

2.2.14 SwapEx, 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
SWAPEX, LLC
(SwapEx)**

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

WHEREAS SwapEx has filed an application dated October 8, 2013 (**Application**) with the Ontario Securities Commission (**Commission**) requesting an interim order pursuant to section 147 of the Act exempting SwapEx from the requirement to be recognized as an exchange under subsection 21(1) of the Act (**Exchange Relief**);

AND WHEREAS SwapEx has represented to the Commission that:

- 1.1 SwapEx is a Delaware limited liability company formed on March 27, 2012 and is a wholly-owned direct subsidiary of SwapEx Limited (“**SwapEx Ltd**”), a private company limited by shares organized under the laws of England and Wales. SwapEx Ltd. is a wholly-owned direct subsidiary of State Street Corporation (“**SSC**”), which is a Massachusetts corporation and public company. SSC is also the parent company of State Street Bank and Trust Company. SwapEx is a Delaware limited liability company that is an indirect affiliate of State Street Bank and Trust. SwapEx is located at 1230 Avenue of the Americas, New York, NY 10020.
- 1.2 SwapEx currently lists for trading foreign exchange non-deliverable forwards (“**NDFs**”) that are not presently listed for clearing by a clearing agency (and thus are settled bilaterally) as well as interest rate swaps (“**IRS**”) for which the Chicago Mercantile Exchange will act as a CFTC-regulated Derivatives Clearing Organization (“**DCO**”). SwapEx may support the trading of IRS or NDFs that are cleared at other clearinghouses in the future.
- 1.3 The CFTC has mandated that every swap execution facility (“**SEF**”) must, at a minimum, make available an order book for trading of every instrument listed on the SEF. The CFTC has also permitted SEFs to make request for quote (“**RFQ**”) trading available to its participants and, for swaps that have not been designated as required to be cleared or made available for trading by the CFTC, any other means of execution. SwapEx offers both order book and RFQ trading for all instruments listed for trading on its platform.
- 1.4 In the United States, SwapEx operates under the jurisdiction of the Commodity Futures Trading Commission (“**CFTC**”) and has obtained temporary registration with the CFTC to operate a SEF; SwapEx has a Chief Compliance Officer who monitors its compliance with all regulatory, legal, and internal rules, policies and procedures and is also responsible for supervising SwapEx’s self-regulatory obligations. In addition, SwapEx has entered into a Regulatory Services Agreement with the National Futures Association (“**NFA**”), pursuant to which NFA will provide certain regulatory compliance services to SwapEx, including responsibility for the Company’s on-going market surveillance functions on a trade date plus one basis. SwapEx, through its Market Regulation Department headed by the Chief Compliance Officer, will conduct real-time market surveillance activities.
- 1.5 SwapEx 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;
- 1.6 Because SwapEx regulates the conduct of its participants, it is considered by the Commission to be an exchange;

- 1.7 Because SwapEx intends to have participants located in Ontario, it would be considered by the Commission to be carrying on business as an exchange in Ontario and would be required to be recognized as such or exempted from recognition pursuant to section 21 of the Act;
- 1.8 SwapEx has no physical presence in Ontario and does not otherwise carry on business in Ontario except as described above; and
- 1.9 SwapEx intends to file a full application to the Commission for a subsequent order exempting it from the requirement to be recognized as an exchange pursuant to section 147 of the Act (**Subsequent Order**);

AND WHEREAS the products traded on SwapEx are not commodity futures contracts as defined in the *Commodity Futures Act* (Ontario) and SwapEx 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 SwapEx's activities on an ongoing basis to determine whether it is appropriate for the Exchange Relief to continue to be granted subject to the terms and conditions set out in Schedule "A" to this order;

AND WHEREAS SwapEx has acknowledged to the Commission that the scope of the Exchange Relief 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 SwapEx'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 SwapEx to the Commission, the Commission has determined that the granting of the Exchange Relief would not be prejudicial to the public interest;

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

PROVIDED THAT:

1. This Order terminates on the earlier of (i) October 29, 2014 and (ii) the effective date of the Subsequent Order;
2. SwapEx complies with the terms and conditions contained in Schedule "A."; and
3. SwapEx shall file a full application to the Commission for the Subsequent Order by January 31, 2014.

DATED October 29, 2013.

"Judith Robertson"

"James Turner"

SCHEDULE "A"

TERMS AND CONDITIONS

Regulation and Oversight of SwapEx

1. SwapEx 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. SwapEx will continue to comply with the ongoing requirements applicable to it as a SEF registered with the CFTC.
3. SwapEx 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. SwapEx must do everything within its control, which includes cooperating with the Commission as needed, to cause SwapEx 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. SwapEx 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. SwapEx 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, SwapEx 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. SwapEx will require Ontario Users to notify SwapEx 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, SwapEx will promptly restrict the Ontario User's access to SwapEx if the Ontario User is no longer appropriately registered or exempt from those requirements.
9. SwapEx must make available to Ontario Users appropriate training for each person who has access to trade on SwapEx's facilities.

Trading by Ontario Users

10. SwapEx will not provide access to an Ontario User to trade 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 SwapEx in Ontario, SwapEx will submit to the non-exclusive jurisdiction of (i) the courts and administrative tribunals of Ontario and (ii) an administrative proceeding in Ontario.
12. SwapEx 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 SwapEx's activities in Ontario.

Disclosure

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

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- (a) rights and remedies against SwapEx 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 SwapEx may be governed by the laws of the U.S., rather than the laws of Ontario; and
- (c) SwapEx is regulated by the CFTC, rather than the Commission.

Filings with the CFTC

- 14. SwapEx will promptly provide staff of the Commission copies of all rules of SwapEx, and amendments to those rules, that it files with the CFTC under the regulations pertaining to self-certification and/or approval.
- 15. SwapEx will promptly provide staff of the Commission copies of all amendments to SwapEx's Form SEF (including Exhibits to Form SEF) that it files with the CFTC.
- 16. SwapEx 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. SwapEx 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 SwapEx;
 - (c) details of any material legal proceeding instituted against SwapEx;
 - (d) notification that SwapEx has instituted a petition for a judgment of bankruptcy or insolvency or similar relief, or to wind up or liquidate SwapEx 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. SwapEx 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 SwapEx;
 - (iii) the access model, including eligibility criteria, for Ontario Participants;
 - (iv) systems and technology; and
 - (v) the clearing and settlement arrangements for SwapEx;
 - (b) any change in SwapEx 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 SwapEx 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, SwapEx by the CFTC or any other regulatory authority to which it is subject;

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- (e) any matter known to SwapEx 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 SwapEx participant known to SwapEx or its representatives that may have a material, adverse impact upon SwapEx, a clearing agency or any Ontario Participant.
19. SwapEx will promptly file with staff of the Commission copies of any Rule Enforcement Review report regarding SwapEx once issued as final by the CFTC.

Quarterly Reporting

20. SwapEx 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 SwapEx, or, to the best of SwapEx's knowledge, by the CFTC or SEC with respect to such Ontario Users' activities on SwapEx;
 - (c) a list of all investigations by SwapEx relating to Ontario Users;
 - (d) a list of all Ontario applicants for status as a participant who were denied such status or access to SwapEx 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 SwapEx 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. SwapEx will arrange to have the annual report, annual unaudited financial statements of SwapEx, and, if otherwise prepared, audited financial statements of SwapEx filed with the Commission promptly after their issuance.
22. SwapEx will arrange to have any annual "Service Organization Controls 1" report prepared for SwapEx filed with the Commission promptly after the report is issued as final by its independent auditor.

Information Sharing

23. SwapEx 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.