

Voting Draft – As approved by the Commission on 10/30/2020
(subject to technical corrections)

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 30

Foreign Futures and Options Transactions

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: The Commodity Futures Trading Commission (Commission) is granting an exemption to UBS AG (UBS), a firm designated by the Swiss Financial Market Supervisory Authority (FINMA), from the application of certain of the Commission's foreign futures and option regulations based upon substituted compliance with certain comparable regulatory and self-regulatory requirements of a foreign regulatory authority consistent with conditions specified by the Commission, as set forth herein. This Order is issued pursuant to Commission § 30.10(a), which permits persons to file a petition with the Commission for exemption from the application of certain of the Regulations set forth in Part 30 and authorizes the Commission to grant such an exemption if such action would not be otherwise contrary to the public interest or to the purposes of the provision from which exemption is sought. The Commission notes that this Order does not pertain to any transaction in swaps, as defined in Section 1a(47) of the Commodity Exchange Act (Act).

EFFECTIVE DATE: [Insert date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION: The Commission has issued the following Order:

*Order Under Commission Regulation 30.10 Exempting UBS AG, a Firm Designated by the Swiss Financial Market Authority, From the Application of Certain of the Foreign Futures and Option Regulations the Later of the Date of Publication of the Order Herein in the **Federal Register** or After Filing of Consents by UBS, as Appropriate, to the Terms and Conditions of the Order Herein.*

Commission Regulations governing the offer and sale of commodity futures and option contracts traded on or subject to the regulations of a foreign board of trade to customers located in the U.S. are contained in Part 30 of the Commission's regulations.¹ These regulations include requirements for intermediaries with respect to registration, disclosure, capital adequacy, protection of customer funds, recordkeeping and reporting, and sales practice and compliance procedures that are generally comparable to those applicable to transactions on U.S. markets. 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, among other things, considered the desirability of ameliorating the potential impact of such a program. Based upon these considerations, the Commission determined to permit persons located outside the U.S. and subject to a comparable regulatory structure in the jurisdiction in which they were located to seek an exemption from certain of the requirements under Part 30 of the Commission's regulations based upon substituted compliance with the regulatory requirements of the foreign jurisdiction.²

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

² "Foreign Futures and Foreign Options Transactions," 52 FR 28290 (Aug. 5, 1987).

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Pursuant to § 30.10(a), persons located outside the U.S. and subject to a comparable regulatory structure in the jurisdiction in which they are located may seek an exemption from certain of the requirements under Part 30 of the Commission’s regulations based upon compliance with the regulatory requirements of the person’s home jurisdiction.³ Although a petition for exemption pursuant to § 30.10(a) typically is filed on behalf of persons located and doing business outside the U.S. that seek access to U.S. customers by a governmental agency responsible for implementing and enforcing the foreign regulatory program, or a self-regulatory organization (SRO) of which such persons are members, there is nothing to prevent an individual or firm from submitting a petition on its own behalf. A petitioner who seeks an exemption pursuant to § 30.10(a) must set forth with particularity the comparable regulations applicable in the jurisdiction in which that person is located. 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 § 30.10.⁴ 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)

³ 17 CFR 30.10(a).

⁴ 52 FR 28990, 29001.

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protection of customer funds from misapplication; (4) recordkeeping and reporting requirements; (5) sales practice standards; and (6) procedures to audit for compliance with, and to take action against those persons who violate, the requirements of the program. In addition, Appendix A to Part 30 further provides that any exemption of a general nature based on comparability requires appropriate information sharing arrangements between the Commission and the appropriate governmental agency 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.

The Commission specifically stated in adopting § 30.10 that no exemption of a general nature would be granted unless the persons to whom the exemption is to be applied: (1) submit to jurisdiction in the U.S. by designating an agent for service of process in the U.S. with respect to transactions subject to Part 30 and filing a copy of the agency agreement with the National Futures Association (NFA); (2) agree to provide access to their books and records in the U.S. to the Commission and Department of Justice representatives; and (3) notify NFA of the commencement of business in the U.S.⁵ Appendix A specifically states that “in considering an exemption request, the Commission will take into account the extent to which United States persons or contracts regulated by the Commission are permitted to engage in futures-related activities or be offered in the country from which an exemption is sought.”⁶

⁵ 52 FR 28980, 28981 and 29002.

⁶ 17 CFR Part 30, Appendix A.

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On May 24, 2019, UBS, a financial investment business organized and located in Switzerland, petitioned the Commission for an exemption from the application of the Commission's Part 30 Regulations. In support of its petition, UBS stated that granting such an exemption to conduct foreign futures and option transactions on behalf of customers located in the U.S. without having to register as a futures commission merchant would not be contrary to the public interest or to the purposes of the provisions from which the exemption is sought because UBS is subject to a regulatory framework comparable to that imposed by the Act and the regulations thereunder. Based upon a review of the UBS petition, the Commission has concluded that UBS has demonstrated to the Commission's satisfaction that the exemption for relief pursuant to § 30.10(a) is not otherwise contrary to the public interest or to the purposes of the provisions from which exemption is sought. Accordingly, the Commission has determined that compliance with applicable Swiss law may be substituted for compliance with those sections of the Act and regulations thereunder more particularly set forth herein.

By this Order, the Commission hereby exempts UBS, subject to specified conditions, from the following regulatory requirements:

- Registration with the Commission for firm and for firm representatives;
- The requirement in Commission § 30.6(a) and (d), 17 CFR §30.6(a) and (d), that the firm provide customers located in the U.S. with the risk disclosure statements in Commission Regulation 1.55(b), 17 CFR §1.55(b), and Commission Regulation 33.7, 17 CFR §33.7, or as otherwise approved under Commission Regulation 1.55(c), 17 CFR §1.55(c);
- The separate account requirement contained in Commission § 30.7, 17 CFR §30.7;

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- Those sections of Part 1 of the Commission's regulations that apply to foreign futures and options sold in the U.S. as set forth in Part 30; and
- Those sections of Part 1 of the Commission's regulations relating to books and records which apply to transactions subject to Part 30,

based upon substituted compliance by such persons with the applicable statutes and regulations in effect in Switzerland.

This determination to permit substituted compliance is based on, among other things, the Commission's finding that the regulatory framework governing UBS hereunder provides:

- (1) A system of qualification or authorization of firms who deal in transactions subject to regulation under Part 30 that includes, for example, criteria and procedures for granting, monitoring, suspending and revoking licenses, and provisions for requiring and obtaining access to information about authorized firms and persons who act on behalf of such firms;
- (2) Financial requirements for firms including, without limitation, a requirement for a minimum level of working capital and daily mark-to-market settlement and/or accounting procedures;
- (3) A system for the protection of customer assets that is designed to preclude the use of customer assets to satisfy house obligations and requires separate accounting for such assets;
- (4) Recordkeeping and reporting requirements pertaining to financial and trade information;
- (5) Sales practice standards for authorized firms and persons acting on their behalf that include, for example, required disclosures to prospective customers and prohibitions on improper trading advice;
- (6) Procedures to audit for compliance with, and to redress violations of, the customer protection and sales practice requirements referred to above, including, without limitation, an affirmative surveillance program designed to detect trading activities that take advantage of customers, and the existence of broad powers of investigation relating to sales practice abuses; and

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(7) Mechanisms for sharing of information between the Commission, UBS, and the Swiss regulatory authority on an “as needed” basis including, without limitation, confirmation data, data necessary to trace funds related to trading futures products subject to regulation in Switzerland, position data, and data on firms’ standing to do business and financial condition.

In particular, Commission staff has concluded, upon review of the petition of UBS and accompanying exhibits, that FINMA’s regulation of financial futures and options intermediaries is comparable to that of the U.S. in the areas specified in Appendix A of Part 30, as described above.

This Order does not provide an exemption from any provision of the Act or regulations thereunder not specified herein, such as the antifraud provision in § 30.9. Moreover, the relief granted is limited to brokerage activities undertaken on behalf of customers located in the U.S. with respect to otherwise permitted transactions on or subject to the rules of any other non-U.S. market where UBS is authorized by Swiss law to conduct brokerage activities. The relief does not extend to regulations relating to trading, directly or indirectly, on U.S. exchanges, and does not pertain to any transaction in swaps, as defined in Section 1a(47) of the Act. For example, UBS trading for its own account in U.S. markets would be subject to the Commission’s large trader reporting requirements.⁷ Similarly, if UBS were carrying positions on a U.S. exchange on behalf of foreign clients and submitted such transactions for clearing on an omnibus basis through a firm registered as a futures commission merchant under the Act, it would be subject to the reporting requirements applicable to foreign brokers.⁸ The relief herein is

⁷ See, e.g., 17 CFR Part 18.

⁸ See, e.g., 17 CFR Parts 17 and 21.

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inapplicable where UBS solicits or accepts orders from customers located in the U.S. for transactions on U.S. markets. In that case, UBS must comply with all applicable U.S. laws and regulations, including the requirement to register in the appropriate capacity.

The eligibility of UBS to seek relief under this exemptive Order is subject to certain conditions. Specifically, UBS must represent in writing to the Commission that it:

- (1) Is licensed as a financial investment business and is otherwise in good standing under the standards in place in Switzerland; and it will notify the Commission and NFA promptly of any change in its status as a financial investment business that would affect its continued eligibility for the exemption granted hereunder, including the termination of its activities in the U.S., and of any information that affects its financial or operational viability under the exemption granted by this Order;
- (2) Consents to jurisdiction in the U.S. under the Act by filing a valid and binding appointment of an agent in the U.S. for service of process in accordance with the requirements set forth in Commission § 30.5;
- (3) Is located outside the U.S., its territories and possessions and, where applicable, has subsidiaries or affiliates domiciled in the U.S. with a related business (e.g., banks and broker/dealer affiliates) along with a brief description of each subsidiary's or affiliate's identity and principal business in the U.S.;
- (4) Has no principal or employee who solicits or accepts orders from customers located in the U.S. who would be disqualified under Section 8a(2) of the Act, 7 U.S.C. §12a(2), from doing business in the U.S.;
- (5) Undertakes to comply with the applicable provisions of Swiss laws and FINMA rules that form the basis upon which this exemption from certain provisions of the Act and regulations thereunder is granted, and will notify the Commission promptly of all material changes to the relevant laws in Switzerland, any rules promulgated thereunder and FINMA rules;

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- (6) Will provide customers located in the U.S. no less stringent regulatory protection than Switzerland customers under all relevant provisions of Swiss law;
- (7) Will cooperate with the Commission with respect to any inquiries concerning any activity subject to regulation under the Part 30 Regulations, and agrees to provide access to its books and records related to transactions under Part 30 required to be maintained under the applicable statutes and regulations in effect in Switzerland upon the request of any representative of the Commission or U.S. Department of Justice at the place in the U.S. designated by such representative, within 72 hours, or such lesser period of time as specified by that representative as may be reasonable under the circumstances after notice of the request; and
- (8) Consents to participate in any NFA arbitration program that offers a procedure for resolving customer disputes on the papers where such disputes involve representations or activities with respect to transactions under Part 30, and consents to notify customers located in the U.S. of the availability of such a program; provided, however, that the firm may require its customers located in the U.S. to execute a consent concerning the exhaustion of certain mediation or conciliation procedures made available by FINMA prior to bringing an NFA arbitration proceeding.

As set forth in the Commission's September 11, 1997 Order delegating to NFA certain responsibilities, the written representations set forth in paragraphs (1)-(8) above shall be filed with NFA.⁹

This Order will become effective as to UBS the later of the date of publication of the Order in the Federal Register or the filing of the consents set forth above. Should the Commission receive written notice from FINMA or UBS

⁹ 62 FR 47792, 47793 (Sept. 11, 1997). Among other duties, the Commission authorized NFA to receive requests for confirmation of Regulation 30.10 relief on behalf of particular firms, to verify such firms' fitness and compliance with the conditions of the appropriate Regulation 30.10 Order and to grant exemptive relief from registration to qualifying firms.

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that any change in status of UBS affects its continued eligibility for the exemption granted hereunder, including the termination of its activities in the U.S., the relief granted by this Order may be suspended immediately as to UBS. That suspension will remain in effect pending further notice by the Commission, or the Commission's designee, to UBS and FINMA.

This Order is issued pursuant to Regulation 30.10 based on the representations made and supporting material provided to the Commission and the recommendation of the staff, and is made effective as to UBS granted relief hereunder based upon the filing and representations of UBS required hereunder. Any material changes or omissions in the facts and circumstances pursuant to which this Order is granted might require the Commission to reconsider its finding that the exemption is not otherwise contrary to the public interest or to the purposes of the provision from which exemption is sought. Further, if experience demonstrates that the continued effectiveness of this Order in general would be contrary to public policy or the public interest, or that the systems in place for the exchange of information or other circumstances do not warrant continuation of the exemptive relief granted herein, the Commission may, after appropriate notice and opportunity to respond, condition, modify, suspend, terminate, withhold as to UBS, or otherwise restrict the exemptive relief granted in this Order, as appropriate and as permitted by law, on its own motion. The process by which the Commission may terminate relief is set forth in § 30.10(c).¹⁰

The Commission will continue to monitor the implementation of its program to exempt firms located in jurisdictions generally deemed to have a

¹⁰ 17 CFR 30.10(c). See 85 FR 15359 (Mar. 18, 2020).

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comparable regulatory program from the application of certain of the foreign futures and option regulations and will make necessary adjustments if appropriate.

Issued in Washington, DC, on September __, 2020, by the Commission.

Christopher J. Kirkpatrick,
Secretary of the Commission