

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 30

RIN 3038-AE86

Foreign Futures and Options Transactions

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission) is proposing amendments to certain provisions of its regulations governing the offer and sale of foreign futures and options to customers located in the United States of America (U.S.). The proposed amendments would codify the process by which the Commission may terminate exemptive relief issued pursuant to those regulations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3038-AE86, by any of the following methods:

- CFTC Comments Portal: *https://comments.cftc.gov*. Select the “Submit Comments” link for this rulemaking and follow the instructions on the Public Comment Form.
- Mail: Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.
- Hand Delivery/Courier: Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <https://comments.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), 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 <https://comments.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 FOIA.

FOR FURTHER INFORMATION CONTACT: Matthew Kulkin, Director, mkulkin@cftc.gov; Frank Fisanich, Chief Counsel, ffisanich@cftc.gov; or Andrew Chapin, Associate Chief Counsel, achapin@cftc.gov, Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, DC 20581, (202) 418-5000.

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

SUPPLEMENTARY INFORMATION:

I. Background

Part 30 of the Commission’s regulations governs the offer and sale of futures and option contracts traded on or subject to the regulations of a foreign board of trade (“foreign futures and options”) to customers located in the U.S.² These regulations set forth requirements for foreign firms acting in the capacity of a futures commission merchant (FCM), introducing broker, commodity pool operator and commodity trading adviser with respect to the offer and sale of foreign futures and options to U.S. customers and are designed to ensure that such products offered and sold in the U.S. are subject to regulatory safeguards comparable to those applicable to transactions entered into on designated contract markets. In particular, requirements with respect to registration, disclosure, capital adequacy, protection of customer funds, recordkeeping and reporting, and sales practice and compliance procedures apply to the offer and sale of foreign futures and options as they do the offer and sale of domestic transactions.

In formulating a regulatory program to govern the offer and sale of foreign futures and option products to customers located in the U.S., the Commission considered the desirability of ameliorating the potential impact of such a program on persons already subject to regulatory oversight abroad. Based upon this consideration, the Commission determined to permit persons located outside the U.S. and subject to a comparable regulatory structure in the jurisdiction in which they are located to seek an exemption from certain of the requirements under part 30 of the Commission’s regulations based

² 17 CFR part 30.

upon compliance with the regulatory requirements of the person's jurisdiction.³ Such an exemption may be sought pursuant to § 30.10.⁴

A petition for exemption pursuant to § 30.10 typically is filed on behalf of persons located and doing business outside the U.S. that seek access to U.S. customers by: (1) a governmental agency responsible for implementing and enforcing the foreign regulatory program; or (2) a self-regulatory organization (SRO) of which such persons are members. A petitioner who seeks an exemption pursuant to § 30.10 must set forth with particularity the comparable regulations applicable in the jurisdiction in which that person is located. The Commission may, in its discretion, grant such an exemption if demonstrated to the Commission's satisfaction that the exemption is not otherwise contrary to the public interest or to the purposes of the provision from which exemption is sought. Appendix A to part 30, "Interpretative Statement With Respect to the Commission's Exemptive Authority Under §30.10 of Its Rules" (Appendix A), generally sets forth the elements the Commission will evaluate in determining whether a particular regulatory program may be found to be comparable for purposes of exemptive relief pursuant to § 30.10.⁵ Appendix A also specifically states that in considering an exemption request, the Commission will take into account the extent to which U.S. persons or contracts regulated by the Commission are permitted to engage in futures-

³ Foreign Futures and Foreign Options Transactions, 52 FR 28980 (Aug. 5, 1987).

⁴ 17 CFR 30.10.

⁵ 52 FR 28990, 29001. These elements include: (1) registration, authorization or other form of licensing, fitness review or qualification of persons that solicit and accept customer orders; (2) minimum financial requirements for those persons who accept customer funds; (3) protection of customer funds from misapplication; (4) recordkeeping and reporting requirements; (5) sales practice standards; (6) procedures to audit for compliance with, and to take action against those persons who violate, the requirements of the program; and (7) information sharing arrangements between the Commission and the appropriate governmental and/or self-regulatory organization to ensure Commission access on an as-needed basis to information essential to maintaining standards of customer and market protection within the U.S.

related activities or be offered in the country from which an exemption is sought.⁶ If the Commission determines that relief is appropriate, the Commission issues an Order to the foreign regulator or SRO that sets forth conditions governing such relief. For example, the foreign regulator or SRO must certify that it will promptly notify the Commission of any material changes to local laws and regulations forming the basis for the relief. If the Commission grants an exemption pursuant to §30.10, persons subject to regulatory oversight by the foreign regulator or SRO, as appropriate, and located and doing business outside the U.S. may solicit or accept orders directly from U.S. customers for foreign futures or options transactions and, in the case of a person acting in the capacity of an FCM, accept customer money or other property, without registering under the Commodity Exchange Act (CEA) in the appropriate capacity.⁷ As a condition for relief from registration, each foreign person must file written representations set forth in the Order issued by the Commission to its foreign regulator or SRO prior to engaging U.S. customers. For example, such foreign person must agree to provide the Commission or its representative access to its books and records related to transactions undertaken pursuant to the exemptive relief. Should the foreign regulator or SRO fail to comply with any of the conditions set forth in the relevant Order, the relief no longer applies. To date, the Commission has issued Orders pursuant to § 30.10 upon application from foreign regulators and SROs spanning the globe, including those in North America, Europe, South America, Australia and Asia.⁸ Each of these Orders applies to foreign

⁶ 17 CFR part 30, appendix A.

⁷ The term “futures commission merchant” is defined in § 1.3, 17 CFR 1.3.

⁸ For a complete list of Orders issued by the Commission pursuant to § 30.10, *see* <https://sirt.cftc.gov/sirt/sirt.aspx?Topic=ForeignPart30Exemptions>.

intermediaries acting solely in the capacity of FCMs. As a result of this regulatory deference, U.S. customers have greater access to robust global markets without sacrificing the regulatory goals for customer protection set forth in the CEA.

Within each Order issued pursuant to § 30.10, the Commission reserves the right to condition, modify, suspend, terminate, withhold as to a specific firm, or otherwise restrict the exemptive relief granted, as appropriate, on its own motion. For example, the Commission may reconsider its finding that the standards for relief set forth in Regulation 30.10 and, in particular, Appendix A, have been met due to changes in the foreign regulatory program. The Commission also may determine that the continued exemptive relief, in general, or with respect to a particular firm, would be, for example, contrary to the public interest, or that the arrangements in place for the sharing of information with the Commission or other circumstances do not warrant continuation of the exemptive relief.

II. The Proposal

Regulation 30.10(a) sets forth the process by which any person adversely affected by any requirement set forth in part 30 may file a petition with the Commission seeking an exemption.⁹ Pursuant to this provision, the Commission may, in its discretion, grant the exemption if it finds that the exemption is not otherwise contrary to the public interest or to the purposes of the provision for which an exemption is sought. While § 30.10(a) provides that the Commission may grant an exemption subject to any terms or conditions it may find appropriate, the regulation does not provide a specific course of action should the Commission determine that exemptive relief is no longer warranted. Accordingly, the

⁹ 17 CFR 30.10(a).

Commission is proposing to amend § 30.10 by adding a new paragraph (c) to codify the process by which the Commission may terminate exemptive relief issued pursuant to paragraph (a).

The Commission notes that part 48 of its regulations provides a process for termination of a foreign board of trade's (FBOT) registration.¹⁰ Regulation 48.9 generally provides two broad mechanisms for revocation of an FBOT's registration: (1) failure to satisfy registration requirements or conditions; and (2) other events that could result in revocation, such as a material change to regulatory regime, market emergency, or any other event impacting the public interest.¹¹ Similarly, the Commission in this rulemaking is proposing to codify the process by which relief granted by the Commission pursuant to § 30.10 would be terminated.

Proposed § 30.10(c)(1) specifically would provide that the Commission may terminate exemptive relief, after appropriate notice and an opportunity to respond, under three circumstances. First, the Commission could terminate the relief should it determine that there has been a material change or omission in the facts and circumstances pursuant to which relief was granted that demonstrate that the standards set forth in Appendix A forming the basis for granting such relief are no longer met. For example, the laws within a foreign jurisdiction could be amended to no longer require customer funds be segregated from proprietary funds. In this case, an exempt foreign broker would no longer be subject to customer protection standards comparable to those applicable to a registered FCM. Second, the Commission could terminate relief should it determine that

¹⁰ 17 CFR part 48.

¹¹ 17 CFR 48.9.

the continued exemptive relief would be contrary to the public interest or inconsistent with the purposes of the § 30.10 exemption. For example, in considering whether exemptive relief continues to be warranted, the Commission could take account of a lack of comity relating to the execution or clearing of any commodity interest¹² subject to the Commission's exclusive jurisdiction.¹³ Third, the Commission could terminate relief should it determine that the information-sharing arrangements no longer adequately support exemptive relief.

Proposed § 30.10(c)(2) and (3) would provide any affected person with an appropriate opportunity to respond to any notice by the Commission issued pursuant to § 30.10(c)(1). The affected person would be the foreign regulator, SRO or other entity that filed the original petition for relief. The Commission believes that the timing for any opportunity to respond would take into account the exigency of circumstances. Should the Commission ultimately determine to terminate any exemptive relief, it shall notify the affected person in writing setting forth the particular reasons why relief is no longer warranted and issue an Order terminating exemptive relief to be published in the *Federal Register*. Proposed § 30.10(c)(2) through (4) would provide further that any Order terminating exemptive relief shall set forth an appropriate timeframe for the orderly transfer or close out of any accounts held by U.S. customers impacted by such an Order. Consistent with § 48.9, proposed § 30.10(c)(5) would provide that any person whose relief has been terminated may apply for exemptive relief 360 days after the issuance of

¹² The term "commodity interest" includes, among other things, any contract for the purchase or sale of a commodity for future delivery, or any swap as defined in the CEA. *See* 17 CFR 1.3.

¹³ The Commission's exclusive jurisdiction is set forth in 7 U.S.C. 2(a).

the relevant Order issued by the Commission if the deficiency causing the revocation has been cured or relevant facts and circumstances have changed.

The Commission notes that the proposed amendment to § 30.10 would not impact its ability to suspend immediately the relief set forth in any Order issued pursuant to § 30.10(a) should exigent circumstances occur, e.g., a foreign regulator halts the flow of capital outside its jurisdiction impacting a U.S. customer's ability to withdraw money held in a segregated foreign futures and options customer account. The proposed amendment also would not impact the Commission's ability, as set forth in each of the Orders issued pursuant to § 30.10, to otherwise condition, modify, withhold as to a specific firm, or otherwise restrict exemptive relief on its own motion.

The Commission requests comment on all aspects of this proposed rulemaking. The Commission specifically requests comment as to whether § 30.10(c) should be amended further to formalize the process for other changes to the scope of relief issued by the Commission, e.g., modification or suspension of the granted exemptive relief, subject to the parameters set forth within the proposed regulation.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that Federal agencies consider whether the rules that they issue will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the 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.¹⁴

The regulatory amendments proposed by the Commission in this release would affect foreign members of foreign boards of trade who perform the functions of an FCM. While the RFA may not apply to foreign entities,¹⁵ the Commission previously determined that FCMs should be excluded from the definition of small entities.¹⁶ Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that these proposed regulations 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 by the PRA. Proposed regulation 30.10(c)(2) would result in the collection of information requirements within the meaning of the PRA, as discussed below. This proposed rule contains a collection of information for which the Commission has not previously received control numbers from the Office of Management and Budget (OMB). If adopted, responses to this collection of information would be required to obtain or retain benefits. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it

¹⁴ See 5 U.S.C. 601 et seq.

¹⁵ See 13 CFR 121.105 (noting that a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor).

¹⁶ See, e.g., Policy Statement and Establishment of Definitions of “Small Entities” for purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619 (Apr. 30, 1982).

displays a currently valid control number. The Commission has submitted to OMB an information collection request to obtain an OMB control number for the collection contained in this proposal in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Specifically, proposed regulation 30.10(c)(3) provides any party affected by the Commission's determination to terminate relief with the opportunity to respond to the notification in writing no later than 30 business days following the receipt of the notification, or at such time as the Commission permits in writing. The Commission estimates that, if adopted, it would receive one response to this collection resulting in eight burden hours annually.

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission 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) minimize 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.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566, or by e-mail 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 for comment submission instructions to the Commission. A copy of the supporting statements for the collection of information discussed above may be obtained by visiting *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 Considerations

1. Summary

Section 15(a) of the CEA¹⁷ requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. The baseline for this consideration of costs and benefits is the current status, where the Commission has not codified the procedures by which the Commission may terminate exemptive relief issued pursuant to § 30.10. Because the Commission has not yet terminated such relief, the Commission has not yet implemented a procedure for terminating such exemptions. Moreover, the Commission has limited relevant or useful quantitative data to assess the potential costs and benefits of proposed regulation 30.10(c). Accordingly, the Commission has generally considered the costs and benefits of proposed regulation 30.10(c) in qualitative terms.

As a general matter, proposed regulation 30.10(c) would reduce legal uncertainty by articulating the basis on which the Commission may terminate exemptive relief pursuant to § 30.10 and establishing a process whereby an affected party would first be notified and given an opportunity to respond before the Commission would take any

¹⁷ 7 U.S.C. 19(a).

action. The affected party will benefit from the clear process set forth in the proposed regulation. The affected party would only incur costs in connection with the proposed regulation to the extent that the Commission identified a basis for terminating the exemption and notified the party of that basis. Those costs would include reviewing and responding to the notification, which the Commission believes would vary depending on the circumstances, including the stated basis for termination. As stated above, the Commission believes that 30 days, or such additional time as the Commission may permit in writing, would be sufficient for the affected party to develop a response while allowing the Commission to take timely action to protect its regulatory interests.

The Commission requests comment on the potential costs and benefits of proposed Regulation 30.10(c), including, where possible, quantitative data. The Commission further requests comment on any alternative proposals that might achieve the objectives of the proposed regulation, and the costs and benefits associated with any such alternatives.

2. Section 15(a) Factors

Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and 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 interest considerations.

The Commission is considering the costs and benefits of these rules in light of the specific provisions of section 15(a) of the CEA:

a. *Protection of Market Participants and the Public.* Section 15(a)(2)(A) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of protection of market participants and the public. The proposed amendments would protect market participants and the public by setting forth a clear procedure for the Commission's termination of exemptive relief issued pursuant to § 30.10(a) and by providing a reasonable timeframe for the orderly transfer of any accounts held by U.S. customers impacted by an order terminating relief.

b. *Efficiency, Competitiveness, and Financial Integrity of Markets.* Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of efficiency, competitiveness, and financial integrity considerations. The Commission has not identified a specific effect on the efficiency and financial integrity of markets as a result of the proposed regulations. There may be a minor impact of termination on the competitiveness of futures markets. Foreign futures and options may compete directly or indirectly with contracts listed on DCMs. Due to legal restrictions in foreign jurisdictions, the only way that U.S. customers may access certain foreign contracts may be through an exempt foreign firm. The termination of any exemptive relief therefore may reduce the available options for U.S. market participants.

c. *Price Discovery.* Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of price discovery considerations. The Commission believes that the proposed amendments will not have any significant impact on price discovery.

d. *Sound Risk Management Practices.* Section 15(a)(2)(D) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of

sound risk management practices. The Commission believes that the proposed amendments will not have a large impact on the risk management practices of the futures and options industry. However, to the extent that having a transparent process for terminating exemptions issued to foreign regulatory or self-regulatory organizations on behalf of individual firms may encourage an increased offer and sale of contracts that more closely match the hedging needs of particular U.S. market participants, the practice of sound risk management might be improved slightly.

e. *Other Public Interest Considerations.* Section 15(a)(2)(E) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of other public considerations. The Commission believes that having a transparent process for terminating an exemption from registration would ensure exempt § 30.10 firms have due process in the event that the Commission believes such a termination may be warranted. This process would also give procedural notice to U.S. customers who may be affected by the termination of an order of § 30.10 exemption.

The Commission invites comment on its preliminary consideration of the costs and benefits associated with the proposed changes to § 30.10.

List of Subjects in 17 CFR Part 30

Consumer protection, Fraud.

For the reasons set forth in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 30 as follows:

PART 30 – FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

1. The authority citation for part 30 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6c and 12a, unless otherwise noted.

2. In § 30.10, add paragraph (c) to read as follows:

§ 30.10 Petitions for exemption.

* * * * *

(c)(1) The Commission may, in its discretion and upon its own initiative, terminate the exemptive relief granted to any person pursuant to paragraph (a) of this section, after appropriate notice and an opportunity to respond, if the Commission determines that:

(A) There is a material change or omission in the facts and circumstances pursuant to which relief was granted that demonstrate that the standards set forth in appendix A of this part forming the basis for granting such relief are no longer met; or

(B) The continued effectiveness of any such exemptive relief would be contrary to the public interest or inconsistent with the purposes of the exemption provided for in this part; or

(C) The arrangements in place for the sharing of information with the Commission do not warrant continuation of the exemptive relief granted.

(2) The Commission shall provide written notification to the affected party of its intention to terminate an exemption pursuant to paragraph (a) of this section and the basis for that intention.

(3) The affected party may respond to the notification in writing no later than 30 business days following the receipt of the notification, or at such time as the Commission permits in writing.

(4) If, after providing any affected person appropriate notice and opportunity to respond, the Commission determines that relief pursuant to paragraph (a) of this section

is no longer warranted, the Commission shall notify the person of such determination in writing, including the particular reasons why relief is no longer warranted, and issue an Order Terminating Exemptive Relief. Any Order Terminating Exemptive Relief shall provide an appropriate timeframe for the orderly transfer or close out of any accounts held by U.S. customers impacted by such an Order.

(5) Any person whose relief has been terminated may apply for exemptive relief 360 days after the issuance of the Order Terminating Exemptive Relief if the deficiency causing the revocation has been cured or relevant facts and circumstances have changed. Issued in Washington, DC, on June 25, 2019, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

**Appendix to Foreign Futures and Options Transactions – Commission Voting
Summary**

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.