

# Morgan Lewis

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**VIA EMAIL**

Timothy B. Henseler, Esq.  
Chief, Office of Enforcement Liaison  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-7553

Re: In the Matter of Transamerica Asset Management, Inc.

Dear Mr. Henseler:

We submit this letter on behalf of our client, Transamerica Asset Management, Inc. ("TAM"), and its ultimate parent, Aegon N.V. ("Aegon"), a reporting company with securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act"). TAM will settle the above-noted action brought by the U.S. Securities and Exchange Commission (the "SEC" or "Commission"). The settlement will result in the entry of a cease-and-desist order against TAM pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (the "Advisers Act") and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (the "Company Act") (the "Order"). The action and Order are described below.

Aegon is a foreign private issuer with securities listed on the New York Stock Exchange. As indicated in its most recent Annual Report on Form 20-F, Aegon is a well-known seasoned issuer ("WKSI") as defined in Rule 405 under the Securities Act of 1933 (the "Securities Act").

Pursuant to Rule 405 promulgated under the Securities Act, Aegon hereby respectfully requests that the Commission or the Division of Corporation Finance ("Division"), pursuant to delegated authority, determine that for good cause shown it is not necessary under the circumstances that Aegon be considered an "ineligible issuer" under Rule 405 and therefore waive the disqualification that will result when the Commission enters the Order. Aegon has previously received waivers from ineligible issuer status, but the misconduct that was underlying the prior waivers was different from the misconduct that is the subject of the Order.<sup>1</sup> Aegon requests that this determination be effective upon entry of the Order against TAM in the above-referenced matter.

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<sup>1</sup> Aegon has previously been granted waivers regarding its WKSI status in the following instances: *In the Matter of Certain Investment Advisers Participating in the Share Class*

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## 1. BACKGROUND

TAM has submitted an offer of settlement to the Commission, which will result in the Commission issuing the Order. In the offer of settlement, TAM consents to entry of the Order without admitting or denying the findings set forth in the Order, except for the jurisdiction of the Commission and the subject matter of the proceeding. The Order results from TAM's conduct regarding certain misstatements and omissions to investors related to the annual operating expenses of four money market funds (the "Funds") that TAM managed. The Order finds that between January 1, 2016, and February 28, 2019, TAM caused the Funds to reimburse amounts that TAM had previously waived and reimbursed to the Funds on a voluntary basis (hereinafter, "recaptured amounts"). As a result of TAM's recaptured amounts, the Funds charged expenses that exceeded their contractual limits and caused the Funds' investors to collectively incur millions of dollars in additional fund expenses. The Order finds that TAM omitted the recaptured amounts from a description of the Funds' annual operating expenses in the Funds' prospectuses as required by Form N-1A, thereby materially misstating the expenses that investors paid when buying and holding the Funds' shares. The Order finds that TAM willfully violated Section 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-8 thereunder and Section 34(b) of the Company Act.

Pursuant to the Order, TAM: (i) shall cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rules 206(4)-7 and 206(4)-8 and Section 34(b) of the Company Act, (ii) is censured, and (iii) must pay disgorgement of \$5,258,357.30 and prejudgment interest of \$688,425.23. The Order is not imposing a civil penalty based upon TAM having self-reported the matter and TAM's cooperation in a Commission investigation and related enforcement action.

## 2. DISCUSSION

Effective on December 1, 2005, the Commission reformed and revised the registration, communications, and offering procedures under the Securities Act.<sup>2</sup> As part of the Securities Offering Reforms, the Commission revised Securities Act Rule 405 and created a new category of offering communication, the "free writing prospectus" ("FWP"). Eligible issuers may use non-term sheet FWPs in registered offerings pursuant to Rules 164 and 433 under the Securities Act. The

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*Disclosure Initiative* (March 11, 2019) relating to the SEC's relating to the Share Class Selection Disclosure Initiative; *In the Matter of AEGON USA Investment Management, LLC, et al.* (August 27, 2018) relating to certain indirect, wholly-owned subsidiaries of Aegon who engaged in improper conduct while offering, selling, and managing certain quantitative model based investment strategies offered through mutual funds, variable products and separately managed accounts; and *In re Transamerica Financial Advisors, Inc.* (June 24, 2014) relating to Transamerica Financial Advisors' failure between January 2009 and June 2013 to apply certain breakpoint discounts despite client requests for aggregation of accounts and failure to adopt and implement compliance policies and procedures to ensure that client fees were calculated as represented.

<sup>2</sup> Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 70 Fed. Reg. 44,722, 44,790 (Aug. 3, 2005) ("Securities Offering Reforms").

non-term sheet FWP benefits, however, are unavailable to issuers defined as “ineligible issuers” under Rule 405.

An issuer is an ineligible issuer if, among other things, the issuer, or an entity that at the time was a subsidiary of the issuer, has been, within three years, the subject of an administrative decree or order arising out of a governmental action that requires the issuer or its subsidiary to cease and desist from violating the anti-fraud provisions of the federal securities laws or determines that the issuer or the issuer’s subsidiary violated the anti-fraud provisions of the federal securities laws.<sup>3</sup>

Because TAM is a subsidiary of Aegon, the entry of the Order against TAM makes Aegon an ineligible issuer for a period of three years after the date of the Order.<sup>4</sup> This will preclude Aegon from receiving the benefits of being a WKSI for three years.

The Commission has the authority, directly or pursuant to authority delegated to the Division, to determine, “upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”<sup>5</sup> Consistent with the framework outlined in the Division’s *Revised Statement on Well-Known Seasoned Issuer Waivers* (April 24, 2014) (the “Revised Statement”), there is good cause to grant the requested waiver, as discussed below. In the Revised Statement, the Division stated that it would consider the following factors in determining whether to grant a waiver:

- the nature of the violation and whether it involved disclosure for which the issuer or any of its subsidiaries was responsible or calls into question the ability of the issuer to produce reliable disclosure currently and in the future;
- whether the conduct involved a criminal conviction or scienter-based violation;
- who was responsible for the misconduct and what was the duration of the misconduct;
- what remedial steps the issuer took; and
- the impact to the issuer if the waiver request is denied.

For the reasons set forth below, we respectfully submit that there is good cause for the Commission, or the Division pursuant to delegated authority, to grant the waiver requested and determine that it is not necessary for the public interest or the protection of investors that Aegon be considered an ineligible issuer as a result of the Order.

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<sup>3</sup> 17 C.F.R. 230.405(1)(vi).

<sup>4</sup> TAM is an indirect, subsidiary of Aegon. TAM is currently owned by Transamerica Premier Life Insurance Company, which owns 77% of TAM’s outstanding voting securities, and AUSA Holding, LLC, which owns the remaining 23% of TAM’s outstanding voting securities. Transamerica Premier Life Insurance Company is wholly owned by Commonwealth General Corporation. Commonwealth General Corporation and AUSA Holdings, LLC are each wholly owned by Transamerica Corporation (DE). Transamerica Corporation (DE) is wholly owned by The Aegon Trust, which is wholly owned by Aegon International B.V. Aegon International B.V. is wholly owned by Aegon.

<sup>5</sup> 17 C.F.R. 230.405(2).

*a. Nature of Violation and Whether the Violation Casts Doubt on the Ability of the Issuer to Produce Reliable Disclosures to Investors*

The conduct described in the Order relates to misstatements and omissions by TAM in its disclosures of the Funds. The conduct described in the Order does not pertain to activities undertaken by Aegon in its capacity, and specifically not in connection with its role as an issuer of securities or in its filings with the Commission. Furthermore, neither TAM nor any of its employees, including the individuals involved in the activities that are the subject of the Order, are involved in the preparation or review of Aegon's public disclosures or filings with the Commission.

Aegon is not a party in the Order. The conduct related to disclosures by TAM that are described in the Order did not involve any of Aegon's public disclosures and did not impact Aegon's financial statements. As described in the Order, all activities covered by the Order were carried out at TAM, a downstream subsidiary of Aegon with different employees and operations, not at Aegon. The Order does not describe any weaknesses or violations associated with disclosures and other internal controls and procedures maintained by Aegon in connection with its preparation and review of its financial statements and Commission filings. Aegon and its officers and directors were not involved in the conduct at issue; no Aegon employee participated in, knew, or should have known about, or ignored any red flags with respect to the conduct described in the Order. No one responsible for the conduct described in the Order had any connection to Aegon's policies and procedures in connection with insuring accurate, current, and future disclosures by Aegon as an issuer of securities in its filings with the Commission. All of the conduct described in the Order occurred at TAM.

*b. The Order Is Not Criminal in Nature and Does Not Involve Scier-er-Based Fraud*

The Order does not involve a criminal conviction and does not state that TAM acted with scier-er or intent to defraud. The Order states that TAM violated Section 206(4) of the Advisers Act and Section 34(b) of the Company Act, two non-scier-er-based anti-fraud provisions of the federal securities laws. Therefore, the significantly greater burden to show good cause that a waiver is justified that would result if the Order did involve a criminal conviction or scier-er based fraud does not apply.

*c. The Duration of the Misconduct*

The Order describes conduct that occurred over three (3) years, from January 2016 through February 2019.

*d. Persons Responsible for the Misconduct*

The personnel responsible for the conduct are employed by TAM. None of those individuals has responsibility for, or any influence over, Aegon as an issuer of securities or its filings with the Commission.

*e. Remedial Steps*

TAM has taken a number of remedial steps to address the issues that led to the conduct that is the subject of the Order, including the following:

- Ceased all recaptures under TAM's voluntary waiver arrangement effective as of March 1, 2019;

- Enhanced prospectus fee table review processes, including the implementation of new and enhanced protocols around the review and comparison of expense ratios in prospectus fees tables and financial highlights and the review of disclosures of applicable expense waivers, reimbursements and recaptures, including (1) additional review, research and analysis by TAM during the funds' annual registration statement update process of any differences between the gross and/or net expenses of a class of a fund as set forth in the fund's financial highlights and those included in the fund's draft prospectus fee table, and (2) the preparation by TAM of a new comparison chart, which is shared with reviewers of the draft prospectus, containing any such differences, along with an explanation for each of the differences;
- Enhanced Board reporting of any fund class whose total actual expenses are in excess of its contractual expense cap, including (1) highlighting in the quarterly expense ratio reporting any class with a net expense ratio in excess of the class's contractual expense cap, and (2) the preparation by TAM of a new chart listing any class of any fund with a net expense ratio in excess of its expense cap and an explanation of the reason(s) why the class is operating above its expense cap;
- Revised registration statement and shareholder report disclosures concerning the Funds' contractual and voluntary waiver arrangements, including with respect to those circumstances when TAM may recapture amounts previously waived and/or reimbursed to the Funds;
- Implemented initiatives focused on further enhancing communication and coordination within TAM, including instituting additional regular meetings of TAM senior management and convening ad hoc cross-departmental working groups to review and analyze the impacts of new initiatives and other changes;
- Committed to reimburse investors for the amount of recaptured expenses they paid above the contractual expense cap (plus interest); and
- To the extent that TAM seeks to recapture expenses in the future under the current voluntary waiver arrangement, TAM has committed, prior to any such recaptures, that it will establish additional protocols around such recaptures and review those enhancements with the Board.

*f. Impact on the Issuer if the Request Is Denied*

The Division's Revised Statement provides that it will "assess whether the loss of WKSII status would be a disproportionate hardship in light of the nature of the issuer's conduct." As noted above, the conduct of the issuer, Aegon, was not at issue in the Order. Rather, the conduct in the Order was limited to TAM, a downstream subsidiary of Aegon, and was not related to parts of the broader Aegon company operations. As a result, we respectfully submit that applying ineligible issuer status to Aegon would have a disproportionate consequence on Aegon.

The loss of Aegon's WKSII status could, as described in more detail below, have a significant impact on Aegon's ability to timely raise capital and conduct its global operations, which in turn could harm its investors.

Aegon is an integrated, diversified financial services group that offers innovative and effective savings and protection solutions with operations in over 20 countries, and serving nearly 30 million customers. Aegon is a leading provider of life insurance, pensions, and asset management.

Aegon currently relies on its WKSII status to offer securities under its automatic shelf registration statements. Aegon's two existing automatic shelf registration statements are set to expire in

August 2020 and December 2020, respectively. To ensure its continued ability to raise capital to meet its needs, Aegon filed a new automatic shelf registration statement on July 23, 2020, registering (i) an indeterminate number of common shares of Aegon N.V., (ii) an indeterminate principal amount of debt securities of Aegon N.V. and AEGON Funding Company LLC, and (iii) an indeterminate number of guarantees for separate consideration, warrants, purchase contracts of Aegon N.V. and AEGON Funding Company LLC.

The automatic shelf registration process allows Aegon to access United States capital markets in a timely and efficient manner, which is essential for funding the company's global operations and for maintaining adequate capital and liquidity. Due to Aegon's allocation of approximately 55% of its balance sheet to U.S. based enterprises, Aegon has a natural funding need for US dollars. Currently, Aegon carries the equivalent of roughly \$7 billion in debt. As a result, Aegon needs financing and re-financing flexibility for roughly 55% of that debt, or \$4 billion, and denial of this request would likely prevent Aegon from efficiently funding its U.S. operations.

The ability of Aegon to avail itself of its automatic shelf registration and the other benefits available to a WKSI is important to Aegon's ability to raise capital and conduct its operations. Since 2018, Aegon has completed two offerings of subordinated debt under its WKSI shelf, for a total notional value of \$1.7 billion, and, since the establishment of the WKSI shelf, a total of \$6.2 billion in senior and subordinated debt and almost 600 million common shares have been issued. Aegon's most recent shelf take-down occurred in October 2019, consisting of the issuance of \$925 million of subordinated notes. The proceeds of this offering were used to refinance existing capital instruments in preparation for the end of a European transitional arrangement which will end on December 31, 2025 and which will require further refinancing transactions before that date. To capture optimal market conditions and decrease market risk, all recent issuances using the WKSI shelf were executed same-day. Losing its status as a WKSI would limit Aegon's ability to efficiently access the United States capital markets as the need for additional capital and liquidity arises and when market conditions are most advantageous.

Additionally, the COVID-19 pandemic has led to increased market volatility and rapid shifts in liquidity of capital markets. Consequently, the ability of Aegon to utilize its WKSI shelf and other benefits of WKSI status, including the ability to register an indeterminate amount of securities, is of key importance to Aegon in the current market environment, as it will allow Aegon to capitalize immediately on advantageous market conditions or capital shortfalls when they arise.

Furthermore, Aegon, like other institutions, faces changing regulatory and market conditions with uncertainties. Because Aegon serves as an important source of capital and liquidity for its many highly regulated insurance subsidiaries that are subject to capitalization requirements and ratios, Aegon's ability to rapidly access capital markets when capital or liquidity needs arise, and when conditions are favorable, is critical. Without the ability to utilize an automatic shelf registration statement, Aegon may be unable to react quickly to such changing requirements and conditions, which could lead to stakeholder harm. The procedural and financial flexibility that the automatically effective shelf affords Aegon is essential given the current volatility of capital markets.

Aegon's WKSI status, including the ability to use its WKSI shelf, is an important part of the company's capital, liquidity, and risk management planning, including the company's recovery plans. Aegon is required to maintain a detailed recovery plan to demonstrate that the business operations are viable under extreme stress scenarios. Aegon's recovery plan includes different management actions to address certain stresses. Proof of a swift and continuous access to U.S.

capital markets, for example, through Aegon's WKSI-shelf, is one of management's key actions used to address recovery plan requirements.

Aegon must also comply with numerous requirements on its minimum capital and liquidity. The primary uses of Aegon's liquidity are paid losses, reinsurance payments, benefit claims, surrenders, withdrawals, interest payments, dividends, expenses, investment purchases and collateral requirements associated with its client-facing businesses. Aegon's insurance companies may require additional funding support to meet capital or liquidity needs, including in the event of large catastrophes. Other potential events that could strain Aegon's liquidity include severe equity market declines or other events causing economic or political upheaval, and the responses thereto, which continue to cause ongoing and severe economic and societal disruption accompanied by significant market volatility.

These constraints on liquidity drive the requirements for capital adequacy and are based on regulatory requirements, rating agency and creditor expectations, and business needs, and measured against internally-defined risk tolerances that take those items into account. Actual US and European regulatory capital levels are monitored and stressed on a regular basis. Aegon evaluates the capital impact of potential macroeconomic, financial and insurance stresses in relation to the relevant capital constraints of both the parent company and its insurance subsidiaries. However, as with any financial services business of the size and scope of Aegon and particularly in times of stress, circumstances may cause actual liquidity or capital needs to exceed projected liquidity or readily deployable capital resources. These circumstances could include additional collateral calls, deterioration in investment portfolios or reserve strengthening affecting statutory surplus, higher surrenders of annuities and other policies, downgrades in credit ratings, or catastrophic losses that could result in significant additional cash or capital needs and loss of sources of liquidity and capital. Swift and continuous access to U.S. capital markets, for example, through Aegon's WKSI shelf, is one of the mitigants to address a shortfall of capital or liquidity.

### **3. CONCLUSION**

Accordingly, we respectfully request that the Commission, or the Division pursuant to delegated authority on behalf of the Commission, make the determination that there is good cause for Aegon not to be considered an ineligible issuer as a result of the Order and grant this request for waiver from ineligible issuer status.

If you have any questions regarding any of the foregoing, please do not hesitate to contact me at 202-739-5746 or Emily Chapman at 202-739-5699.

Sincerely,



Amy Natterson Kroll