

Public Statements & Remarks

Statement of CFTC Commissioner Rostin Behnam Regarding Notice of Proposed Rulemaking Regarding an Exemption from Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools and Reopening of Comment Period

May 28, 2020

I will support today's notice of proposed rulemaking and reopening of a comment period primarily aimed at amending the conditions of the current exemption under Commission regulation 3.10(c)(3) (referred to as the "3.10 Exemption") available to certain non-U.S. commodity pool operators (CPOs) to further reflect the increasingly global nature of the CPO space and clarify the Commission's approach with respect to its oversight of foreign intermediaries that are not engaged in commodity interest activities on behalf of U.S. customers. I greatly appreciate the time and consideration that the staff of the Division of Swap Dealer and Intermediary Oversight (DSIO) gave to my comments and concerns. I also wish to thank the Office of General Counsel (OGC) staff for ensuring that we consistently adhere to the letter and spirit of the Commodity Exchange Act (CEA or the "Act") and regulations. I am pleased that the ongoing dialog that has become a hallmark of many working relationships within the Commission is enduring better than ever through the pandemic, and that we can advance important policy and regulatory initiatives without sacrificing constructive debate and deliberation.

Today's proposal both expands the availability of the 3.10 Exemption to non-U.S. CPOs who operate both qualifying offshore commodity pools and other commodity pools that may or may not meet an alternative regulatory registration exemption or exclusion and eases certain identifiable and unduly restrictive impediments to relying on the 3.10 Exemption. Like several recent rulemakings undertaken with respect to Part 4 of the Commission Regulations, today's proposal is a continuation of the Commission's ongoing efforts in honing its regulatory footprint with respect to this dynamic segment of the derivatives market by refining our approach through calibrating decades of policy and rulemakings to the needs of the market participants, consumers, and the national public interest we are charged with protecting.

Though today's proposal is brief in its delivery, it reflects many years of staff experience and familiarity with the Commission's historical positions and reasoning in addressing material policy issues raised by appropriately balancing the financial interests of foreign intermediaries and their customers with our commitment to the financial integrity of U.S. markets and U.S. customer protection. I believe today's proposal equally reflects the Commission's commitment to making targeted changes in step with improvements in surveillance and monitoring capabilities as well with our relationships with both the National Futures Association (NFA) and foreign regulators.

Last fall, when the Commission finalized several amendments to Part 4 of the regulations addressing various registration and compliance requirements for CPOs and commodity trading advisors, I commended its decision to not move forward at that time on proposals to exempt from registration qualifying CPOs operating commodity pools outside of the U.S. consistent with Commission Staff Advisory 18-96[1] and adding a prohibition against statutory disqualifications for certain exempt CPOs. [2] The decision not to act reflected a thoughtful consideration of the comments received and the practicalities of both proposals as they related to ongoing concerns about cross-border issues and the Commission's regulatory goals.

Today's proposal results from ongoing review and discussions with market participants and the NFA to determine how best to provide relief that better aligns the Commission's customer protection concerns with the Commission's regulatory provisions in an increasingly international asset management space. [3] Other aspects of today's proposal include the addition of a safe harbor for person's engaged in CPO activities with respect to offshore commodity pools that take certain enumerated actions aimed at preventing U.S. persons from participating in such pools, and a provision permitting certain U.S. control affiliates of a non-U.S. CPO to contribute capital to such CPO's offshore pools as seed money without impacting the non-U.S. CPO's eligibility for the 3.10(c) Exemption. Taking a pause as opposed to rushing forward has afforded Commission staff additional time to tailor regulatory language so as to avoid confusion and inadvertent loss of longstanding Commission policy aimed at protecting U.S. customers.

While I have some questions and will be interested in hearing from commenters on the specific issues raised with regard to seed money and certain other aspects of the proposal that seem to permeate multiple policy-driven discussions of late, I believe today's proposal is reasonable, will reduce regulatory burdens without sacrificing key regulatory protections, and is drafted in observance of the high standards for exercising exemptive authority under section 4(c) of the Act. To that end, I am reassured that the exercise of such authority unequivocally preserves the Commission's authority outlined in section 4(d) of the Act to investigate a CPO's compliance with the requirements and conditions of the 3.10(c) Exemption, as proposed, and to bring an enforcement action for any violation of any provision of the CEA or Commission regulations caused by the failure to comply with or satisfy any of the Exemption's conditions or requirements.[4] This is in addition to the Commission's retained authority to take enforcement action against any non-U.S. CPO claiming the 3.10 Exemption based on their activities within the U.S. derivatives markets consistent with our authority regarding market participants generally.

Again, I would like to thank the staffs of DSIO, OGC and the rest of the Commissioners who worked to put forth this proposal.

[1] Advisory No. 18-96, Offshore Commodity Pools Relief for Certain Registered CPOs from rules 4.21, 4.22 and 4.23(a) (10) and (a)(11) and From the Location of Books and Records Requirement of Rule 4.23 (Apr. 11, 1996), <https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm>.

[2] Rostin Behnam, Statement of Concurrence by CFTC Commissioner Rostin Behnam: Amendments to Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, Nov. 25, 2019, <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement112519>.

[3] Of note, today's proposal does not retract Staff-Advisory 18-96, remains available to U.S. CPOs and others who would not be in the position to rely on the revised 3.10(c) Exemption as proposed today.

[4] 7 U.S.C. 6(d).

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