



Vanguard[®]

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August 11, 2020

Mr. Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Submitted via portal: <https://comments.cftc.gov>

Re: Proposed Exemption from Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools [RIN 3038-AE46]

Dear Mr. Kirkpatrick,

The Vanguard Group, Inc. (“**Vanguard**”)¹ welcomes the Commodity Futures Trading Commission’s (the “**Commission**”) proposal² (the “**Proposal**”) to amend Regulation 3.10(c) (the “**3.10 Exemption**”) to provide an exemption from registration for certain foreign persons acting as commodity pool operators of offshore commodity pools (“**non-U.S. CPOs**”). Vanguard supports the Commission’s objectives to better align the terms of its regulations with the Commission’s stated goals and current global market practices. We appreciate the Commission’s effort in crafting a proposal that appropriately reflects the operations of non-US CPOs while providing strong investor protections and support the Commission’s expeditious adoption of the Proposal with minor modifications.

Vanguard appreciates the effort by the Commission to provide flexibility and regulatory certainty by proposing to:

- Allow non-U.S. CPOs to rely on the 3.10 Exemption for offshore pools on a pool-by-pool basis while registering or relying on other exemptions for offshore pools that do not qualify for this 3.10 Exemption;
- Add a safe harbor for unintended U.S. investors; and
- Permit certain U.S. controlling affiliates to contribute initial capital to non-U.S. CPOs while allowing the non-U.S. CPO to be eligible for exemption from registration under the 3.10

¹ Vanguard is one of the world’s leading investment management companies, offering a diverse selection of low-cost investment products—including mutual funds and exchange-traded funds—advice and related services. As of June 30, 2020, we managed approximately \$6.1 trillion in assets globally on behalf of more than 30 million investors.

² See Commodity Futures Trading Commission, Exemption From Registration for Certain Foreign Persons Acting as Commodity Pool Operators of Offshore Commodity Pools Pool Operators of Offshore Commodity Pools (June 12, 2020), <https://www.federalregister.gov/documents/2020/06/12/2020-12034/exemption-from-registration-for-certain-foreign-persons-acting-as-commodity-pool-operators-of->

Exemption, subject to conditions designed to 1) prevent evasion of Part 4 of the Commission's regulations ("**Part 4**") and 2) prevent contributions by persons barred from the U.S. commodity interest markets.

While we strongly support the Proposal, further to the comments contained in the Associations' comment letter³, Vanguard believes two changes would enhance the Proposal, consistent with the Commission's mandate to protect U.S. commodity pool participants:

- **Controlling Affiliate.** The Commission should not require that the U.S. affiliate that contributes capital to an offshore pool managed by a non-U.S. CPO be a controlling affiliate of the non-U.S. CPO or be regulated in the United States in order to qualify for the Affiliate Investment Exception.
- **Contribution Timing.** The Commission should not specify parameters around when and for how long a U.S. affiliate's contribution may remain in the offshore pool in order to remain eligible for the 3.10 Exemption.

1. Controlling Affiliate

Vanguard has established a policy and procedure whereby a U.S. affiliate makes capital contributions to certain offshore pools managed by non-U.S. CPOs for the purpose of establishing or protecting performance, addressing investor concentration concerns or to provide product support.

Vanguard recommends that rather than requiring these contributions be made by a controlling affiliate, such contributions may be made by any affiliate of the CPO, as defined in Rule 4.7. The Commission has long taken the position that contributions by an affiliate of a CPO do not constitute "participation" in a pool and therefore do not require the protections of Part 4. This position should not be impacted regardless of whether a controlling affiliate or another affiliate makes the capital contribution. In other contexts, the CFTC has recognized that the customer protection provisions of the Commodity Exchange Act are inapposite to affiliates of a CPO. For example, CFTC rules 4.22 and 4.7(a)(2)(viii)(A)(1) acknowledge that a CPO's affiliate that contributes capital to offshore pools does not need to receive the information that is otherwise provided by the CPO to other investors for their protection. Finally, the anti-evasion condition in the Proposal which requires that interest in the affiliate making the contribution cannot be marketed as providing access to trading in the U.S. commodity markets appropriately addresses the Commission's concern that these contributions may be used to evade Part 4 protections for U.S. investors.

2. Contribution Timing

As specified in the Preamble, the Commission proposes to limit the capital contribution to:

"those made at or near a pool's inception, which generally result from commercial decisions by the U.S. controlling affiliate, typically in conjunction with the non-U.S. CPO, to support the offshore pool until such time as it has an established performance history for solicitation purposes, although the contributed capital may remain in the offshore pool for the duration of its operations. The

³ See Letter from The Alternative Investment Management Association Limited ("AIMA"), the Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG"), the Investment Adviser Association ("IAA"), ICI Global and the Managed Funds Association ("MFA") (collectively, the "Associations"), to Commission, dated August 11, 2020.

Commission preliminarily believes that this limitation is appropriate to ensure that the capital is being contributed in an effort to support the operations of the offshore pool at a time when its viability is being tested, rather than as a mechanism for the U.S. controlling affiliate to generate returns for its own investors.”

Vanguard also believes that any contribution of capital by a U.S. affiliate should be done “in an effort to support the operations of the offshore pool at a time when its viability is being tested”. However, an offshore pool’s viability is not limited to its start-up. A pool’s viability may be tested under other circumstances such as:

- The unanticipated removal of seed capital originally contributed by an unaffiliated institutional investor or, in the case of a pool that is an exchange-traded fund, an Authorized Participant.
- AUM growth is slower than expected.
- Concerns regarding shareholder concentration (1 or few shareholders) in the pool increasing the impact that shareholder activity may have on the pool.
- Extreme market volatility.

Further, per Vanguard policy, the U.S. affiliate makes these capital contribution decisions in conjunction with the non-U.S. CPO for the purpose of establishing or protecting performance. Limiting affiliate capital contributions to “at or near a pool’s inception” would have the unintended consequence of limiting the affiliate’s ability to support its non-U.S. CPO while continuing to allow the non-U.S. CPO to qualify for the 3.10 Exemption.

Accordingly, Vanguard strongly recommends that the exemption for capital contributions not be limited to initial capital. In addition, Vanguard strongly supports the Commission’s preliminary conclusion that the exemption should not impose a limit on the length of time the capital may remain in the pool.

To summarize, while Vanguard supports the Proposal and encourages its swift adoption, we do believe that the concerns raised above need to be addressed in order to truly fulfil the objectives of bringing certainty to non-US CPOs that wish to participate in the U.S. Commodity markets on behalf of non-U.S. investors. In addition, Vanguard joins the Associations in their comments regarding the Commission’s Proposal and urges the Commission to consider the Associations’ additional recommendations intended to further the Commission’s focus on U.S. customer protections.

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In closing, we thank the Commission for the opportunity to provide our comments and appreciate the Commission's consideration of Vanguard's views. If you have any questions regarding Vanguard's comments or would like additional information, please contact Matthew Klein, Senior Counsel, at (610) 503-1458.

Sincerely,

/s/ William C. Thum

William C. Thum
Principal and Head of Capital Markets
Office of the General Counsel
Vanguard

cc: The Honorable Heath P. Tarbert
The Honorable Brian D. Quintenz
The Honorable Rostin Behnam
The Honorable Dawn DeBerry Stump
The Honorable Dan M. Berkovitz

Joshua B. Sterling, Director
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