

2.2.13 ICAP SEF (US) LLC – s. 147

Headnote

Application for an order that a swap execution facility registered with the United States Commodity Futures Trading Commission is exempt from the requirement to register as an exchange in Ontario – requested order granted.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 147.

**IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S. 5, AS AMENDED
(THE ACT)**

AND

**IN THE MATTER OF
ICAP SEF (US) LLC**

**ORDER
(Section 147 of the Act)**

WHEREAS ICAP SEF (US) LLC (the **Applicant**) has filed an application dated September 16, 2013 (**Application**) with the Ontario Securities Commission (**Commission**) pursuant to section 147 of the Act requesting an interim order exempting the Applicant from the requirement to be recognized as an exchange under subsection 21(1) of the Act (**Order**);

AND WHEREAS the Applicant has represented to the Commission that:

1. The Applicant is a limited liability company organized under the laws of the State of Delaware in the United States (**U.S.**) and is a wholly owned subsidiary of ICAP Broking Holdings North America LLC. The ultimate parent company of the Applicant is ICAP plc, a company listed on the London Stock Exchange;
2. On September 27, 2013, the U.S. Commodity Futures Trading Commission (the **CFTC**), a U.S. federal regulatory agency, granted the Applicant temporary registration to operate a swap execution facility (**SEF**) in the U.S. The Applicant intends to launch its SEF on October 2, 2013, the mandatory compliance date under the relevant CFTC regulation;
3. The Applicant will be a marketplace for trading swaps that are regulated by the CFTC. The Applicant currently intends to be a multi-asset SEF offering trading in interest rate swaps, credit indices, non-deliverable forward FX, commodities and equity derivatives. It is expected that swaps that require clearing will be cleared at the Chicago Mercantile Exchange, Ice Clear Credit US and UK and LCH.Clearnet US and UK;
4. The Applicant will require its participants, including any participants located in Ontario, to qualify as “eligible contract participants” (**ECP**), as defined in section 1a(18) of the U.S. *Commodity Exchange Act* (the **CEA**). Also, participants must either be a clearing member of one of the clearing houses mentioned in paragraph 3 above or have a relationship with a registered futures commission merchant who is a clearing member of one those clearing houses. At the time of launch, it is expected that most SEF participants will be banks, registered dealers and advisers and other large financial institutions. However, a SEF must offer impartial access; for example, a pension fund or hedge fund that meets the ECP definition and has an acceptable clearing arrangement in place could be a member of the SEF;
5. The Applicant is subject to regulatory supervision by the CFTC. The CEA requires a SEF to register with the CFTC and to comply with applicable CFTC regulations, including the CFTC's SEF Core Principles. SEFs are required to have a rulebook and a compliance program, including a Chief Compliance Officer and a compliance manual. A SEF's participant access criteria must be impartial and transparent and must be applied in a fair and non-discriminatory manner. The CFTC requires each SEF to have certain required trading protocols. A SEF must publish on its website certain daily trading data for each swap contract listed on the SEF and must report all transactions executed on the SEF to a swap data repository. The CFTC reviews, assesses and enforces a SEF's adherence to CFTC regulations on an ongoing basis;

6. A SEF is a self-regulatory organization under CFTC rules. A SEF is obliged under CFTC rules to have requirements governing the conduct of participants, to monitor compliance with those requirements and to discipline participants, including by means other than exclusion from the marketplace. The Applicant has contracted with the U.S. National Futures Association (the **NFA**) for the NFA to conduct market surveillance of its SEF trades pursuant to a Regulatory Services Agreement;
7. Fees for SEF services must be equitable and established in a uniform and non-discriminatory manner. A SEF must submit audited financial statements to the CFTC and maintain adequate financial resources to cover its operating costs for a period of at least one year, calculated on a rolling basis;
8. The Applicant proposes to offer direct access to trading on its SEF to prospective participants that are located in Ontario (**Ontario Participants**) and that satisfy the criteria in paragraph 4 above;
9. The Applicant expects that Ontario Participants will include Canadian financial institutions, registered dealers and advisers, government entities, pension funds and other well capitalized non-regulated entities that satisfy the criteria for an ECP;
10. Because the SEF regulates the conduct of its participants, it is considered by the Commission to be an exchange;
11. Since the Applicant seeks to provide Ontario Participants with direct access to trading derivatives, it is considered by the Commission to be "carrying on business as an exchange" in Ontario and is required to be recognized as such or exempted from recognition pursuant to section 21 of the Act;
12. The Applicant has no physical presence in Ontario and does not otherwise carry on business in Ontario except as described herein;
13. The Applicant intends to file a full application to the Commission for a subsequent order exempting it from the requirement to be recognized as an exchange under section 147 of the Act (**Subsequent Order**).

AND WHEREAS the products traded on the Applicant's SEF are not commodity futures contracts as defined in the *Commodity Futures Act* (Ontario) and the Applicant is not considered to be carrying on business as a commodity futures exchange in Ontario;

AND WHEREAS the Commission will monitor developments in international and domestic capital markets and the Applicant's activities on an ongoing basis to determine whether it is appropriate for the Order to continue to be granted subject to the terms and conditions set out in Schedule "A" to this order;

AND WHEREAS the Applicant has acknowledged to the Commission that the scope of the Order and the terms and conditions imposed by the Commission set out in Schedule "A" to this order may change as a result of the Commission's monitoring of developments in international and domestic capital markets or the Applicant's activities, or as a result of any changes to the laws in Ontario affecting trading in derivatives or securities;

AND WHEREAS based on the Application, together with the representations made by and acknowledgements of the Applicant to the Commission, the Commission has determined that the granting of the Order would not be prejudicial to the public interest;

IT IS HEREBY ORDERED by the Commission that, pursuant to section 147 of the Act, the Applicant is exempt on an interim basis from recognition as an exchange under subsection 21(1) of the Act,

PROVIDED THAT:

1. This Order shall terminate on the earlier of (i) October 2, 2014 and (ii) the effective date of the Subsequent Order;
2. The Applicant complies with the terms and conditions contained in Schedule "A"; and
3. The Applicant shall file a full application to the Commission for the Subsequent Order by January 31, 2014.

DATED October 1st, 2013

"Mary G. Condon"

"James E. A. Turner"

SCHEDULE "A"

TERMS AND CONDITIONS

Regulation and Oversight of the Applicant

1. the Applicant will maintain its registration as a swap execution facility (**SEF**) with the Commodity Futures Trading Commission (**CFTC**) and will continue to be subject to the regulatory oversight of the CFTC.
2. the Applicant will continue to comply with the ongoing requirements applicable to it as a SEF registered with the CFTC.
3. the Applicant will notify the Commission if its registration as a SEF has been revoked, suspended, or amended by the CFTC, or the basis on which its registration as a SEF has been granted has significantly changed.
4. the Applicant must do everything within its control, which includes cooperating with the Commission as needed, to cause the Applicant to carry out its activities as an exchange exempted from recognition under subsection 21(1) of the Act in compliance with Ontario securities law.

Access

5. the Applicant will not provide direct access to a participant in Ontario (**Ontario User**) unless the Ontario User is appropriately registered as applicable under Ontario securities laws or is exempt from or not subject to those requirements, and qualifies as an "eligible contract participant" under the United States *Commodity Exchange Act*, as amended (**CEA**).
6. the Applicant may reasonably rely on a written representation from the Ontario User that specifies either that it is appropriately registered as applicable under Ontario securities laws or is exempt from or not subject to those requirements.
7. For each Ontario User provided direct access to its SEF, the Applicant will require, as part of its application documentation or continued access to the SEF, the Ontario User to represent that it is appropriately registered as applicable under Ontario securities laws or is exempt from or not subject to those requirements.
8. the Applicant will require Ontario Users to notify the Applicant if their registration as applicable under Ontario securities laws has been revoked, suspended, or amended by the Commission or if they are no longer exempt from or become subject to those requirements and, following notice from the Ontario User and subject to applicable laws, the Applicant will promptly restrict the Ontario User's access to the Applicant if the Ontario User is no longer appropriately registered or exempt from those requirements.
9. the Applicant must make available to Ontario Users appropriate training for each person who has access to trade on the Applicant's facilities.

Trading by Ontario Users

10. the Applicant will not provide access to an Ontario User to trading in products other than swaps and security-based swaps, as defined in section 1a of the CEA, without prior Commission approval.

Submission to Jurisdiction and Agent for Service

11. With respect to a proceeding brought by the Commission arising out of, related to, concerning or in any other manner connected with the Commission's regulation and oversight of the activities of the Applicant in Ontario, the Applicant will submit to the non-exclusive jurisdiction of (i) the courts and administrative tribunals of Ontario and (ii) an administrative proceeding in Ontario.
12. the Applicant will file with the Commission a valid and binding appointment of an agent for service in Ontario upon whom the Commission may serve a notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal, penal or other proceeding arising out of or relating to or concerning the Commission's regulation and oversight of the Applicant's activities in Ontario.

Disclosure

13. the Applicant will provide to its Ontario Users disclosure that states that:

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- (a) rights and remedies against the Applicant may only be governed by the laws of the U.S., rather than the laws of Ontario and may be required to be pursued in the U.S. rather than in Ontario;
- (b) the rules applicable to trading on the Applicant may be governed by the laws of the U.S., rather than the laws of Ontario; and
- (c) the Applicant is regulated by the CFTC, rather than the Commission.

Filings with the CFTC

- 14. the Applicant will promptly provide staff of the Commission copies of all rules of the Applicant, and amendments to those rules, that it files with the CFTC under the regulations pertaining to self-certification and/or approval.
- 15. the Applicant will promptly provide staff of the Commission copies of all amendments to Applicant's Form SEF (including Exhibits to Form SEF) that it files with the CFTC.
- 16. the Applicant will promptly provide to the Commission copies of all product specifications and amended product specification specifications that it files with the CFTC under the regulations pertaining to self-certification and/or approval.
- 17. the Applicant will promptly provide staff of the Commission the following information to the extent it is required to provide to or file such information with the CFTC:
 - (a) the annual Board of Directors' report regarding the activities of the board and its committees;
 - (b) the annual unaudited financial statements of the Applicant;
 - (c) details of any material legal proceeding instituted against the Applicant;
 - (d) notification that the Applicant has instituted a petition for a judgment of bankruptcy or insolvency or similar relief, or to wind up or liquidate the Applicant or has a proceeding for any such petition instituted against it; and
 - (e) the appointment of a receiver or the making of any voluntary arrangement with creditors.

Prompt Notice or Filing

- 18. the Applicant will promptly notify staff of the Commission of any of the following:
 - (a) any material change to its business or operations or the information provided in the Application, including, but not limited to:
 - (i) changes to the regulatory oversight by the CFTC;
 - (ii) the corporate governance structure of the Applicant;
 - (iii) the access model, including eligibility criteria, for Ontario Participants;
 - (iv) systems and technology; and
 - (v) the clearing and settlement arrangements for the Applicant;
 - (b) any change in the Applicant regulations or the laws, rules and regulations in the U.S. relevant to futures and options where such change may materially affect its ability to meet the criteria set out in Appendix 1 to this schedule;
 - (c) any condition or change in circumstances whereby the Applicant is unable or anticipates it will not be able to continue to meet the SEF Core Principles established by the CFTC or any other applicable requirements of the Commodity Exchange Act or CFTC regulations;
 - (d) any known investigations of, or disciplinary action against, the Applicant by the CFTC or any other regulatory authority to which it is subject;

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- (e) any matter known to the Applicant that may affect its financial or operational viability, including, but not limited to, any significant system failure or interruption; and
 - (f) any default, insolvency, or bankruptcy of the Applicant participant known to the Applicant or its representatives that may have a material, adverse impact upon the Applicant, a clearing agency or any Ontario Participant.
19. the Applicant will promptly file with staff of the Commission copies of any Rule Enforcement Review report regarding the Applicant once issued as final by the CFTC.

Quarterly Reporting

20. the Applicant will maintain the following updated information and submit such information in a manner and form acceptable to the Commission on a quarterly basis (within 30 days of the end of each calendar quarter), and at any time promptly upon the request of staff of the Commission:
- (a) a current list of all Ontario Users;
 - (b) a list of all Ontario Users against whom disciplinary action has been taken in the last quarter by the Applicant, or, to the best of Applicant's knowledge, by the CFTC or SEC with respect to such Ontario Users' activities on the Applicant;
 - (c) a list of all investigations by the Applicant relating to Ontario Users;
 - (d) a list of all Ontario applicants for status as a participant who were denied such status or access to the Applicant during the quarter, together with the reasons for each such denial;
 - (e) a list of all products available for trading during the quarter, identifying any additions, deletions, or changes since the prior quarter;
 - (f) for each product,
 - (i) the total trading volume and value originating from Ontario Users, presented on a per Ontario User basis, and
 - (ii) the proportion of worldwide trading volume and value on the Applicant conducted by Ontario Users, presented in the aggregate for such Ontario Users; and
 - (g) a list outlining each incident of a material systems failure, malfunction or delay that occurred at any time during the quarter for any system relating to trading activity, including trading, routing or data, specifically identifying the date, duration and reason for the failure, malfunction or delay, and noting any corrective action taken.

Annual Reporting

21. the Applicant will arrange to have the annual report and annual audited financial statements of the Applicant filed with the Commission promptly after their issuance.
22. the Applicant will arrange to have the annual "Service Organization Controls 1" report prepared for the Applicant filed with the Commission promptly after the report is issued as final by its independent auditor.

Information Sharing

23. the Applicant will provide such information as may be requested from time to time by, and otherwise cooperate with, the Commission or its staff, subject to any applicable privacy or other laws (including solicitor-client privilege) governing the sharing of information and the protection of personal information.