

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 3 and 30

RIN 3038-AC26

**Amendment to Commission Regulation 3.10(c): Exemption from Registration for
Certain Foreign Persons**

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule.

SUMMARY: The Commodity Futures Trading Commission ("Commission") is proposing to amend Commission regulation § 3.10(c)(2) and (3). The proposed amendment would amend the conditions under which persons located outside the United States ("U.S.") acting in the capacity of a futures commission merchant ("FCM"), an introducing broker ("IB"), commodity trading advisor ("CTA"), or commodity pool operator ("CPO") in connection with commodity interest transactions solely on behalf of persons located outside the U.S., or on behalf of certain international financial institutions, would qualify for an exemption from registration with the Commission.

DATES: Comments must be received on or before [Insert date 30 days from publication in the Federal Register].

ADDRESSES: You may submit comments, identified by RIN number 3038-AC26, by any of the following methods:

- CFTC Web site: <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Comments Online process on the Web site.

- Mail, Hand Delivery or Courier: Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street N.W., Washington, DC 20581.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Please submit your comments using only one of these methods.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make publicly available. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in §145.9 of the Commission's regulations.¹

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Frank Fisanich, Chief Counsel, or Andrew Chapin, Associate Chief Counsel, at (202) 418-5430, Division of Swap Dealer

¹ 17 CFR 145.9. Commission regulations referred to herein are found at 17 CFR Chapter I.

and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581. Electronic mail:

ffisanich@cftc.gov or achapin@cftc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Registration and Exemption from Registration of Intermediaries

Part 3 of the Commission’s regulations governs the registration of intermediaries engaged in the offer and sale of, and providing advice concerning, all commodity interest transactions, including those futures, options on futures, and swaps traded on U.S. trading facilities, including both designated contract markets (“DCMs”) and swap execution facilities (“SEFs”). Commission regulation 3.10 sets forth the manner in which intermediaries, including FCMs, IBs, CPOs, and CTAs, must apply for registration with the Commission. Currently, § 3.10(c) provides an exemption from registration, subject to certain conditions, for certain persons located outside the U.S. (such intermediaries are referred to herein as “Foreign Intermediaries”) acting as intermediaries with respect to persons also located outside the U.S., even though such transactions may be executed bilaterally, or on or subject to the rules of a DCM or SEF.

As a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,² swaps³ became subject to regulation under the CEA. Accordingly, the Commission promulgated conforming amendments to its regulations to include swaps in the definition of “commodity interest” in Regulation 1.3(yy). Thus, acting as an

² Pub. L. 111-203, 124 Stat. 137 (2010).

³ Swaps are defined in Section 1a(47) of the CEA and Commission Regulation § 1.3(xxx).

intermediary for persons located within the U.S. in connection with swaps, whether executed bilaterally, or on or subject to the rules of a DCM or SEF, may require Foreign Intermediaries to register with the Commission. On the other hand, certain Foreign Intermediaries acting only for persons located outside the U.S. in connection with swaps may be exempt from registration with the Commission under § 3.10(c).⁴

With respect to activities involving commodity interest transactions (which, as explained above, includes swaps) executed bilaterally, or made on or subject to the rules of any DCM or SEF, existing Regulation 3.10(c)(3)(i) provides an exemption from registration as a CPO, CTA, or IB if a person⁵ and the transaction meet the following conditions:

1. The person is located outside the U.S.;
2. The person acts only on behalf of persons located outside the U.S.; and
3. The commodity interest transaction is submitted for clearing through a registered FCM.

Regulation 3.10(c)(2)(i) provides a similar exemption from registration for any Foreign Intermediary acting as an FCM.

In 2015 and 2016, the Commission's Division of Swap Dealer and Intermediary Oversight ("Division") issued staff no-action relief that permitted Foreign Intermediaries to rely on the exemption from registration in 3.10(c)(3)(i) if their activities involve swaps

⁴ See Adaptation of Regulations To Incorporate Swaps, 77 Fed. Reg. 66,288, 66,295 (Nov. 2, 2012) (discussing the modification of the term, "commodity interest," to include swaps); Registration of Intermediaries, 77 Fed. Reg. 51,898, 51,899 (Aug. 28, 2012) (discussing the conforming amendments to Regulation 3.10(c)).

⁵ Under §1a(38) of the CEA and Regulation 1.3(u), the term "person" imports the plural and singular, and includes individuals, associations, partnerships, corporations and trusts. 7 U.S.C. § 1a(38); 17 C.F.R. § 1.3(u).

that are not subject to a Commission clearing requirement.⁶ The Division noted that the CEA and Commission regulations do not require that all swaps be cleared and some swaps are not yet accepted for clearing by any Commission-registered derivatives clearing organization (“DCO”). Thus, the Division stated that it did not believe the Commission intended that Foreign Intermediaries acting only for persons located outside the U.S. be required to register if the intermediaries merely acted for such persons in connection with transactions not required to be cleared by the CEA or Commission regulations.

Similarly, pursuant to additional no-action relief provided in 2015, the Division also provided relief from registration as an IB or CTA for intermediaries acting for International Financial Institutions (“IFIs”).⁷ While such institutions may have headquarters or another significant presence in the U.S.,⁸ the Division recognized that the unique attributes and multinational status of these institutions did not warrant treating them as domestic persons.

⁶ See CFTC Letters 15-37 (June 4, 2015) and 16-08 (Feb. 12, 2016).

⁷ IFIs are those institutions defined in the Commission’s previous rulemakings and staff no-action letters, i.e.: Int’l Monetary Fund, Int’l Bank for Reconstruction and Development, European Bank for Reconstruction and Development, Int’l Development Association, Int’l Finance Corp., Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, Inter-American Investment Corp., Council of Europe Development Bank, Nordic Investment Bank, Caribbean Development Bank, European Investment Bank and European Investment Fund (Int’l Bank for Reconstruction and Development, Int’l Finance Corp. and Multilateral Investment Guarantee Agency are parts of the World Bank Group). *See, e.g.*, Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant,” and “Eligible Contract Participant,” 77 FR 30596, 30692 n.1180 (May 23, 2012).

⁸ See CFTC No-Action Letter 15-37 (June 4, 2015).

II. The Proposal

A. Proposal Rationale

Given the various execution venues and clearing requirements applicable to swaps⁹, the Commission now proposes to amend § 3.10(c)(2)(i) and (3)(i) in tandem to simplify the registration exemption that is available to Foreign Intermediaries. Specifically, the proposed amendments would permit a Foreign Intermediary to be eligible for an exemption from registration with the Commission if the Foreign Intermediary, in connection with a commodity interest transaction, only acts on behalf of (1) persons located outside the U.S., or (2) IFIs (as defined in the proposed rule amendments), without regard to whether such persons or institutions clear such commodity interest transaction.

The Commission notes at the outset that the exemptions from registration in § 3.10(c)(2) and (3) do not in themselves excuse any person (including any IFI) from compliance with any provision of the Act or Commission regulations otherwise applicable to such persons, including, without limitation, any requirement that a resulting commodity interest transaction be cleared by a DCO registered or exempt from registration with the Commission. Commission regulation 3.10 in its current form makes it a condition of the Foreign Intermediary's exemption that its foreign located customer's commodity interest transactions be cleared through a registered FCM. However, as explained above, not all commodity interest transactions are subject to a clearing

⁹ E.g., A swap may be executed bilaterally and then performed bilaterally between those counterparties or could be submitted for clearing where each counterparty would then face the clearing house for performance; a swap could be executed on a SEF and then performed bilaterally between the counterparties or could be cleared; a swap could be executed on a DCM and cleared. Under Part 50 of the Commission's regulations, some swaps are required to be cleared, but some swaps can be either performed bilaterally or voluntarily cleared if a clearing house accepts such swaps for clearing.

requirement under the CEA or Commission regulations, and some are not available for clearing by any derivatives clearing organization (“DCO”) registered with the Commission.

Thus, the Commission is proposing to amend the language of the exemptions by removing the clearing requirement because persons located outside the U.S. that are subject to any applicable clearing requirement for futures or swaps, or any other applicable provision of the CEA or Commission regulations, must comply with those requirements regardless of any registration exemption for a Foreign Intermediary.

The Commission has come to the view that the focus of the exemption should be the activity of the Foreign Intermediary, not its customer. Accordingly, the Commission believes that the proposed amendments are consistent with its longstanding policy to focus its customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic participants. Where a Foreign Intermediary’s customers are located outside the U.S., the Commission believes the jurisdiction where the customer is located has the preeminent interest in protecting such customers.

B. Amended Rule Text

Further to the foregoing, with respect to the amended rule text, the Commission is proposing to eliminate from 3.10(c)(2)(i) and (3)(i) both the clearing requirement and references to DCMs and SEFs. The Commission is retaining the reference to the definition of “foreign broker” in paragraph (c)(2)(i) because “foreign broker” is not a Commission intermediary registration category (as are IB, CTA, and CPO) and the definition is necessary to make clear that a foreign broker is one who is “engaged in soliciting or in accepting orders only from persons located outside the United States, its

territories or possessions.” This definitional reference also maintains symmetry with paragraph (c)(3)(i), which specifies that the exemption from registration applies to intermediary activity, as described in the IB, CTA, and CPO definitions, on behalf of IFIs or persons located outside the U.S., its territories, or possessions .

Finally, because the Commission is proposing to codify the registration relief in No-Action Letter 15-37 with respect to intermediary activities on behalf of IFIs, the Commission proposes to add a new § 3.10(c)(6) to define IFIs for the purposes of § 3.10 in order to provide legal clarity on the scope of the registration exemption.

The Commission requests comment on all aspects of this proposed rulemaking.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires Federal agencies, in promulgating regulations, to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. Each Federal agency is required to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking.¹⁰

The rule proposed by the Commission would affect only FCMs, IBs, CTAs and CPOs. The Commission has previously determined that FCMs and CPOs are not small entities for purposes of the RFA. Therefore, the requirements of the RFA do not apply

¹⁰ 5 U.S.C. 601 et seq.

to those entities.¹¹ The Commission notes that the foreign persons affected by the proposed changes would be registered FCMs and CPOs if not for the exemption provided therein. Further, the Commission notes that the proposed rule would impose no new obligation, significant or otherwise, on any of the entities remaining entities.

With respect to CTAs and IBs, the Commission has found it appropriate to consider whether such registrants should be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular Commission regulation at issue.¹² As certain of these registrants may be small entities for purposes of the RFA, the Commission considered whether this rulemaking would have a significant economic impact on such registrants. This Proposal would clarify in what circumstances certain foreign persons acting in the capacity of a FCM or an IB, CTA or CPO would be exempt from registration, in connection with commodity interest transactions solely on behalf of persons located outside the U.S. This proposal is not expected to impose any new burdens on market participants. Rather, to the extent that this proposal provides an exemption to the intermediary registration requirement, the Commission believes it is reasonable to infer that the exemption would be less burdensome to such participant. The Commission does not, therefore, expect small entities to incur any additional costs as a result of this proposal. Therefore, the Commission has determined that the proposed rule will not create a significant economic impact on a substantial number of small entities.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5

¹¹ See Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18620 (Apr. 30, 1982) (FCMs and CPOs).

¹² See 47 FR at 18620 (CTAs); and, Introducing Brokers and Associated Persons of Introducing Brokers, Commodity Trading Advisors and Commodity Pool Operators; Registration and Other Regulatory Requirements, 48 FR 35248, 35276 (Aug. 3, 1983) (IBs).

U.S.C. 605(b) that the proposed rule will not have a significant impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (“PRA”) imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined the PRA.¹³ An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The proposed rules will not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under the PRA.

The Commission invites the public and other interested parties to comment on any aspect of the reporting burdens. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission generally solicits comments in order to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) mitigate the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. The Commission specifically invites public comment on the accuracy of its estimate that no additional information

¹³ 44 U.S.C. 3501 et seq.

collection requirements or changes to existing collection requirements would result from the rules proposed herein.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by email at OIRAsubmissions@omb.eop.gov.

Please provide the Commission with a copy of submitted comments so that all comments can be summarized and addressed in the final rule preamble. Refer to the ADDRESSES section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statement for the collection of information discussed above may be obtained by visiting <http://reginfo.gov/>. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

C. Cost-Benefit Analysis

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before issuing new regulations under the Act.¹⁴ By its terms, it does not require the Commission to quantify the costs and benefits of new rules or to determine whether the benefits of the proposed rules outweigh their costs; it requires the Commission to “consider” the cost and benefits of its actions. Section 15(A) of the CEA further specifies that the costs and benefits of the proposed rules shall be evaluated in light of five broad areas of market public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of the futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public

¹⁴ 7 U.S.C. 19(a).

interest considerations. The Commission may, in its discretion, give greater weight to any of the five enumerated areas of concern and may, in its discretion, determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

The proposed regulation should foster: (1) the protection of market participants and the public by providing greater legal certainty to the commodity interest activities of persons located outside the U.S.; and (2) greater efficiency, competitiveness and financial integrity of financial markets; price discovery; and sound risk management practices by ensuring greater depth in swaps markets accessed by U.S. persons. The Commission invites public comment on its cost-benefit considerations.

List of Subjects

17 CFR Part 3

Definitions, Foreign futures, Consumer protection, Foreign options, Registration requirements.

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act and, in particular, Sections 2(a)(1), 4(b), 4c and 8a thereof, 7 U.S.C. 2, 6(b), 6c and 12a (1982), and pursuant to the authority contained in 5 U.S.C. 552 and 552b (1982), the Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 3 -- REGISTRATION

1. The authority citation for part 3 continues to read as follows:

Authority: 5 U.S.C. 522, 522b; 7 U.S.C. 1a, 2, 4, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6o, 6p, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, 23, unless otherwise noted.

2. Revise §3.10(c)(2)(i) and (3)(i) to read as follows:

§ 3.10 Registration of futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators and leverage transaction merchants.

* * * * *

(c) Exemption from registration for certain persons.

* * * * *

(2)(i) A person located outside the United States, its territories, or possessions (a “foreign located person”) engaged in activity that meets the definition of a futures commission merchant in the Act and § 1.3(p) is not required to register as a futures commission merchant if such activity is either solely that of a foreign broker as defined in § 1.3(xx) or solely on behalf of international financial institutions.

* * * * *

(3)(i) A foreign located person engaged in activity that meets the definition of an introducing broker, commodity trading advisor, or commodity pool operator, as defined in the Act and in §§ 1.3(mm), (bb), and (nn) respectively, is not required to register as an introducing broker, commodity trading advisor, or commodity pool operator if such activity is either solely on behalf of foreign located persons or international financial institutions.

* * * * *

3. Add new subparagraph (6) to § 3.10(c) to read as follows:

(6) For the purposes of this section, “international financial institution” means each of the following and any other international financial institution that the Commission may designate: Int’l Monetary Fund, Int’l Bank for Reconstruction and Development, European Bank for Reconstruction and Development, Int’l Development Association, Int’l Finance Corp., Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, Inter-American Investment Corp., Council of Europe Development Bank, Nordic Investment Bank, Caribbean Development Bank, European Investment Bank and European Investment Fund.

Issued in Washington, DC, on July 27, 2016, by the Commission.

Christopher J. Kirkpatrick,
Secretary of the Commission.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

Appendix to Amendment to Commission Regulation 3.10(c): Exemption from Registration for Certain Foreign Persons – Commission Voting Summary

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.