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CFTC Expands Availability of Exemption from Registration for non-U.S. Commodity Pool Operators of Offshore Commodity Pools

On October 15, 2020, the U.S. Commodity Futures Trading Commission (“CFTC” or “Commission”) adopted an amendment (the “Amendment”) to Commission Regulation 3.10(c)(3) (the “3.10 Exemption”), expanding the availability of an exemption from registration for non-U.S. commodity pool operators (“CPOs”) of offshore commodity pools (“Exempt CPOs”). As discussed in greater depth below, the Amendment resolves a number of longstanding issues relating to the 3.10 Exemption. Specifically, the Amendment codifies existing no-action relief related to swap clearing, clarifies that Exempt CPOs may rely on the 3.10 Exemption on a pool-by-pool basis, provides a safe harbor to Exempt CPOs for inadvertent U.S. investors, and establishes criteria by which U.S. affiliates of Exempt CPOs may contribute initial capital to an Exempt CPO’s offshore pool.

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The 3.10 Exemption is generally available to CPOs located outside the U.S. who operate offshore pools in which all participants are located outside the U.S. Historically, the 3.10 Exemption required Exempt CPOs to submit all commodity interest transactions for clearing through a registered futures commission merchant (“FCM”). Consequently, Exempt CPOs were technically required to submit all swaps for clearing even if such swaps were not otherwise required to be cleared. CFTC Staff addressed this technicality in 2016 when it issued Letter 16-08. The Amendment effectively codifies Letter 16-08 by specifying that only those transactions that are otherwise subject to a clearing requirement must be submitted for clearing either through a registered FCM or directly if the offshore pool is a clearing member.

The Amendment also aligns the text of the 3.10 Exemption with the CFTC’s longstanding objective of only regulating foreign CPOs when they offer funds to U.S. investors. A strict construction of the regulation previously could have led to the conclusion that a foreign CPO who offers a fund to U.S. investors must register, or qualify for a registration exemption other than the 3.10 Exemption, with respect to all funds, including offshore pools that do not have U.S. investors. The Amendment clarifies that the 3.10 Exemption is in fact available on a pool-by-pool basis, thus allowing an Exempt CPO to rely on the 3.10 Exemption with respect to its qualifying offshore commodity pools concurrently with CPO registration and/or other exemptions¹ or exclusions² otherwise available to an Exempt CPO.

The Amendment also establishes a safe harbor for Exempt CPOs who cannot certify that all participants in an offshore commodity pool are located outside of the U.S. The inclusion of the safe harbor will benefit foreign CPOs who previously were unable to rely on the 3.10 Exemption because, due to the structure of their offshore pools, they could not represent with absolute certainty that there were no U.S. investors in their offshore pools. The safe harbor also provides comfort to Exempt CPOs who are concerned about potential “snowbird” investors (i.e., foreign investors who later relocate to the U.S.).

¹ For example, the *de minimus* exemption under Commission Regulation 4.13(a)(3)

² For example, the exclusion from the definition of CPO under Commission Regulation 4.5

The safe harbor criteria are as follows:

1. the commodity pool is organized and operated outside of the U.S.;
2. the offering and other written materials include clear, written prohibitions on the commodity pool's offering to and ownership by U.S. persons;
3. the commodity pool's constitutional documents and offering material are reasonably designed to preclude participation by persons located in the U.S. and to facilitate the enforcement of such exclusion by the CPO;
4. the CPO exclusively uses non-U.S. intermediaries for the distribution of commodity pool participations;
5. the CPO employs reasonable investor due diligence methods at the time of sale to preclude persons located in the U.S. from participation in the pool; and
6. the participation units of the commodity pool are directed and distributed to participants outside of the U.S., including by listing and trading such units on secondary markets operated outside of the U.S., and in which the CPO has reasonably determined that participation by persons located in the U.S. is unlikely.

In addition, the revised 3.10 Exemption will be available to foreign CPOs even if a U.S. affiliate of the foreign CPO contributes initial capital to an offshore commodity pool, subject to the following requirements:

- i. the U.S. affiliate must not be a natural person;
- ii. the U.S. affiliate and its principals are not barred or suspended from participating in commodity interest markets in the U.S., its territories or possessions; and
- iii. interests in the U.S. affiliate are not marketed as providing access to trading in commodity interest markets in the U.S., its territories or possessions.

The Amendment will be effective 60 days after its publication in the Federal Register.

Please contact [Deborah A. Monson](#), [Jeremy A. Liabo](#), [Steven Mikel](#) or the Ropes & Gray attorney who usually advises you with any questions you may have or if you would like additional information.