TACT ASSET MANAGEMENT INC.
Investment Advisers Act of 1940 — Section 203(a)
October 24, 2012
RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

IM Ref. No. 201210171155

Your letter dated October 23, 2012 requests our assurance that we would not recommend enforcement action to the Securities and Exchange Commission (the "Commission") under Section 203(a) of the Investment Advisers Act of 1940 (the "Advisers Act") against TACT Asset Management Inc. ("TACT") if TACT does not register with the Commission as an investment adviser under the Advisers Act.

Facts

You state the following: TACT is a corporation organized under the laws of the State of Delaware that has its only place of business located in the state of New York. Nipponkoa Insurance Co., Ltd. ("Nipponkoa") is an insurance company organized under the laws of Japan. Nipponkoa is licensed in Japan to conduct its insurance business and is regulated by the Financial Services Agency of Japan, the Japanese insurance regulator. Nipponkoa satisfies the requirements to be a "foreign insurance company" as defined in Rule 3a-6 under the Investment Company Act of 1940 (the "1940 Act").1 TACT provides investment advice for, and assists with the management of, the portion of Nipponkoa's general proprietary account invested in United States securities. TACT has no clients other than Nipponkoa.

Legal Analysis

Section 203(a) of the Advisers Act states, in relevant part that, except as provided in Section 203(b), it shall be unlawful for any investment adviser, unless registered under this Section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser. Section 203(b)(2) of the Advisers Act provides that Section 203(a) does not apply to an investment adviser whose only clients are insurance companies. "Insurance company" is defined in Section 202(a)(12) of the Advisers Act as having the same meaning as in the 1940 Act.

The reference in Section 202(a)(12) of the Advisers Act to the "meaning" of insurance company under the 1940 Act is not clear. Section 202(a)(12) could be interpreted to refer to the definition of "insurance company" in Section 2(a)(17) of the 1940 Act, which clearly includes only U.S. insurance companies.2 The Commission, however, adopted Rule 3a-6 in 1991 which "adopt[s] the general approach [for foreign insurance companies] that the [1940] Act takes with regard to United States … insurance companies" and "effectively removes foreign … insurance companies from the scope of the [1940] Act."3 Accordingly, Section 202(a)(12) of the Advisers Act also could be interpreted to include both insurance companies that meet the definition under Section 2(a)(17) of the 1940 Act, as well as those that qualify under Rule 3a-6 under the 1940 Act.4

You argue that investment advisers whose only clients are insurance companies, whether those clients are domestic insurance companies, foreign insurance companies that meet the requirements of Rule 3a-6 or a mixture of such insurance companies, should not be required to register with the Commission in reliance on Section 203(b)(2) of the Advisers Act. In particular, you assert that the adviser's role is the same whether they are advising domestic or foreign insurance companies. You argue that, in both cases, the adviser provides investment advice solely to companies engaged primarily in the business of writing insurance and reinsurance and that are regulated by their local insurance regulators. Moreover, you argue that foreign insurance companies that can rely on Rule 3a-6 are no more in need of the protections of the Advisers Act if they retain an adviser than domestic insurance companies. Indeed, you argue that the Commission has a greater interest in protecting domestic insurance companies and their customers and investors than protecting foreign insurance companies and their customers and investors.

Conclusion

Based on the facts and representations set forth in your letter, we would not recommend enforcement action to the Commission against TACT under Section 203(a) of the Advisers Act if TACT does not

register as an investment adviser under the Advisers Act. This response expresses our view on enforcement action only and does not express any legal or interpretive position on the issues presented.5 Because our position is based upon all of the facts and representations, any different facts or representations may require a different conclusion.

Michael S. Didiuk
Senior Counsel

Footnotes

1 “Foreign insurance company” under Rule 3a-6 under the 1940 Act means “an insurance company incorporated or organized under the laws of a country other than the United States, or a political subdivision of a country other than the United States, that is:

> (i) Regulated as such by that country’s or subdivision’s government or any agency thereof;
>
> (ii) Engaged primarily and predominantly in:
>
> > (A) The writing of insurance agreements of the type specified in section 3(a)(8) of the Securities Act of 1933, except for the substitution of supervision by foreign government insurance regulators for the regulators referred to in that section; or
> >
> > (B) The reinsurance of risks on such agreements underwritten by insurance companies; and
>
> (iii) Not operated for the purpose of evading the provisions of the Act. Nothing in this rule shall be construed to include within the definition of ‘foreign insurance company’ a separate account or other pool of assets organized in the form of a trust or otherwise in which interests are separately offered.”

2 Section 2(a)(17) provides that “insurance company” means “a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner or a similar official or agency of a State; or any receiver or similar official or any liquidating agent for such company, in his capacity as such.”

3 See Exception From the Definition of Investment Company for Foreign Banks and Foreign Insurance Companies, Investment Company Act Release No. 18381 (Nov. 4, 1991) (“Adopting Release”). Rule 3a-6 generally provides that, notwithstanding Section 3(a)(1)(A) or 3(a)(1)(C) of the 1940 Act, a foreign insurance company shall not be considered an investment company for purposes of the 1940 Act.

4 But see Adopting Release at n.9.

5 You do not request guidance, and we take no position, regarding the meaning of “insurance company” under the Advisers Act for any other purposes (e.g., the definition of “dealer” under Section 202(a)(7) of the Adviser Act).