

Public Statements & Remarks

Statement of Commissioner Dawn D. Stump Regarding Amending Rule 3.10(c): Exemption from Registration for Non-US CPOs of Offshore Commodity Pools

October 15, 2020

Overview

I am pleased to support the final rulemaking to amend Rule 3.10(c) in order to clarify, among other things, that a non-U.S. person does not have to register as a commodity pool operator (CPO) with respect to its operation of offshore commodity pools for non-U.S. participants that trade in U.S. derivatives markets, even if that CPO also operates other commodity pools with U.S. participants for which it is registered (or claims an exclusion or exemption from registration).

The Pool-by-Pool Approach

I firmly believe that the rule amendments we are adopting today reflect the right public policy. These amendments will update Rule 3.10(c) to better align it with the realities of the modern international investment management environment. Many large CPOs with substantial assets under management are located outside the United States and operate internationally to benefit their clients in what is a global derivatives market. A rule in which a CPO outside the United States with many different commodity pools could have to register with the Commission with respect to offshore pools that have no U.S. participants simply because it also operates other pools in which U.S. persons do participate is often unworkable from an operational standpoint.

It also makes little sense from a regulatory standpoint, as reflected in the Commission's longstanding and oft-cited policy originally stated over 30 years ago:

“[G]iven this agency's limited resources, it is appropriate at this time to focus [the Commission's] customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users of the futures markets and that the protection of foreign customers of firms confining their activities to areas outside this country, its territories, and possessions may best be left for local authorities in such areas.”^[1]

Thus, today's rulemaking carries on the Commission's tradition of deference to our international colleagues to regulate individuals and activities in their own countries where their regulatory interest is paramount. As I have said before, the Commission's historical commitment to appropriate deference (which also is sometimes referred to as “mutual recognition”), “is a demonstration of international comity – an expression of mutual respect for the important interests of foreign sovereigns.”^[2] Mutual recognition also reflects the shared goals of global authorities seeking to achieve the most effectively regulated markets through coordination rather than duplication.

When a commodity pool with a non-U.S. CPO has U.S. participants, or when a commodity pool's CPO is in the United States, we regulate accordingly. But the Commission should not impose registration and regulatory requirements on non-U.S. CPOs with respect to their operation of offshore commodity pools for non-U.S. participants. In such circumstances, the protection of the foreign pool participants is best left to our international counterparts, as their regulatory interest is greater than ours.^[3] That result makes sense, and will be achieved by the application of Rule 3.10(c) on a pool-by-pool basis.

And it turns out that doing so is not very controversial. We did not receive any comment letters opposing the pool-by-pool approach to the registration of non-U.S. CPOs operating offshore commodity pools.

The Affiliate Contribution Exception

Interestingly, what generated at least as much comment was the Commission's related proposal to establish an "Affiliate Contribution Exception." This exception provides that initial seed capital contributed by a U.S. entity to an affiliated non-U.S. CPO's offshore commodity pool will not require the non-U.S. CPO to register with respect to that offshore pool. In other words, despite its seed capital contribution, the U.S. affiliate would not be considered a "participant" in the commodity pool for purposes of Rule 3.10(c) so that, if all others that have contributed are non-U.S. persons, the CPO will not be required to register.

As proposed, the Affiliate Contribution Exception included certain conditions, and the Commission also requested comment on some possible additional guardrails to prevent abuse of the Exception. We did not receive any comments opposing the Affiliate Contribution Exception, nor did we receive any voicing support for the suggested additional guardrails.

On the other hand, we did receive comments expressing the view that our proposal was too narrow. These market participants objected to an Exception that only applied to seed capital contributed at or near the offshore commodity pool's inception. They requested a broader exception for capital invested at any time to establish or provide ongoing support to the pool or to attract and retain non-US investors.

We are declining to expand the Affiliate Contribution Exception beyond the scope of what was proposed. I agree that in adopting a registration exception that does not exist in our rules today, it is appropriate to begin on a limited basis. The Affiliate Contribution Exception will allow U.S. seed money to an affiliated non-US CPO so that it can test its trading strategies and develop a track record when launching a new commodity pool, without triggering a registration requirement. Going forward, I am open to hearing from market participants about specific circumstances in which they believe a broader exception might be warranted.

Staff Advisory 18-96

In a similar vein, there is one other issue that we are not addressing in this rulemaking, but that I hope the Commission will consider in the not-too-distant future. As some may recall, the amendments to Rule 3.10(c) that we are finalizing here actually arose out of a different proposed rulemaking that we issued in 2018,^[4] which would have codified a staff action known as Advisory 18-96^[5] that provides certain relief to both U.S. and non-U.S. CPOs. As a result of the rulemaking we are adopting today, non-U.S. CPOs will no longer need to rely on the relief in Advisory 18-96. Unfortunately, though, the 2018 proposal to codify Advisory 18-96 with respect to U.S. CPOs has slipped through the cracks while we have been addressing non-U.S. CPOs in this rulemaking.

Advisory 18-96, among other things, provides relief for registered U.S. CPOs from disclosure, reporting, and certain recordkeeping requirements in connection with their operation of offshore commodity pools. However, it only provides relief from requirements that were in effect when the Advisory was issued in 1996. Absent codification in a rulemaking by the Commission, it does not apply to requirements adopted since then – one notable example being the requirement to file Form CPO-PQR.

Accordingly, it is my hope that the Commission can find room on its agenda during the coming months to propose, and request public comment on, a codification of staff Advisory 18-96 with respect to U.S. CPOs. Those of us who were Commissioners at the time all voted to issue such a proposal in 2018, and we should now finish what we started.

Conclusion

I am pleased to support today's final rulemaking. I want to thank the staff for the time and effort they have put into answering questions and addressing comments about this rulemaking from me and my team.

[1] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 Fed. Reg. 52902, 52904 (Oct. 18, 2018) (footnotes omitted) (the "2018 proposal"), *quoting* Exemption from Registration for Certain Foreign Persons, 72 Fed. Reg. 63976, 63976-77 (Nov. 14, 2007) (*citing* 48 Fed. Reg. 35248, 25261 (Aug. 3, 1983)).

[2] Statement of Commissioner Dawn D. Stump Regarding Foreign Board of Trade Registration Applications of Euronext Amsterdam, Euronext Paris, and European Energy Exchange, Nov. 5, 2019, *available at* <https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement110519>.

[3] To be sure, the Commission has a regulatory interest when an offshore commodity pool – even one with a non-US CPO and non-US participants – trades in US derivatives markets. In these circumstances, we monitor that trading and impose the same requirements (*e.g.*, large trader reporting) as in the case of any other trader in our markets.

[4] See 2018 proposal, 83 Fed. Reg. at 52902.

[5] Advisory 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" (Division of Trading and Markets, April 11, 1996), *available at* <https://www.cftc.gov/sites/default/files/opa/press96/opacpo-advi.htm>.

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