

Investment Management Alert

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CFTC Proposes to Expand Availability of 3.10(c)(3) Registration Exemption for Non-U.S. Commodity Pool Operators

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Commodity Futures Trading Commission (CFTC) Regulation 3.10(c)(3) currently provides that non-U.S. commodity pool operators (CPOs) are exempt from registration if they solely operate non-U.S. commodity pools offered to non-U.S. investors and submit their underlying commodity interest transactions for clearing (the “3.10 Exemption”).¹ On May 28, 2020, the CFTC unanimously approved a proposal to amend the 3.10 Exemption that, if adopted, would:

- Allow non-U.S. CPOs to claim the 3.10 Exemption on a pool-by-pool basis with respect to their qualifying non-U.S. pools, while claiming other exemptions or exclusions (e.g., the Regulation 4.13(a)(3) de minimis exemption) or registering, as applicable, with respect to their other commodity pool offerings that do not qualify for the 3.10 Exemption (i.e., engage in “stacking” of CPO exemptions).
- Provide a safe harbor to satisfy the 3.10 Exemption’s requirement that non-U.S. pools managed by non-U.S. CPOs do not contain funds of any U.S. investors even if the non-U.S. CPO cannot certify that no U.S. investors could be beneficial owners, so long as the pools satisfy certain factors such as fund documentation disclosures, exclusive use of non-U.S. intermediaries to distribute participations in the commodity pool, and restrictions on secondary market trading in the United States.
- Allow a non-U.S. pool to qualify for the 3.10 Exemption, notwithstanding seed capital provided by a U.S. controlling affiliate of the non-U.S. CPO.²

In addition, the CFTC has re-opened the comment period with respect to its earlier proposal to allow non-U.S. CPOs to rely upon the 3.10 Exemption, regardless of whether the underlying commodity interests traded by their non-U.S. commodity pools are cleared. Interested parties generally have 60 days to provide comment on the CFTC’s proposal.

¹ 17 CFR 3.10(c)(3)(i).

² The proposal can be found at: <https://www.cftc.gov/media/3911/votingdraft052820/download>.

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