



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-6700

Division of Swap Dealer
and
Intermediary Oversight

Thomas Smith
Acting Director

CFTC Letter No. 15-22
No Action
March 31, 2015
Division of Swap Dealer and Intermediary Oversight

Re: Section 4m(1)

Dear :

This is in response to your letter to the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission” or “CFTC”) dated December 20, 2013, as supplemented by your letter dated March 18, 2014, your e-mail messages dated March 28, 2014 and May 23, 2014, and telephone conversations with Division staff (collectively, “Correspondence”). By the Correspondence, you request on behalf of “A”, a Canadian company (“A”), confirmation that neither “A”, any of its subsidiaries, nor any employee, officer, director or manager of “A” or its subsidiaries will be required to register as a commodity pool operator (“CPO”) or commodity trading advisor (“CTA”) under Section 4m(1) of the Commodity Exchange Act (“Act”)¹ if “A” acquires interests in certain collective investment vehicles in the United States through United States subsidiaries wholly-owned by “A” and/or its Canadian Affiliates. For purposes of this letter “Canadian Affiliates” means “A’s” shareholders (the “B” and four Canadian pension funds) and Canadian companies directly or indirectly wholly-owned by “A” and/or its shareholders.

Based upon the representations made in the Correspondence, we understand the relevant facts to be as follows. “A” is a real estate subsidiary of the “B”. The “B” was formed by the Province of “C” to manage, and achieve return on capital, with respect to money deposited with it by various pension and insurance plans and by “C” government agencies, *inter alia*. Under “C” law, the “B” may acquire an interest in an entity that invests in real property (or that holds interests in other entities that invest in real property). The “B” owns 93 percent of “A’s” shares, and the remaining seven percent are owned by four Canadian pension funds.

¹ 7 U.S.C. 6m(1) (2012). The Act may be accessed through the Commission’s Web site, www.cftc.gov.

“A” and its Canadian Affiliates make real estate investments in the United States by means of two types of investment vehicles. In the Correspondence you refer to an investment vehicle that holds direct interests in real property as a “Direct Investment.”² An investment vehicle that holds indirect interests in real property (for example, by acquiring interests in limited partnerships that hold direct interests in real property) you have referred to as a “Collective Investment.” Your request concerns the intention of “A” to use United States subsidiaries wholly-owned by “A” and/or its Canadian Affiliates (“Subsidiaries”) to acquire interests in Collective Investments that are commodity pools.³ The purpose for conducting such transactions through Subsidiaries will be primarily to address various United States tax payment or reporting requirements.

Each Subsidiary is a corporation, limited partnership, or limited liability company organized under the laws of a state of the United States. No one other than “A”, its Canadian Affiliates, or another Subsidiary will hold an interest in a Subsidiary, and thus no Subsidiary has any outside or third-party United States investors. All of the Subsidiaries are managed by “A”, which chooses the investments to be held by each Subsidiary and negotiates the terms of those investments. Any officer, director, manager or employee of any Subsidiary would also be an officer, director, manager or employee of “A”. The officers and directors of Subsidiaries that are organized as corporations, and the natural persons involved in the management and operation of Subsidiaries organized as limited partnerships or as limited liability companies, are typically non-United States persons. No person who is an officer, director, managing director or holder of any similar position in a Subsidiary is subject to a statutory disqualification under Section 8a(2) or 8a(3) of the Act.⁴

Collective Investments are formed and operated by persons unaffiliated with “A”, the Subsidiaries, or the Canadian Affiliates, and as noted above, Collective Investments own interests in other entities that directly or indirectly hold interests in real property. In connection with such holdings, a Collective Investment may use commodity interests for purposes such as hedging interest rate exposure or currency exchange rate exposure. At the present time, if “A” chooses to participate in a Collective Investment that is a pool, it does so through a non-United States affiliate, and not through a Subsidiary.⁵

² For purposes of this letter, without making our own independent finding, we are accepting as correct your determination, based on CFTC Staff Letter 12-13, that the Direct Investments are not commodity pools. Staff Letter 12-13 may be accessed through the Commission’s Web site.

³ At the present time, “A” and its Canadian Affiliates hold any interests they may have in Collective Investments that are commodity pools through non-U.S. affiliates.

⁴ 7 U.S.C. §12a(2) or 12(a)(3).

⁵ Currently, no Subsidiary directly holds swaps or engages in direct derivatives-based hedging or speculative trading activities. Although such activities are not presently contemplated, they may be undertaken in the future. By this letter, the Division is not

Regulation 3.10(c)(3) provides, in pertinent part, that “[a] person located outside the United States, its territories or possessions engaged in the activity of . . . a commodity pool operator . . . only on behalf of persons located outside the United States, its territories or possessions, is not required to register in such capacity” so long as any commodity interest transactions executed or made on or subject to a contract market or a swap execution facility are submitted for clearing through a registered futures commission merchant.⁶ As the Commission explained, its purpose in adopting Regulation 3.10(c)(3) was to codify its longstanding policy⁷ and provide an exemption from registration for intermediaries such as CPOs acting solely on behalf of customers located outside the United States.⁸

“A” is a Canadian person located in Canada, all of its owners are Canadian entities, and all of the funds that “A” invests are from non-United States sources. Thus, if “A” were participating directly in a United States commodity pool operated by a registered CPO (or by a person exempt from CPO registration) and that was the extent of “A’s” commodity interest trading activity, neither “A” nor any principal of “A” would be required to register as a CPO. However, for tax purposes, “A” proposes to act through a Subsidiary in the United States that is managed by “A” and that is wholly-owned by “A” and/or its Canadian Affiliates. Consistent with the purpose of Regulation 3.10(c)(3), the Division will not recommend that the Commission commence an enforcement action based solely upon the failure of any of “A”, its Canadian Affiliates, the Subsidiaries, or their respective employees, officers, directors or managers to register as a CPO if “A” acquires interests in the Collective Investments through the Subsidiaries, as stated above.

Similarly, under the facts presented, the Division does not believe that CTA registration should be required of “A”, the Subsidiaries or any of their respective employees, officers, directors or managers. The Subsidiaries would be acting entirely under the direction of “A”. In making trading decisions for the Subsidiaries (regarding participating in Collective Investments that are pools), “A” would be providing advice to entities wholly-owned by “A”, its shareholders, and/or Canadian companies under common ownership and control with “A”. Accordingly, the Division will not recommend that the Commission commence an enforcement action based solely upon the failure of any of “A”, the Subsidiaries, or their respective

considering or addressing any regulatory requirements that such activities, if undertaken, may trigger.

⁶ Commission Regulations are found at 17 C.F.R. Chapter I (2014), and may be accessed through the Commission’s Web site.

⁷ See, e.g., CFTC Staff Letter 76-21 [1976 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,222 (Aug. 15, 1976).

⁸ 72 Fed. Reg. 63976, 63977 (Nov. 14, 2007).

employees, officers, directors or managers to register as a CTA in connection with “A’s” acquisition of interests in the Collective Investments through the Subsidiaries.⁹

This letter is applicable to “A”, its Canadian Affiliates, the Subsidiaries, and their respective employees, officers, directors and managers solely in connection with participating in the Collective Investments. It does not excuse any of such persons from compliance with any other applicable requirements contained in the Act or in the Commission’s regulations issued thereunder. For example, each remains subject to all antifraud provisions, to all reporting requirements for traders, and to all otherwise applicable provisions of Part 4.¹⁰

This letter and the positions taken herein are based upon the representations made to the Division. Any different, changed, or omitted material facts or circumstances might render this letter void. You must notify the Division immediately in the event that the operations of “A”, the Subsidiaries or the Collective Investments change in any material way from those represented to us. Further, the no-action positions taken in this letter represent the views of this Division only and do not necessarily represent the views of the Commission or of any other office or division of the Commission.

If you have any questions concerning this correspondence, please contact the undersigned or Christopher W. Cummings, Special Counsel, at (202) 418-6700.

Very truly yours,

Thomas Smith

⁹ See also Regulation 4.14(a)(5), which exempts from CTA registration a person who “is exempt from registration as a commodity pool operator and the person’s commodity trading advice is directed solely to, and for the sole use of, the pool or pools for which it is so exempt.”

¹⁰ See, e.g., Regulations 4.20 and 4.41.