No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone” and concluding that the “TTAB erred in its dominant focus on the K+ in both marks, to the substantial exclusion of the other elements of both marks”).

Again, “although the two marks may share the same sound, ‘they are visually distinguishable as typically used by the parties in print,’ in view of Applicant’s unique, stylized design featuring a five-pointed star positioned between the “401” and the “K” elements, and two stripes capturing the “ADVISORS” element under the star. See *Unitek*, 2013 WL 5503087 at *11-*12 (quoting *Playmakers, LLC. v. ESPN, Inc.*, 376 F.3d 894, 897 n. 1 (9th Cir. 2004). And the other likelihood of confusion factors likewise favor Applicant because (1) no ill intent can be ascribed to Applicant, who simply

adopted a stylized design version of an otherwise descriptive mark; and (2) consumers of expensive retirement planning services exercise a high degree of care. See *id.* at *11. For these reasons, there can be no likelihood of confusion between Applicant's stylized 401 K ADVISORS design mark and Morgan Stanley's descriptive 401(K) ADVISOR mark—to which Morgan Stanley is *not* entitled to any exclusive rights. Accordingly, Applicant respectfully requests that the Examining Attorney reconsider and withdraw the refusal to register based on the Cited Registration.

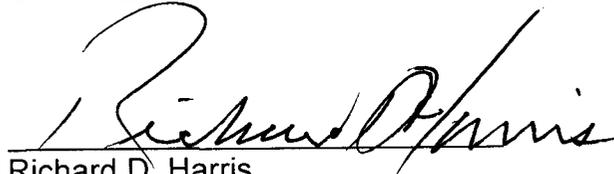
* * *

In light of the foregoing, Applicant respectfully submits that this application is in a *prima facie* condition for allowance. Accordingly, Applicant respectfully requests that the Examining Attorney withdraw his refusal to register Applicant's 401 K ADVISORS & Design mark, and allow this application to pass to publication, towards registration.

Should anything further be required, a telephone call to the undersigned at (312) 456-8400 is respectfully solicited.

Respectfully submitted,

GREENBERG TRAURIG LLP



Richard D. Harris
One of the Attorneys for Applicant

Dated: September 8, 2014

CERTIFICATE OF MAILING

I hereby certify that this RESPONSE TO OFFICE ACTION is being deposited, pursuant to 37 C.F.R. §1.8, with the United States Postal Service on the date set forth below as First Class Mail, postage pre-paid, in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451.

Dated: September 8, 2014

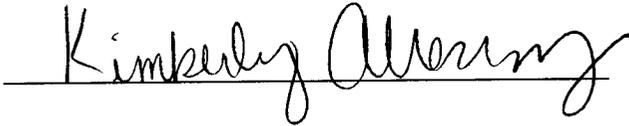
A handwritten signature in black ink, appearing to read "Kimberly Almon", is written over a horizontal line.

Exhibit A

401(k) Advisor[®]

Target Market

Designed for business owners with plan assets of at least \$5 million who are seeking to provide their employees with a participant asset allocation program.

Characteristics

The program offers participants asset allocation advice on nationally known mutual funds. The Morgan Stanley Smith Barney Consulting Group provides ongoing, objective fund analysis. Morgan Stanley Smith Barney is a contractual fiduciary partner with respect to participant asset allocation advice.

Key Selling Points

- Online asset allocation advice available via the Participant Investment Planner[®] (PIP) through Benefit Access[®] (Paper PIPs not available for new plans)
 - Personalized asset allocation recommendations provided directly to participants
 - Customized, fund-specific recommendations
- Reoptimization feature for participants who elect to automatically follow the Consulting Group asset allocation advice
- Automatic account rebalancing option available for participants
- Integrated client service structure
 - Dedicated Implementation Specialist
 - Dedicated account management support
- Quarterly Retirement Plan Review
- Comprehensive education materials, including a customized enrollment kit
- Self-Directed Retirement Account available

Investment Services

401(k) Advisor helps plan sponsors address their fiduciary responsibility under ERISA:

- Multi-fund approach with more than 120 investment options
- More than 40 name brand fund families
- Diversification of plan investments
- Ongoing due diligence of plan investments
- Asset allocation advice delivered to employees to help them make sound investment decisions

Standard Fees

All takeover plans are individually priced based on eligible employees, participants and plan assets.

FA Compensation: Recommended Advisory Fee

Asset Level	Recommended Range
\$5,000,001 - \$6,000,000	0.60% - 1.00%
\$6,000,001 - \$7,000,000	0.55% - 1.00%
\$7,000,001 - \$8,000,000	0.50% - 1.00%
\$8,000,001 - \$9,000,000	0.45% - 1.00%
\$9,000,001 - \$10,000,000	0.40% - 1.00%
\$10,000,001 - \$15,000,000	0.35% - 0.75%
\$15,000,001 - \$18,000,000	0.30% - 0.75%
\$18,000,001 - \$20,000,000	0.25% - 0.75%
Over \$20,000,000	0.20% - 0.60%

Please call 866-248-4787 if you have a prospect or want more information.

Morgan Stanley Smith Barney will act as a fiduciary with respect to providing asset allocation recommendations to employees.

Morgan Stanley Smith Barney does not act as a fiduciary with respect to fund selection at the plan level.

Investment advice offered through the 401(k) Advisor[®] program is offered through Morgan Stanley Smith Barney, a registered investment adviser.

FA must be registered to prospect a public company.

Morgan Stanley Smith Barney LLC, Member SIPC, Consulting Group is a division of Morgan Stanley Smith Barney LLC.

