

Headnote

Application for a ruling pursuant to section 38 of the *Commodity Futures Act* granting relief from the dealer registration requirement in section 22 of the CFA to allow the Filer, an investment dealer and member of the Investment Industry Regulatory Organization of Canada (**IIROC**), to use employees of a Designated Foreign Affiliate of the Filer for After-Hours Trading in commodity futures contracts and commodity futures options on the Bourse de Montréal Inc. – Relief granted, subject to terms and conditions

Statutes Cited

Commodity Futures Act, R.S.O. 1990, c. C.20. as am., subsections 22(1) and 38(1).

October 5, 2018

**IN THE MATTER OF
THE COMMODITY FUTURES ACT
R.S.O. 1990, c. C. 20, AS AMENDED
(the CFA)**

AND

**IN THE MATTER OF
MERRILL LYNCH CANADA INC.
(the Filer)**

**RULING
(Subsection 38(1) of the CFA)**

UPON the application (the **Application**) of the Filer to the Ontario Securities Commission (the **Commission**) for a ruling of the Commission, pursuant to subsection 38(1) of the CFA, that the Designated Foreign Affiliate Employees (as defined below) of the Filer are not subject to the dealer registration requirement in the CFA when conducting Extended Hours Activities (as defined below) on the Bourse de Montréal Inc. (the **MX**), subject to the terms and conditions set out below (the **Exemption Sought**).

AND WHEREAS for the purposes of this ruling (the **Decision**):

- (i) “**dealer registration requirement in the CFA**” means the provisions of section 22 of the CFA that prohibit a person or company from trading in Exchange-Traded Futures unless the person or company satisfies the applicable provisions of section 22(1)(a) of the CFA;
- (ii) “**Exchange-Traded Future**” means a commodity futures contract or a commodity futures option as those terms are defined in subsection 1(1) of the CFA; and

- (iii) terms used in this Decision that are defined in the OSA, and not otherwise defined in this Decision or in the CFA, shall have the same meaning as in the OSA, unless the context otherwise requires;

AND UPON considering the Application and the recommendation of staff of the Commission;

AND UPON the Filer having represented to the Commission and the Director as follows:

The Filer

1. The Filer is a corporation formed under the laws of Canada. The head office of the Filer is located in Toronto, Ontario.
2. The Filer is registered as an investment dealer under the securities legislation of all the jurisdictions of Canada except Nunavut; is registered as a futures commission merchant under the commodity futures legislation of Ontario and Manitoba; and is registered as a dealer under the derivatives legislation of Québec.
3. The Filer is a member of the Investment Industry Regulatory Organization of Canada (**IIROC**) and the TSX Venture Exchange, an approved participant of the MX and a participating organization of the Toronto Stock Exchange.
4. The Filer is not in default of securities or commodity futures legislation in any jurisdiction of Canada.
5. Merrill Lynch International (**MLI** or the **Designated Foreign Affiliate**) is a private unlimited company incorporated in England and Wales. The head office of MLI is located in London, England.
6. The Filer and MLI are each a wholly-owned indirect subsidiary of Bank of America Corporation.
7. MLI is a United Kingdom-based broker dealer in securities and dealer in equity derivatives. MLI is authorised by the Prudential Regulation Authority and regulated by the Financial Conduct Authority and Prudential Regulation Authority.
8. MLI holds memberships and/or has third-party clearing relationships with commodity and financial futures exchanges and clearing associations, including the London Stock Exchange. It also carries positions reflecting trades executed on other exchanges through affiliates and/or third-party clearing brokers.

The MX Extended Trading Hours Amendments

9. The MX, based in Montréal, Québec, operates an exchange for options, commodity futures contracts and commodity futures options, and offers access to trading in those to market participants in Canada.

10. On July 9, 2018, the MX announced that the MX had approved amendments to its rules and procedures in order to accommodate the extension of the MX's trading hours. As a result of these amendments, it is anticipated that, commencing October 9, 2018, trading of certain products on the MX will commence at 2:00 a.m. Eastern Time (**ET**) rather than the current 6:00 a.m. ET.
11. As set out in MX Circular 111-18, in order to accommodate this earlier trading, the MX amended its rules to allow participants on the MX to have employees of affiliated corporations, including foreign affiliates, become an approved person of the MX participant and thus be able to handle trading requests originating from the MX participant's clients or clients of the MX participant's affiliated corporations or subsidiaries.

Application of the dealer registration requirement in the CFA to Designated Foreign Affiliate Employees

12. The Filer is an MX approved participant and MLI is an affiliated corporation. The Filer wishes to make use of certain designated employees of MLI (the **Designated Foreign Affiliate Employees**) to handle trading requests on the MX from the Filer's clients and clients of the Filer's affiliated corporations or subsidiaries during the MX's extended trading hours from 2:00 a.m. ET to 6:00 a.m. ET each day on which the MX is open for trading (the **Extended Hours Activities**).
13. The dealer registration requirement in the CFA requires an individual to be registered to act as a dealing representative on behalf of a registered firm. The Exemption Sought is intended to provide the Filer with an exemption from (i) the requirement that the Filer use only registered dealing representatives to conduct the Extended Hours Activities; and (ii) the requirement that the employees of MLI who will be conducting the Extended Hours Activities be registered as dealing representatives of the Filer.
14. The Filer seeks an exemption from the dealer registration requirement in the CFA because, in the absence of such exemption, each employee of MLI who was to trade on behalf of the Filer would be required to become individually registered and licensed in Canada. The Filer believes this would be duplicative since the Designated Foreign Affiliate Employees are certified under applicable United Kingdom law, would be supervised by the Filer's designated supervisors and would otherwise be subject to the conditions set forth below. The Filer believes this would be unduly onerous in light of the limited trading activities the Designated Foreign Affiliate Employees would be conducting on behalf of the Filer, namely only handling client orders, and only during the period from 2:00 a.m. ET to 6:00 a.m. ET.
15. The Filer has also applied to IIROC for an exemption from the registered representative requirements that are found in IIROC Dealer Member Rules 18.2(a) and 18.2(c) and the requirement to enter into an employee or agent relationship with the person conducting securities related business on its behalf that is found in IIROC Dealer Member Rule 39.3.

16. The Filer anticipates that the IROC Relief, if granted, will be subject to certain conditions, including:
 - (a) The Designated Foreign Affiliate Employees must be certified under the applicable laws of the United Kingdom in a category that permits trading the types of products which they will be trading on the MX.
 - (b) The Designated Foreign Affiliate Employees will be permitted to accept and enter orders from clients of the Filer or clients of the Filer's affiliated corporations or subsidiaries during the period from 2:00 a.m. ET to 6:00 a.m. ET.
 - (c) The Filer retains all responsibilities for its client accounts.
 - (d) The actions of the Designated Foreign Affiliate Employees will be supervised by specific designated supervisors of the Filer (the **Designated Supervisors**), each of whom is qualified to supervise trading in futures contracts, futures contract options and options.
17. The Exemption Sought would apply to Designated Foreign Affiliate Employees who are designated and recorded on a list maintained by the Designated Supervisors, which list would be subject to review by IROC upon request.
18. The Filer and MLI will enter into a services agreement pursuant to which
 - (a) MLI will, among other things, agree to designate members of its staff to serve as Designated Foreign Affiliate Employees who are properly registered, licensed, certified or authorized in their home jurisdiction and sufficiently skilled and familiar to undertake such trading and front office activity, and further agree that the activities of the Designated Foreign Affiliate Employees permitted under this exemptive relief shall be supervised by the Designated Supervisors of the Filer; and
 - (b) the Filer will assume all responsibility for the actions of the Designated Foreign Affiliate Employees and of MLI that relate to the Filer's clients regarding this trading on MX, and the Filer will acknowledge that it will be liable under IROC rules for such actions.
20. All MX trading rules will apply to orders entered by the Designated Foreign Affiliate Employees.
21. Other than individual registration, all other existing Canadian regulatory requirements would continue to apply to this arrangement, including without limitation:
 - (a) the Filer's client accounts would continue to be carried on the books of the Filer;
 - (b) all communications with the Filer's clients will continue to be in the name of the Filer; and

- (c) the Filer's client account monies, security and property will continue to be held by the Filer or its approved custodian.
22. The Filer will establish and maintain written policies and procedures that address the performance and supervision requirements relating to MX extended trading hours.
23. The Filer will disclose this extended trading hours arrangement to clients for its MX trading services.

AND UPON the Commission and the Director being satisfied that it would not be prejudicial to the public interest to do so;

IT IS RULED pursuant to subsection 38(1) of the CFA that the Exemption Sought is granted, so long as:

- (a) the Designated Foreign Affiliate and the Designated Foreign Affiliate Employees are registered, licensed, certified or authorized under the applicable laws of the foreign jurisdiction in which the head office or principal place of business of the Designated Foreign Affiliate is located in a category that permits trading the type of products which the Designated Foreign Affiliate Employees will be trading on the MX;
- (b) the Designated Foreign Affiliate Employees are permitted to accept and enter orders from clients of the Filer or clients of the Filer's affiliated corporations or subsidiaries on behalf of the Filer during the period from 2:00 a.m. ET to 6:00 a.m. ET;
- (c) the Filer retains all responsibilities for its client accounts;
- (d) the actions of the Designated Foreign Affiliate Employees will be supervised by the Designated Supervisors, each of whom is qualified to supervise trading in futures contracts, futures contract options and options;
- (e) the Filer and the Designated Foreign Affiliate enter into a services agreement substantially as described in paragraph 18, and such agreement remains in effect; and
- (f) the Filer has applied for and obtained from IIROC an exemption from the registered representative requirements that are found in the IIROC Dealer Member Rules, and any other requirements of IIROC that IIROC reasonably determines is applicable to the Firm and the Designated Foreign Affiliate Employees in connection with conducting the Extended Hours Activities (collectively, the **IIROC Relief**) and remains in compliance with the terms and conditions of the IIROC Relief.

“Tim Moseley”

Vice-Chair

Ontario Securities Commission

“Grant Vingoe”

Vice-Chair

Ontario Securities Commission