

and agree to fulfill their responsibilities under the order. At the time of its investment in Shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), an Acquiring Fund will notify the Fund of the investment. At such time, the Acquiring Fund will also transmit to the Fund a list of the names of each Acquiring Funds Affiliate and Underwriting Affiliate. The Acquiring Fund will notify the Fund of any changes to the list of names as soon as reasonably practicable after a change occurs. The Fund and the Acquiring Fund will maintain and preserve a copy of the order, the Acquiring Fund Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

13. The Acquiring Fund Adviser, Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Acquiring Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b-1 under the Act) received from the Fund by the Acquiring Fund Adviser, Trustee or Sponsor, or an affiliated person of the Acquiring Fund Adviser, Trustee or Sponsor, other than any advisory fees paid to the Acquiring Fund Adviser, Trustee, or Sponsor, or its affiliated person by the Fund, in connection with the investment by the Acquiring Fund in the Fund. Any Acquiring Fund Sub-Adviser will waive fees otherwise payable to the Acquiring Fund Sub-Adviser, directly or indirectly, by the Acquiring Management Company in an amount at least equal to any compensation received from a Fund by the Acquiring Fund Sub-Adviser, or an affiliated person of the Acquiring Fund Sub-Adviser, other than any advisory fees paid to the Acquiring Fund Sub-Adviser or its affiliated person by the Fund, in connection with any investment by the Acquiring Management Company in the Fund made at the direction of the Acquiring Fund Sub-Adviser. In the event that the Acquiring Fund Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Acquiring Management Company.

14. Any sales charges and/or service fees charged with respect to shares of an Acquiring Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

15. No Fund will acquire securities of an investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except

to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes.

16. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Acquiring Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such advisory contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Acquiring Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Acquiring Management Company.

For the Commission, by the Division of Investment Management, under delegated authority.

**Kevin M. O'Neill,**  
Deputy Secretary.

[FR Doc. 2011-32935 Filed 12-22-11; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29889; 812-13777]

### Rio Tinto plc and Rio Tinto Limited; Notice of Application

December 19, 2011.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of application under section 3(b)(2) and 45(a) of the Investment Company Act of 1940 (the "Act").

**SUMMARY:** *Summary of Application:* Rio Tinto plc ("RTP") and Rio Tinto Limited ("RTL", together with RTP, "Rio Tinto" or the "Group") seek an order under section 3(b)(2) of the Act declaring Rio Tinto to be primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities. Rio Tinto is a leading international mining group. Applicants also seek an order under section 45(a) of the Act granting confidential treatment with respect to certain financial and other information.

**Filing Date:** The application was filed on May 27, 2010, and amended on December 16, 2010, and July 1, 2011.

**Hearing or Notification of Hearing:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may

request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 13, 2012, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. Applicants, RTP, 2 Eastbourne Terrace, London W2 6LG, United Kingdom and RTL, ABN 96 004 458 404, Level 33, 120 Collins Street, Melbourne, Victoria 3000, Australia.

**FOR FURTHER INFORMATION CONTACT:** Jaea F. Hahn, Senior Counsel, at (202) 551-6870, or Jennifer L. Sawin, Branch Chief, at (202) 551-6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or calling (202) 551-8090.

### Applicants' Representations

1. Rio Tinto is an international business involved in each stage of metal and mineral production including finding, developing, mining and processing natural resources such as aluminium, copper, coal, iron ore, uranium, gold and industrial minerals. Rio Tinto is a dual-listed company ("DLC") comprised of two distinct, commonly controlled corporate entities, RTP and RTL, which operate pursuant to a DLC Sharing Agreement (the "Sharing Agreement").<sup>1</sup> RTP is a foreign

<sup>1</sup> Applicants identify the following key principles of the DLC structure: (a) RTP and RTL are each required to have a "special voting share" that enables shareholders of both RTP and RTL to vote on key decisions on a joint basis; (b) dividends and capital returns are equalized via a "DLC Dividend Share" so that shareholders of each company are effectively in the same economic position as if they held shares in a single enterprise; (c) each of RTP and RTL has a separate but common board of directors, and the directors are authorized to do anything necessary or desirable to maintain the DLC structure; (d) each of RTP and RTL is subject to local laws and listing obligations; (e) for the protection of creditors, RTP and RTL have each executed a deed poll guarantee pursuant to which

private issuer organized under the laws of England and Wales with ordinary shares listed on the London Stock Exchange and Euronext and American Depositary Receipts (“ADRs”) traded on the New York Stock Exchange. RTP’s ordinary shares and ADRs are registered under section 12 of the Securities Exchange Act of 1934 (“Exchange Act”). RTL is a foreign private issuer organized under the laws of Australia with shares listed on the Australian Securities Exchange and traded on the over-the-counter market in the United States. RTL’s shares are also registered under section 12 of the Exchange Act; it has no ADRs issued or outstanding. RTP historically held a controlling interest in RTL but no longer beneficially owns (directly or indirectly) any shares of RTL.

2. Although RTP and RTL are two distinct corporate entities with separately traded securities, applicants state that pursuant to the Sharing Agreement, each company is required to operate, as far as possible, as if the two companies and their respective subsidiaries were a single enterprise, and holders of RTP and RTL shares have shared rights between them. Applicants state that the DLC structure places the shareholders of both companies in substantially the same position as if they held shares in a single enterprise owning the assets of both companies. The practical effect of the DLC structure has been recognized by Rio Tinto’s primary regulators. RTP and RTL file with the Commission a combined Annual Report on Form 20-F with combined financial statements which treat RTP and RTL as a single group.

3. Applicants state that out of an abundance of caution and a concern that RTP, RTL and/or Rio Tinto could be classified as an “investment company” under section 3(a)(1)(C) of the Act, Rio Tinto has viewed certain transfers of cash between RTP and RTL as creating “intra-group receivables” which are treated as either “investment securities” on the balance sheet of the subsidiary distributing the cash or as “investment income”; this is despite the fact that the cash being distributed is derived from Rio Tinto’s operations and absent the DLC structure would not raise concerns under the Act. Applicants further state that Rio Tinto currently actively monitors the movement of funds between subsidiaries in order to

maintain RTP’s and RTL’s status under the Act and that such treatment is limiting Rio Tinto’s ability to fund its operating activities in a tax- or capital-efficient manner. Applicants state that in order to adequately fund Rio Tinto’s operations and successfully compete in the mining industry, Rio Tinto needs the financial flexibility to freely move funds between subsidiaries in the DLC structure and to quickly capitalize on new opportunities as they arise. Although each of Rio Tinto, RTP and RTL believes it is excepted from the definition of “investment company” in section 3(a) of the Act by virtue of section 3(b)(1), each is seeking to reduce any uncertainty about its respective status by having RTP and RTL seek an order of the Commission pursuant to section 3(b)(2) of the Act.

#### Applicants’ Legal Analysis

1. Section 3(a)(1)(A) of the Act defines the term “investment company” to include an issuer that is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities. Applicants state that Rio Tinto has not and does not hold itself out as being engaged primarily, or propose to engage primarily, in the business of investing, reinvesting or trading in securities within the meaning of section 3(a)(1)(A) of the Act.

2. Under section 3(a)(1)(C) of the Act, an issuer is an investment company if it is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value in excess of 40 percent of the value of the issuer’s total assets (exclusive of Government securities and cash items) on an unconsolidated basis (“asset test”).<sup>2</sup> Section 3(a)(2) of the Act defines “investment securities” to include all securities except Government securities, securities issued by employees’ securities companies, and securities issued by majority-owned subsidiaries of the owner which (a) are not investment companies, and (b) are not relying on the exclusions from the definition of investment company in section 3(c)(1) or 3(c)(7) of the Act. Applicants state that as of December 31, 2010, the percentage of RTP’s total assets on an unconsolidated basis

(exclusive of Government securities and cash items) which were “investment securities” as defined in section 3(a)(2) of the Act was approximately 9.1% and the percentage of RTL’s total assets (exclusive of Government securities and cash items) which were “investment securities” was approximately 29.2%. Applicants further state that assuming RTP and RTL are treated as a single company for the purposes of testing under the Act, as of December 31, 2010, the percentage of Rio Tinto’s total assets (exclusive of Government securities and cash items) which were “investment securities” on an unconsolidated basis was 1.7%. However, applicants state that if Rio Tinto were to continue to transfer funds among the Group in a tax- and capital efficient manner, and were to continue to treat intra-group receivables arising from such transfers as “investment securities”, then either RTP or RTL (and, in effect, Rio Tinto) could run a significant risk of being deemed an “investment company” under the “asset test.”

3. Rule 3a-1 under the Act provides an exemption from the definition of investment company if no more than 45% of a company’s total assets consist of, and not more than 45% of its net income over the last four quarters is derived from, securities other than Government securities, securities of majority-owned subsidiaries and primarily controlled companies (“income test”). These percentages are determined on a consolidated basis with the company’s wholly-owned subsidiaries. Applicants state that as of December 31, 2010, the percentage of total assets (exclusive of Government securities and cash items) which were “investment securities” for RTP and RTL was 10.3% and 24.3% of their total assets, respectively, and the total income derived from such “investment securities” (“investment income”) for RTP and RTL was 35.5% and 6% of their total income, respectively, as calculated pursuant to rule 3a-1. However, RTP no longer beneficially owns (directly or indirectly) any shares of RTL, and therefore there is no longer a presumption of “control” under section 2(a)(9) of the Act so distributing funds efficiently within the Group could result in a breach of the “income test.”

4. Section 3(b)(2) of the Act provides that, notwithstanding section 3(a)(1)(C) of the Act, the Commission may issue an order declaring an issuer to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly or through majority-owned subsidiaries or through controlled companies conducting

they each guarantee certain contractual obligations of the other; and (f) there are protections in the constituent documents of each of RTP and RTL with respect to potential “change of control” events so that a person could not take over or gain control of one company without also making an offer for the other company.

<sup>2</sup> “Government securities” are defined under section 2(a)(16) of the Act as any securities issued or guaranteed as to principal or interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the United States pursuant to the authority granted by the Congress of the United States, or any certificate of deposit for any of the foregoing.

similar types of businesses. Rio Tinto requests an order under section 3(b)(2) of the Act declaring that it is primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities, and therefore not an investment company as defined in the Act.

5. In determining whether a company is primarily engaged in a non-investment company business under section 3(b)(2), the Commission considers: (a) The issuer's historical development; (b) its public representations of policy; (c) the activities of its officers and directors; (d) the nature of its present assets; and (e) the sources of its present income.<sup>3</sup>

a. **Historical Development.** Rio Tinto's predecessor companies, the Rio Tinto Company and The Consolidated Zinc Corporation, were formed in 1873 and 1905, respectively, to mine ancient copper workings and to treat zinc bearing mine waste. The RTZ Corporation ("RTZ") was formed in 1962 by a merger of The Rio Tinto Company and the Consolidated Zinc Corporation. At the same time, CRA Limited ("CRA") was formed by a merger of the Australian interests of The Rio Tinto Company and The Consolidated Zinc Corporation. Between 1962 and 1995, both RTZ and CRA discovered important mineral deposits, developed major mining projects and also grew through acquisitions. RTZ and CRA were unified in 1995 through the DLC structure; RTZ became RTP and CRA became RTL, together known as Rio Tinto. Historically, the vast majority of the revenues of Rio Tinto's predecessor companies have come from their mining and natural resource processing operations.

b. **Public Representations of Policy.** Rio Tinto states that it has never represented that it is involved in any business other than the finding, developing, mining and processing of the earth's mineral resources. Rio Tinto asserts that it has consistently stated in its annual reports, press releases, filings with the Commission, marketing materials and Web site, that it is a diversified mining and exploration company. Rio Tinto states that it generally does not make public representations regarding its investment securities except as required by its obligation to file periodic reports to comply with federal securities laws. Rio Tinto further states that its press releases and other written communications have emphasized

operations and it has never emphasized either its "investment income" or the possibility of significant appreciation from its cash management investment strategies as a material factor in its business or future growth.

c. **Activities of Officers and Directors.** Rio Tinto states that its executive directors and officers spend substantially all of their time directing and managing the diversified mining and related businesses. The Chief Financial Officer of Rio Tinto spends approximately 5% or less of his time overseeing cash management and investment (or "treasury") activities, and spends the vast majority of his remaining time advising the Chief Executive Officer and Rio Tinto's boards on strategic initiatives and transactions, overseeing economic analysis and forecasting and financial reporting activities, and overseeing Rio Tinto's taxation policies and meeting with investors. Apart from the Chief Financial Officer, the directors and other officers have little involvement in treasury activities. Applicants state that, as of December 31, 2010, Rio Tinto employed approximately 77,000 people on a global basis, with approximately 73,000 focused on Rio Tinto's operations; approximately 3,700 employees are focused on business support functions, of which fewer than 50 spend any appreciable amount of their time on cash management and treasury policies.

d. **Nature of Assets.** Applicants state that Rio Tinto is an international mining group, and its assets are mainly goodwill and fixed, tangible assets used in its operations. Rio Tinto states that the value of its "investment securities" (as defined in section 3(a)(2) of the Act), including intra-group receivables, was approximately 1.7% of its total assets (exclusive of Government securities and cash items) in accordance with rule 3a-1, and the corresponding values for RTP and RTL were 10.3% and 24.3%, respectively, when calculated pursuant to rule 3a-1. Excluding intra-group receivables from the calculations under rule 3a-1, the percentage of total assets (exclusive of Government securities and cash items) that would be considered "investment securities" as of December 31, 2010, for RTP and RTL would have been 1.6% and 1.1%, respectively.

e. **Sources of Income and Revenue.** Applicants state that both RTP and RTL currently satisfy the income test under rule 3a-1. For the year ended December 31, 2010, Rio Tinto had net income from continuing operations of US\$15,281 million, of which approximately 1.1% was "investment income". The corresponding values for RTP and RTL

were 35.5% and 6%, respectively. Applicants state that in the future, Rio Tinto expects substantially all of its revenues to come from its mining and related operations.

6. RTP and RTL thus assert that Rio Tinto satisfies the standards for an order under section 3(b)(2) of the Act.

#### *Section 45(a) of the Act*

1. Section 45(a) of the Act provides that information contained in any application filed with the Commission under the Act shall be made available to the public, unless the Commission finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. Applicants request an order pursuant to section 45(a) of the Act granting confidential treatment to certain financial and other information set forth in Exhibit D.

2. Applicants state that Exhibit D contains detailed financial and other information that Rio Tinto does not otherwise disclose. Applicants state that the application provides a description of the nature of Rio Tinto's assets and the sources of its income, and that the publicly available financial data and other information in the application is sufficient to fully apprise any interested member of the public of the basis for the requested relief.

3. Applicants believe that public disclosure of this information about Rio Tinto would cause substantial harm to its competitive and negotiating positions as it would provide competitors and financial counterparties with insight into the assets, liabilities and income of Rio Tinto and its subsidiaries which they would not otherwise have. For these reasons, applicants believe that public disclosure of the information in Exhibit D is neither necessary nor appropriate in the public interest or for the protection of investors.

#### **Applicants' Conditions**

Applicants agree that any order granted pursuant to the application will be subject to the following conditions:

1. Rio Tinto (consisting of RTP and RTL) continues to constitute a DLC.
2. None of RTP, RTL or Rio Tinto will hold itself out as being engaged primarily, or propose to engage primarily, in the business of investing, reinvesting, or trading in securities.
3. Rio Tinto (consisting of RTP and RTL) continues to allocate and utilize their accumulated cash and investment securities primarily for bona-fide business purposes arising out of the finding, developing, mining and processing of mineral resources.

<sup>3</sup> *Tonopah Mining Company of Nevada*, 26 SEC 426, 427 (1947).

For the Commission, by the Division of Investment Management, under delegated authority.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2011-32922 Filed 12-22-11; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[File No.: 801-68894; Investment Advisers Act of 1940 Release No. 3340]

### In the Matter of Royal Oak Capital Management, LLC, 6173 Bellevue Road, Royal Oak, MD 21662; Notice of Intention To Cancel Registration Pursuant to Section 203(H) of the Investment Advisers Act of 1940

December 19, 2011.

Notice is given that the Securities and Exchange Commission (the "Commission") intends to issue an order, pursuant to Section 203(h) of the Investment Advisers Act of 1940 (the "Act"), cancelling the registration of Royal Oak Capital Management, LLC, hereinafter referred to as the registrant.

Section 203(h) provides, in pertinent part, that if the Commission finds that any person registered under Section 203, or who has pending an application for registration filed under that section, is no longer in existence, is not engaged in business as an investment adviser, or is prohibited from registering as an investment adviser under section 203A, the Commission shall by order, cancel the registration of such person.

The registrant indicated on its most recent Form ADV filing that it is relying on section 203A(a)(1)(A) of the Act to register with the Commission, which prior to September 19, 2011 prohibited an investment adviser from registering with the Commission unless it maintained assets under management of at least \$25 million. Effective September 19, 2011, Congress increased the assets under management threshold under section 203A of the Advisers Act to prohibit an investment adviser from registering with the Commission if it is required to be registered in the state in which it maintains its principal office and place of business and has assets under management between \$25 million and \$100 million. Accordingly, an adviser currently registered with the Commission generally is required to withdraw from registration when its assets under management fall below \$90 million, unless the adviser is not required to register in the state where it

maintains its principal office and place of business.<sup>1</sup>

The registrant is prohibited from registering as an investment adviser under section 203A of the Act because the Commission believes, based on the facts it has, that the registrant did not at the time of the Form ADV filing, and does not currently, maintain the required assets under management to remain registered with the Commission. Accordingly, the Commission believes that reasonable grounds exist for a finding that this registrant is no longer eligible to be registered with the Commission as an investment adviser and that the registration should be cancelled pursuant to section 203(h) of the Act.

Any interested person may, by January 13, 2012 at 5:30 p.m., submit to the Commission in writing a request for a hearing on the cancellation, accompanied by a statement as to the nature of his interest, the reason for such request, and the issues, if any, of fact or law proposed to be controverted, and he may request that he be notified if the Commission should order a hearing thereon. Any such communication should be addressed: Secretary, Securities and Exchange Commission, Washington, DC 20549.

At any time after January 13, 2012, the Commission may issue an order cancelling the registration, upon the basis of the information stated above, unless an order for a hearing on the cancellation shall be issued upon request or upon the Commission's own motion. Persons who requested a hearing, or to be advised as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponements thereof. Any adviser whose registration is cancelled under delegated authority may appeal that decision directly to the Commission in accordance with rules 430 and 431 of the Commission's rules of practice (17 CFR 201.430 and 431).

For further information contact: Parisa Haghshenas, at (202) 551-6787 (Office of Investment Adviser Regulation).

<sup>1</sup> Section 203A of the Act generally prohibits an investment adviser from registering with the Commission unless it meets certain requirements. See Advisers Act section 203A(a)(2)(B)(ii) (amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010)); Advisers Act rule 203A-1(a); *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 3221 (June 22, 2011), available at <http://www.sec.gov/rules/final/2011/ia-3221.pdf>.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.<sup>2</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2011-32899 Filed 12-22-11; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66002; File No. SR-NYSEARCA-2011-94]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade Shares of the ProShares Managed Futures Strategy Fund, ProShares Commodity Managed Futures Strategy Fund and ProShares Financial Managed Futures Strategy Fund Under NYSE Arca Equities Rule 8.200

December 19, 2011.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on December 5, 2011, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following under NYSE Arca Equities Rule 8.200: ProShares Managed Futures Strategy, ProShares Commodity Managed Futures Strategy and ProShares Financial Managed Futures Strategy. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com>.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change

<sup>2</sup> 17 CFR 200.30-5(e)(2).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.