

CLIENT ALERT

CFTC Streamlines Form CPO-PQR and Clarifies Non-U.S. Registration Exemption

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AUTHORS

Rita M. Molesworth | Deborah A. Tuchman | Lisa Eskenazi | Steven C. Matos

The Commodity Futures Trading Commission has adopted final rules that ease commodity pool operator reporting requirements and provide clarity for foreign CPOs. The rules will amend (i) Form CPO-PQR filed by certain registered CPOs¹ and (ii) the Rule 3.10(c) registration exemption relied upon by non-U.S. CPOs (the “3.10 Exemption”).² In both cases, the amendments were adopted largely as proposed.³ In addition, the CFTC adopted additional amendments to Rule 3.10(c) to clarify the applicability of the clearing requirement imposed on foreign intermediaries that rely on the registration exemptions in the rule.⁴

I. Form CPO-PQR

Form CPO-PQR is filed by registered CPOs that are subject to a reporting requirement under CFTC rules. Form CPO-PQR collects information regarding a CPO’s business and the commodity pools it operates. The amendments to CFTC Rule 4.27 and Form CPO-PQR are designed to simplify such reporting requirements by (i) eliminating certain schedules

¹ The voting draft of the final rule amending Form CPO-PQR is available [here](#). The rule is effective 30 days after publication in the Federal Register.

² The voting draft of the final rule amending the Rule 3.10 Exemption is available [here](#). The rule is effective 60 days after publication in the Federal Register.

³ For more information, please see our client memoranda entitled “CFTC Proposes to Simplify Reporting on Form CPO-PQR” (May 5, 2020), available [here](#); and “CFTC Proposes to Amend and Clarify Registration Exemptions for Non-U.S. CPOs” (June 17, 2020), available [here](#).

⁴ The amendments were originally proposed in 2016, and the comment period was reopened in the June 17, 2020 release related to the 3.10 Exemption.

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and requested information, (ii) imposing uniform requirements, including with respect to the frequency of reporting, on all CPOs, regardless of assets under management, and (iii) permitting CPOs to file Form NFA-PQR as a substitute for Form CPO-PQR. The first time CPOs will be required to file the revised Form CPO-PQR will be with respect to the first quarter of 2021.⁵

Form CPO-PQR has been reduced to one schedule, Schedule A, which will now include the schedule of investments that was formerly included on Schedule B. Schedules B and C have otherwise been eliminated. Each CPO subject to the filing requirement will file the same form on a quarterly basis. The amendment eliminates all questions regarding a pool's auditors and marketers, as well as certain questions regarding services provided by pool administrators. Added to the form is a request for the "legal entity identifier" (LEI) of the CPO and each of its commodity pools. The adopting release makes clear that a CPO or pool LEI must be submitted only by those CPOs that are otherwise required to have an LEI. The CFTC noted that the proposed request for LEIs would enable the CFTC to leverage other more frequently updated data sets regarding the swaps market in particular. Importantly, a CPO that is also a registered investment adviser will no longer be permitted to use its filing of Form PF to satisfy its Form CPO-PQR filing obligation.

Among other questions asked by the CFTC in the proposing release was whether the CFTC should consider further amending the schedule of investments to align it with the schedule that appeared in NFA's original (2010) Form PQR.⁶ In addition to requiring less granularity with respect to the investment categories, the 2010 form had a 10%, rather than 5%, reporting threshold for positions. The CFTC elected not to adopt the original Form PQR, citing the need for information amid recent market volatility. Commissioner Berkovitz also noted that while some of the data that is collected may not be particularly useful now, markets are not static and the CFTC may at some point need the additional data. The CFTC directed its staff to evaluate the ongoing utility of information collected on Form CPO-PQR over the next couple of years, indicating that the Commission may reconsider the form's thresholds.

Finally, the CFTC has entered into a memorandum of understanding under which it will share the data it collects on Form CPO-PQR with the Office of Financial Research. The data will be compiled in a revised form consistent with the information the Securities and Exchange Commission shares with OFR on Form PF.

II. **CFTC Rule 3.10(c)**

The 3.10 Exemption is available to non-U.S. CPOs that operate pools located outside the United States. The 3.10 Exemption has been amended to (i) permit reliance on a pool-by-pool basis; (ii) clarify that generally both the pool and its

⁵ The filing deadline for such report is May 30, 2021.

⁶ For more information, see our client memorandum entitled NFA Adopts New Compliance Rules Governing Registered Commodity Pool Operators (Oct. 7, 2009), available [here](#).

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participants must be outside the United States; (iii) incorporate a safe harbor for non-U.S. CPOs that are unable to identify all pool participants; and (iv) provide for an exception for seed investments made by U.S. affiliates.

Stacking of the 3.10 Exemption

The final rule clarifies that a non-U.S. CPO relying on the 3.10 Exemption with respect to a pool is required to meet the conditions of the 3.10 Exemption with respect to such pool only, and not with respect to every other pool the non-U.S. CPO operates. In addition, the final rule clarifies that a non-U.S. CPO may “stack” exemptions and rely upon the 3.10 Exemption for its non-U.S. pools with non-U.S. participants, while concurrently registering with the CFTC or relying on other exemptions with respect to pools it offers or sells to U.S. persons. In response to a comment letter received on the June 2020 proposal, the CFTC removed from the final language a reference to stacking the 3.10 Exemption specifically with the exemptions in Rules 4.13 and 4.5 to clarify that the 3.10 Exemption may be broadly combined with any other available exemption or exclusion.

3.10 Exemption Safe Harbor

The CFTC adopted a safe harbor, as proposed, permitting a non-U.S. CPO to rely on the 3.10 Exemption with respect to a non-U.S. pool even if it cannot confirm that all investors in the pool are non-U.S. persons. In order to rely on the safe harbor, certain conditions aimed at confirming that the pool is not being marketed to U.S. persons must be met. Such conditions include, among others, clear disclosure in the pool’s offering documents prohibiting offering to, and ownership by, U.S. persons, the use of only non-U.S. distribution agents and the performance of reasonable due diligence to preclude U.S. persons from investing. The CFTC expects non-U.S. CPOs to keep adequate records to exhibit compliance with such conditions.

Exception for Initial Contributions by U.S. Affiliates

The CFTC’s 2020 proposal included an exception that would, subject to certain conditions, permit a non-U.S. CPO to rely on the 3.10 Exemption with respect to a pool even if a U.S. controlling affiliate of the CPO provides seed capital to such pool at or near a pool’s inception. The CFTC declined to further expand the exception to include contributions made by U.S. affiliates throughout the term of a pool. Based on comments received, the CFTC adopted the proposed rule with a few changes: (i) qualifying contributions from *any* affiliates, rather than only *controlling* affiliates, are now permitted under the exception; (ii) the rule specifies that contributions by natural person affiliates do not qualify under the exception; and (iii) the condition prohibiting certain bad actor affiliates from relying on the exception was narrowed to include only those that are barred or suspended from participating in commodity interest markets in the United States rather than those subject to any statutory disqualification.

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III. Rule 3.10(c) Clearing Requirement

CFTC Rule 3.10(c) generally exempts persons located outside the United States from the requirement to register with the CFTC as an introducing broker, commodity trading advisor, CPO or futures commission merchant (collectively, “foreign intermediaries”) when acting only on behalf of persons also located outside the United States (including international financial institutions (“IFIs”)) if the transactions in question are submitted for clearing through a registered FCM. The adopted amendments broaden the exemptions to cover uncleared transactions and expand the scope of persons for whom transactions may be effected. The final rule provides that the exemptions are conditioned upon (i) clearing on a registered derivatives clearing organization (“DCO”) only those commodity interest transactions that are required or intended to be cleared on a DCO; and (ii) such transactions being cleared through a registered FCM, unless the foreign intermediary’s customer is a clearing member of the relevant DCO. In addition, the final rule modifies the definition of “international financial institution” to make it consistent with the definition of U.S. person recently adopted by the CFTC in its final cross-border rules. The IFI definition will now include: (i) a specific list of IFIs with two new additions – the European Stability Mechanism and the North American Development Bank;⁷ and (ii) a catch-all for “any other similar international organizations, and their agencies and pension plans.”

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If you have any questions regarding this client alert, please contact one of the authors, any member of our CFTC team listed below, or the Willkie attorney with whom you regularly work.

⁷ Such additional entities were identified in previous relief granted by the CFTC staff related to swap regulations in CFTC Staff Letter No. 17-34 (July 24, 2017) and CFTC Staff Letter No. 18-13 (May 16, 2018).

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Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the Commodity Exchange Act and the CFTC regulatory regime. We would be pleased to assist on your matters.

Athena Eastwood

202 303 1212

aeastwood@willkie.com

J. Christopher Giancarlo

212 728 3816

jcgiancarlo@willkie.com

Rita M. Molesworth

212 728 8727

rmolesworth@willkie.com

Paul J. Pantano Jr.

202 303 1211

ppantano@willkie.com

Deborah A. Tuchman

212 728 8491

dtuchman@willkie.com

Conrad G. Bahlke

212 728 8233

cbahlke@willkie.com

Lisa Eskenazi

212 728 3349

leskenazi@willkie.com

Neal E. Kumar

202 303 1143

nkumar@willkie.com

James E. Lippert

212 728 8945

jlippert@willkie.com

Steven C. Matos

212 728 8757

smatos@willkie.com

Michael Hartz

202 303 1161

mhartz@willkie.com

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