Public Statements & Remarks

Statement of Commissioner Dawn D. Stump Regarding Amending Rule 3.10(c)(3) –Exemption from Registration for Foreign Persons Acting as Commodity Pool Operators on Behalf of Offshore Commodity Pools

May 28, 2020

Overview

I am pleased to support the proposal before us today to amend Rule 3.10(c)(3) in order to clarify that a non-US person does not have to register as a commodity pool operator ("CPO") with respect to its operation of offshore commodity pools for non-US participants that trade in US derivatives markets, even if that CPO also operates other commodity pools with US participants for which it is registered (or claims another exclusion or exemption from registration). The proposal addresses an important issue, and arises from comments on a different proposed rulemaking that we issued back in October 2018.

I want to thank Chairman Tarbert for giving us the opportunity to advance this proposal, given that he wasn't at the Commission in October 2018, and so I doubt this issue was on his radar when he was confirmed as Chairman. And I want to thank the staff of the Division of Swap Dealer and Intermediary Oversight, the General Counsel's Office, and the Chief Economist's Office for working so hard on this proposal in addition to the many other important priorities that the Chairman has laid out for us to complete this year.

Today's proposal is in keeping with a couple of principals that I have discussed in relation to prior rulemakings. First, it reflects the benefits of acting to codify staff relief where appropriate and to periodically re-visit our rules. And second, it carries on the Commission's long tradition of deference to our international colleagues to regulate individuals and activities in their own countries where their regulatory interest is paramount. I would like to take a few minutes to talk about each of these principals in the context of the treatment of offshore commodity pools operated by non-US CPOs in Rule 3.10(c)(3).

The Benefits of Codifying Staff Relief and Re-Visiting Existing Rules

First, the benefits of acting to codify staff relief where appropriate, and to periodically re-visit our rules. Our staff often has occasion to issue relief or take other action in the form of no-action letters, interpretative letters, or advisories on various issues and in various circumstances. This affords the Commission a chance to observe how the staff action operates in real-time, and to evaluate lessons learned. As I have previously noted, with the benefit of this time and experience, the Commission should then consider whether codifying such staff action into rules is appropriate in order to provide legal certainty to the marketplace.[1]

Although it took quite a while, that is what has happened here. In 1996, Commission staff issued Advisory 18-96, which provided relief from certain regulatory requirements for registered CPOs with respect to their offshore commodity pools. In October 2018, the Commission proposed to codify Advisory 18-96 – a proposal that the four sitting Commissioners who were here at that time all supported.

Although commenters generally supported the proposal as well, several of them disagreed sharply with statements in the proposed rulemaking release regarding the separate question of when, pursuant to Rule 3.10(c)(3), non-US CPOs operating offshore commodity pools must register in the first instance. The 2018 proposed rulemaking stated the view that Rule 3.10(c)(3) applies on an "all-or-nothing" basis, so that a non-US CPO that operates one or more commodity pools with US participants and other pools without, could have to register as a CPO for all its pools. A number of commenters, by contrast, read Rule 3.10(c)(3) to apply on a "pool-by-pool" basis, such that non-US CPOs are required to register (or claim another registration exclusion or exemption) with respect to their commodity pools with US participants, but not with respect to their offshore commodity pools without US participants.

I do not take sides in that debate. I was not here in 2007 when Rule 3.10(c)(3) was adopted, and all I can say is that I have read it many times since October 2018 and I can see how reasonable minds can interpret the wording differently.

But what is important to me is that, by acting to codify Advisory 18-96, we discovered the need to re-visit Rule 3.10(c)(3) – which is what today's proposal is about. As I have said before, "[i]t is simply good government to re-visit our rules and assess whether certain rules need to be updated, evaluate whether rules are achieving their objectives, and identify rules that are falling short and should be withdrawn or improved."[2]

Today, we are proposing to update Rule 3.10(c)(3) to better align it with the realities of the modern international investment management environment. As the release observes, many large CPOs with substantial assets under management are located outside the United States and operate on a global scale 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 US participants simply because it also operates other pools in which US persons do participate is often unworkable from an operational standpoint, and as I will discuss shortly, makes little sense from a regulatory standpoint. Accordingly, we are proposing to improve Rule 3.10(c)(3) to clearly and unequivocally embrace the pool-by-pool approach.

Deference to International Colleagues with a Paramount Regulatory Interest

Such an approach reflects appropriate deference to our international colleagues where they have a paramount regulatory interest. I noted last year when the Commission proposed two rulemakings concerning non-US clearinghouses, that "[w]e cannot effectively supervise [clearinghouses] in every corner of the world."[3] Nor can we do so for CPOs.

Indeed, the Commission was realistic about the limitations on its ability to regulate CPOs outside US borders operating commodity pools with participants that also are outside US borders in its proposed codification of Advisory 18-96 in October 2018. The preamble of that release quoted a statement by the Commission over 30 years ago that has been oft-cited in the years since then:

> "'[G]iven this agency's limited resources, it is appropriate at this time to focus [the Commission's] custo protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic us of the futures markets and that the protection of foreign customers of firms confining their activities to a outside this country, its territories, and possessions may best be for local authorities in such areas.'"[4]

The Commission then stated its belief "that this rationale continues to be true with respect to CPOs and commodity pools . . ."[5]

As I have said before, the Commission's historical commitment to appropriate deference to our international regulatory colleagues (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."[6] This deference 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-US CPO has US 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-US CPOs with respect to their operation of offshore commodity pools for non-US 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.[7] That result makes sense, and would be achieved by the application of Rule 3.10(c)(3) on a pool-by-pool basis.

Conclusion

I therefore support today's proposal. Of necessity, the rulemaking release recounts some of the history regarding Rule 3.10(c)(3). But I would ask those planning to comment that we not re-litigate the debates of the past, but rather focus on the future and the rule amendment that is being proposed. I look forward to reviewing the public's comments on that proposed amendment. And I again 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.

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[1] *See* comments of Commissioner Dawn D. Stump during Open Commission Meeting on January 30, 2020 (transcript pending), noting that after several years of no-action relief regarding trading on swap execution facilities ("SEFs"), "we have the benefit of time and experience and it is time to think about codifying some of that relief. . . . [T]he SEFs, the market participants, and the Commission have benefited from this time and we have an obligation to provide more legal certainty through codifying these provisions into rules.").

[2] Statement of Commissioner Dawn D. Stump for CFTC Open Meeting on September 16, 2019, *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement091619.

[3] Statement of Commissioner Dawn D. Stump for the CFTC Open Meeting, July 11, 2019, *available at* https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement071119.

[4] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 Fed. Reg. 52902, 52904 (Oct. 18, 2018) (footnotes omitted), *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)).

[5] *Id.*, 83 Fed. Reg. at 52904.

[6] 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.

[7] 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.

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