

News & Alerts

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Morgan Stanley Withdraws from the Broker Protocol

On Monday, October 30, Morgan Stanley Smith Barney (Morgan Stanley) announced that it is withdrawing from the Protocol for Broker Recruitment (Broker Protocol) effective Friday, November 3, 2017. The Broker Protocol applies to both brokers and investment adviser representatives and eases a representatives transition from one signatory firm to another. Given Morgan's Stanley's status as a founding member of the Broker Protocol and the size of its network of 15,000+ representatives, other firms may follow suit.

In 2004, Smith Barney, Merrill Lynch and UBS agreed to the Broker Protocol to cut down on rising litigation costs resulting from the movement of registered representatives from one firm to another and use of client information in violation of non-solicitation and confidentiality clauses, and Regulation S-P, which is intended to protect client privacy. Under the Broker Protocol, notwithstanding the non-solicitation and confidentiality provisions in a representative's employment agreement, he/she could leave a firm and take certain client information for the sole purpose of contacting clients and sharing (a) news that the representative left his/her former firm and is associating with a new firm, and (b) the representative's contact information at the new firm. In order for the Broker Protocol to take effect, both the representative's former firm and the new firm must be signatories to the protocol.

Morgan Stanley's acquisition of Smith Barney made it one of the largest wealth management firms in the United States. Since adopting the Broker Protocol, brokers who were part of Smith Barney and remained with the firm after the acquisition—and any new brokers and advisers who joined since 2004—have an expectation that their employment contracts were covered by the terms of the protocol. If departing, most representative assumed they could contact their clients in order to take their clients with them. By withdrawing from the Broker Protocol, Morgan Stanley will make it much more difficult for these brokers to leave the firm.

Over the past two years, Morgan Stanley, UBS and Merrill Lynch have each announced efforts to decrease dramatically their independent broker recruiting efforts and instead focus on helping their existing representatives attract new clients. These firms, as well as Wells Fargo, have further demonstrated their desire to retain their existing representatives through increased pursuit of court-imposed restraining orders against brokers who have changed firms, taking client information with them. Although none of the other big wirehouses have announced a withdrawal this week, it is highly likely other firms—large and small—will follow

Morgan Stanley's path and withdraw from the Broker Protocol. If there is a mass exodus, it will likely lead to a the collapse of the Broker Protocol as an industry standard.

Without the Broker Protocol in effect, there will be no agreed upon exceptions to the non-solicitation and confidentiality provisions in a representative's employment agreement. This will likely lead to an increase in litigation and arbitration over these provisions, making it more difficult for smaller groups to leave a wirehouse like Morgan Stanley or an independent broker group associated with Morgan Stanley. Without the Broker Protocol, a number of these cases will be decided based upon state employment laws. Whether representatives will be able to mount a defense based on their reliance on Morgan Stanley's adoption of the Broker Protocol remains to be seen, and ultimately will be decided in court.

Since the announcement—and in anticipation of other large wirehouses following Morgan Stanley's lead—broker or investment adviser representatives seeking to move to another firm, should first speak with their own regulatory and employment lawyers to determine their strategy and how they may exit with their current clients in tow. Firms recruiting representatives from the wirehouses should also consult with counsel and regulatory consultants to weigh the risks and rewards of hiring any individual or group.

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