

MEMO# 32687

August 19, 2020

Letter to CFTC on Proposed Changes to Regulation 3.10(c): Exemption from Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools

[32687]

August 19, 2020 TO: ICI Global Members SUBJECTS: International/Global RE: Letter to CFTC on Proposed Changes to Regulation 3.10(c): Exemption from Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools

On August 11, ICI Global, the Alternative Investment Management Association Limited (AIMA), the Asset Management Group of the Securities Industry and Financial Markets Association (SIFMA AMG), the Investment Adviser Association (IAA), and the Managed Funds Association (MFA) (collectively, the Associations) jointly submitted comments to the Commodity Futures Trading Commission (CFTC) on the CFTC's proposals to amend Regulation 3.10(c) as set forth in the notices of proposed rulemaking entitled "Exemption From Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools" (2020 Release) and "Exemption from Registration for Certain Foreign Persons" (2016 Release) (collectively, the Proposal).[\[1\]](#)

Background

Regulation 3.10(c)(3) generally provides that a person engaged in the activity of an introducing broker (IB), commodity trading advisors (CTAs), or commodity pool operators (CPOs), in connection with any commodity interest transaction executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility, is not required to register with the CFTC, provided that: (1) the person is located outside the United States, its territories, and possessions; (2) the person acts only on behalf of persons located outside the United States; and (3) the commodity interest transaction is submitted for clearing through a registered futures commission merchant.

In 2016, the CFTC proposed to amend Regulation 3.10(c)(3) to reflect positions in prior staff no-action letters that provided relief: (1) with respect to transactions in swaps not subject to a CFTC clearing requirement; and (2) from registration as an IB or CTA for intermediaries acting solely for international financial institutions.[\[2\]](#) In addition to the elements described

below, the Proposal re-opens the comment period for the 2016 proposal for 60 days following the publication of the Proposal in the Federal Register.

In 2018, the CFTC proposed to add a new exemption in Commission Regulation 4.13 that would have codified and expanded the relief provided in CFTC Staff Advisory 18-96.[\[3\]](#) The 2018 proposal was withdrawn in 2019.[\[4\]](#)

Key Elements of the Proposal

The CFTC has proposed amendments to the 3.10 exemption that would expressly:

- Allow non-US CPOs to rely on the 3.10 exemption for offshore pools on a pool-by-pool basis, based on whether all of the participants in a particular offshore pool are located outside the United States and, accordingly, to rely on the 3.10 exemption concurrently with other exemptions available to CPOs (Stacking Provisions);
- Establish a safe harbor with respect to inadvertent participation of US participants in offshore pools;
- Permit contributions of initial capital by US controlling affiliates of an offshore pool's CPO, by specifying that such capital contributions are not considered participation in the pool for purposes of the 3.10 exemption, subject to conditions designed (1) to prevent evasion of Part 4 of the CFTC's regulations and (2) to prevent contributions by persons barred from the US commodity interest markets (Affiliate Support Exemption); and
- Codify previously issued no-action relief that expressly permits offshore CPOs and CTAs to rely on the 3.10 exemption for US commodity interest transactions without regard to whether the transactions are cleared (that is, clarifying that the 3.10 exemption does not impose a separate clearing requirement for transactions that are not otherwise required to be cleared) (CPO/CTA Codification Proposal).

The Associations' Recommendations

In the letter, the Associations express strong support for the proposed amendments to the 3.10 exemption, noting that the proposed changes would bring welcome certainty and efficiencies to non-US asset managers that wish to participate in the US commodity markets on behalf of non-US investors in a manner that adds vibrancy to those markets, while fully protecting the interests of US investors and appropriately allocating the Commission's scarce resources.

The Associations then explain that, in their view, the purposes of the Proposal can be better achieved, without any sacrifice of US investor protection, by incorporating the adjustments described below in the final 3.10 exemption amendments:

- Adjusting the Affiliate Support Exemption (1) to permit contributions from US affiliates without limiting the exemption to "controlling affiliates;" (2) to permit US affiliate contributions that serve the same commercial support purpose as initial capital but may be necessary later in the offshore pool's lifecycle; and (3) to align the terms of the condition intended to ban contributions from US persons that "are barred from participating in the US commodity interest markets" with the purpose of that condition;
- Aligning the text of the proposed Stacking Provisions to conform to the CFTC's stated purpose, which is to permit a registered or exempt CPO to rely on the 3.10 exemption

on a pool-by-pool basis while relying simultaneously, for other activities, on full or partial exemptions or exclusions provided by other CFTC rules (for example, but not limited to, Regulations 4.13(a)(3) and 4.5); and

- Adding corresponding provisions to paragraphs (c)(ii) and (v) of the 3.10 exemption for CTAs, in order to provide consistent regulatory treatment for global asset management activities that do not involve US investors, in alignment with the CFTC's policy goals and current global practices.

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[Attachment](#)

endnotes

[1] See Exemption from Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools, *available at* <https://www.cftc.gov/media/3911/votingdraft052820/download>.

[2] See Exemption from Registration for Certain Foreign Persons, 81 Fed. Reg. 51824 (Aug. 5, 2016). ICI submitted a comment letter on this proposal jointly with other trade associations, which is *available at* <https://www.ici.org/pdf/30209.pdf>.

[3] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 Fed. Reg. 52902 (Oct. 18, 2018); CFTC Staff Advisory 18-96 (Apr. 11, 1996). Staff Advisory 18-96 provides relief from certain CFTC regulatory requirements to CFTC registered CPOs that operate offshore commodity pools.

[4] Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs, 84 Fed. Reg. 67355, 67357 (Dec. 10, 2019). Under the Proposal, Staff Advisory 18-96 would remain available.