

Public Statements & Remarks

Statement of Commissioner Dan M. Berkovitz Regarding Final Rule to Amend Exemptions for Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools

October 15, 2020

I am voting for the final rule amending regulation 3.10(c) (Final Rule). Regulation 3.10(c) provides an exemption from registration to foreign persons who operate commodity pools (CPO) located outside of the United States. The Final Rule makes pragmatic adjustments to certain conditions for claiming the exemption that will allow the Commission to focus its limited resources on protecting U.S. persons who participate in commodity pools, rather than on commodity pools operated outside the U.S. in which non-U.S. persons participate.

A fundamental goal of the Commission's registration and regulation of CPOs is the protection of U.S. customers.^[1] The CFTC has long held that CPOs trading commodity interests in our markets are not required to register as CPOs if they are located offshore and only operate pools for non-U.S. persons.^[2] In 2007, the Commission codified the exemption in regulation 3.10(c).

The Final Rule: (i) exempts non-U.S. CPOs from registration and regulation with respect to individual commodity pools that do not solicit from U.S. persons or have U.S. investors;^[3] (ii) provides that this exemption for some pools may be used with other exemptions or exclusions; and (iii) provides a safe harbor to non-U.S. CPOs in the event that U.S. persons inadvertently become participants in the offshore pools, provided that a number of conditions are met to minimize that possibility. Lastly, the Final Rule permits U.S. affiliates of non-U.S. CPOs to contribute "initial capital" to exempt offshore pools without being treated as "participants" in the pools themselves if certain conditions are satisfied.

In my statement for the proposed amendments to regulation 3.10(c), I noted some concern that the U.S. affiliate provision might result in persons in the U.S. investing—either knowingly or unknowingly—in unregulated foreign commodity pools if they invested in the U.S. affiliates. The proposal included specific "anti-evasion" provisions that would prevent certain "bad actors" from using the exemption and prohibit the marketing of the U.S. affiliate as a vehicle for U.S. commodity interest investments.^[4] At my request, several questions regarding potential abuse of the U.S. affiliate provision were included in the proposed rule.

The letters commenting on the proposed rule generally expressed support. A joint letter from asset management industry associations addressed the questions in the proposal regarding the U.S. affiliate provision and provided rationales in support thereof. The letter explained that the initial capital investments from U.S. affiliates intended to help demonstrate fund performance or facilitate fund operations, for example, are not the types of investments that need the full array of customer protections provided for individual commodity pool investors.

Furthermore, comment letters explained how the conditions in the U.S. affiliate provision, coupled with the anti-evasion provisions (with some modifications), balance the flexibility needed by CPOs to make prudent capital allocation decisions with preventive measures reducing the likelihood of abuse. While it is possible that some less than forthright actors could attempt to use the regulation 3.10(c) exemption to skirt the CPO registration requirements when soliciting commodity interest investments from U.S. persons, the Final Rule has appropriate restrictions that will facilitate enforcement when necessary.

In conclusion, the Final Rule makes prudent, limited amendments that reduce the burdens on the Commission's limited resources while maintaining the necessary protections intended for U.S. commodity pool participants. I would like to thank the commenters for their contribution to improving the Final Rule and the CFTC staff for working with my office to address my concerns.

[1] The regulation of CPOs also facilitates the Commission's ability to oversee the derivative markets, manage systemic risks, and fulfill its mandate to ensure safe trading practices. See, e.g., *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252, 11253, 11275 (Feb. 24, 2012), upheld by *Investment Company Institute v. CFTC*, 720 F.3d 370 (D.C. Cir. 2013).

[2] See CFTC Staff Interpretative Letter 76-21 (Aug. 15, 1976).

[3] The CPO would need to register and comply with CFTC regulations with regard to any other commodity pools it operates that do solicit funds from U.S. persons.

[4] As noted in section II.F.3 of the Final Rule, if the U.S. affiliate is marketed as providing access to commodity interests traded outside the United States, then the affiliate would be subject to the registration regime provided for such entities in part 30 of the Commission's regulations.