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April 12, 2011

Submitted via the Federal eRulemaking Portal: http://www.regulations.gov

Mr. David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: **Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations (RIN 3038—AD30)**

Dear Secretary Stawick:

This letter is submitted by Sidley Austin LLP in response to the request by the Commodity Futures Trading Commission (the "Commission") for comment on the notice of proposed rulemaking (the "Proposal") issued by the Commission on January 26, 2011 and published in the Federal Register on February 11, 2011 in which the Commission proposes to eliminate certain exemptions currently found in Sections 4.13 and 4.14 of the Commission's rules.[1] While we represent many family offices, we are writing to you on behalf of a single family office with deep concerns about the elimination of these exemptions. In the event that the Commission elects to eliminate the exemptions from Sections 4.13 and 4.14, we believe that it is in the interest of the Commission, in order to ensure that the Commission's registration regimes for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") are consistent with the registration regime of the Securities and Exchange Commission (the "SEC") for

[1] Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 FR 7976 (February 11, 2011).

investment advisers under the Investment Advisers Act (the "Advisers Act"),[2] to provide relief from CPO and CTA registration for so-called "family offices." We believe that family offices do not implicate the same concerns over accountability and transparency as espoused by the Commission in proposing to eliminate the CPO and CTA registration exemptions.

Commission Rule 4.13(a)(3) currently exempts a person from registration as a CPO for a pool if (1) the pool's interests are exempt from registration under the Securities Act of 1933, as amended (the "Securities Act"); (2) the pool's interests are offered only to certain sophisticated persons, including Qualified Eligible Persons, as defined in Commission Rule 4.7 ("QEPs"), accredited investors as defined in Regulation D under the Securities Act, or knowledgeable employees, as defined in SEC regulations under the Investment Company Act of 1940, as amended; and (3) the pool's aggregate initial margin and premiums attributable to futures and options on futures do not exceed five percent of the liquidation value of the pool's portfolio and the aggregate notional value of such positions does not exceed 100 percent of the liquidation value of the pool's portfolio. Under Rule 4.13(a)(4), a CPO is exempt from registration as such with respect to a given pool if (1) the interests in the pool are exempt from registration under the Securities Act and (2) the operator reasonably believes that all participants in the pool are QEPs or accredited investors (except that natural persons must hold at least $2 million in portfolios of securities or similar investments). Commission Rule 4.14(a)(8)(i)(D) currently exempts a person from registration as a CTA for a pool if, among other requirements, the advised fund has a CPO that qualifies for exemption from registration under Rules 4.13(a)(3) or 4.13(a)(4), as long as the advisor does not hold itself out as a CTA. The Commission is proposing to eliminate Rules 4.13(a)(3) and (4) and 4.14(a)(8)(i)(D). In addition, Commission Rule 4.14(a)(5) exempts a person from CTA registration if the CTA limits its advice to only pools for which the CTA is also the CPO but is exempt from registration as such. Eliminating 4.13(a)(3) and (4) would drastically reduce the number of persons able to rely on 4.14(a)(5) for exemption from CTA registration.

If the Commission elects to eliminate the aforementioned CPO and CTA registration exemptions, we urge the Commission the provide relief from CPO and CTA registration to family offices, whether through an exemptive rule, guidance provided in the adopting release, or such other means as the Commission finds reasonable under the circumstances, along lines similar to those proposed by the SEC for persons that would otherwise be required to register as investment advisers. The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[3] amended the Advisers Act to exempt from the definition of investment adviser "any family office, as defined by rule, regulation, or order of the [SEC.]"[4] The SEC has proposed, but not yet adopted, rules further describing what types of entities will be considered "family offices."[5] We wrote to the SEC on behalf of our family office client urging certain changes and clarifications in the SEC's proposed implementing regulations. We believe that

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2 The Proposal states that "the Commission does not want its registration . . . regime for pooled investment vehicles and their operators and/or advisors to be incongruent with the registration and reporting regimes of other regulators, such as that of the SEC for investment advisers[.]"

3 Pub. L. 111-203, 124 Stat. 1376 (2010).

4 *See* Advisers Act § 202(a)(11(G) (as amended by Dodd-Frank).

5 *See* Family Offices, 75 FR 63753 (October 18, 2010) (the "SEC Proposal").

both the Commission and the many family offices currently in existence[6] and that may come into existence in the future would benefit from a rule providing that pooled investment vehicles that would otherwise be "commodity pools" within the meaning of the Commodity Exchange Act, as amended (the "Act") and Commission regulations promulgated thereunder, are excluded from the definition of "commodity pool" to the extent that participation in such pools is limited as described herein, and that the family office advising such pools is furthermore exempt from registration as a CTA with respect to any commodity trading advice provided to such investment vehicles. We believe that such a rule would separate commercial commodity advisory firms from family offices and that such a rule should be sufficiently broad and flexible to be relied upon by the vast majority of family offices, notwithstanding the diverse array of structures currently in use by family offices.

Family offices are multi-purpose entities that provide a variety of services, including commodity advisor services, to the members of an extended family and, in certain instances, employees of the family office. Family offices employ a vast array of organizational, management and employment structures, reflecting the diverse and varied structures of the families to which they provide services. Many family offices operate collective investment vehicles in which family members and employees of the family office participate, in order to achieve certain economies of scale. These vehicles in many instances trade commodity interests subject to the Commission's jurisdiction. As a result, absent an exemption or other relief, these family investment vehicles would be treated as commodity pools, the operators of these pools would be required to register as CPOs and the advisors (which may be the same entity as the CPOs) to such pools would be required to register as CTAs.

As family offices generally involve only a small number of closely related or associated persons with personal relationships with the other participants and with the managers of the family office, both the Commission and the SEC have long histories of granting relief to family offices from their respective registration requirements. The staff of the Commission (first the staff of the Division of Trading and Markets and then the staff of the Division of Clearing and Intermediary Oversight) has determined that certain pools operated by family offices do not meet the definition of a "pool" under Commission Rule 4.10(d)(1) and has issued a series of friends and family "not a pool" letters (in the form of either Interpretative Letters or No-Action Letters). This relief has been granted typically where all direct or indirect participants were members of the same immediate or extended family, trusts for their benefit of the benefit of their descendants and, in certain circumstances, long-time business associates of the family.[7] The SEC has provided similar relief on the basis that certain family offices are not within the intent of the term "investment adviser" under the Advisers Act).

Notwithstanding the existence of many "not a pool" letters, many family offices have found it necessary or desirable, since 2003, to file notices of claims for exemption under Commission Rules 4.13(a)(3) or (4). Family offices make these filings because the Commission's exemptive and no-action letters may only be relied upon by the direct beneficiaries of such letters and the

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6 In the SEC Proposal, the SEC noted that "[i]ndustry observers have estimated that there are 2,500 to 3,000 single family offices managing more than $1.2 trillion in assets." 75 FR at 63754.

7 *See, e.g.*, Commission Letters 86-10, 86-17, 93-46, 93-72, 94-26, 94-70, 95-15, 95-18, 95-21, 95-35, 95-55, 95-58, 96-24, 96-37, 96-51, 97-07, 97-29, 97-50, 97-52,97-56, 97-78, 99-43, 99-45, 00-98, and 00-100.

Commission's interpretative letters are binding only on the division of the Commission issuing such letters, and not on the Commission as a whole. In addition, family offices employ a broad array of organizational, management and employment structures that vary greatly from family to family and therefore many family offices may not fit squarely within the facts of existing interpretative letters and therefore may not be comfortable relying exclusively on such letters. We note that since 2003 when 4.13(a)(3) and (4) were adopted, the staff has issued few, if any, "not a pool" letters. We do not know whether the Commission has received requests for "not a pool" letters during this period, but as many family offices could rely on 4.13(a)(3) or (4) for CPO registration exemption (and either 4.14(a)(8)(i)(D) or 4.14(a)(5) for corresponding CTA registration exemption), we think it is likely that most family offices merely avoided the issue by relying on these exemptive provisions.

The process of seeking a "not a pool" letter from the Commission is highly costly and time-consuming to the requesting family office. If the Commission eliminates the CPO registration exemptions in Commission Rules 4.13(a)(3) and (4) and the CTA exemption in Commission Rule 4.14(a)(8)(i)(D), family offices that act as CPOs to pools for which the CPO has relied on these exemptions will either need to register as CPOs and CTAs or will need to seek individualized relief at great expense to such family offices (not to mention a great deal of effort by the Commission in reviewing such requests). As mentioned above in footnote 6, there are likely between 2,500 and 3,000 family offices currently in operation, managing more than $1.2 trillion in assets. Many of these family offices provide commodity trading advice to one or more pools, thereby subjecting such family offices to CPO (and possibly CTA) registration requirements. Family offices that seek "not a pool" letters will place a substantial burden on the Commission's resources, as such letters are highly fact-intensive and provide relief only to the party directly seeking the relief. In our experience, it may take many months of working with the staff and many hours of conversations with multiple members of the staff in order to obtain a "not a pool" letter. We do not believe that this is a good use of the Commission's limited resources and therefore urge the Commission to adopt broad-based relief from CPO and CTA registration for family offices.

Congress, the SEC, and the Commission each have expressed an interest in achieving regulatory harmony between the SEC and the Commission. Adopting a rule to exempt advisors to family offices from registering as a CPO and a CTA furthers this interest. Similarly, having advisors to family offices exempt from registration with the SEC but not with the Commission may lead to advisors structuring their activities in an inefficient manner to achieve regulatory arbitrage at the expense of regulators and the family office. Congress indicated its interest in having family offices exempt from registration under the Advisers Act when it included a provision in Dodd-Frank excluding family offices from the definition of investment adviser. Dodd-Frank eliminated the exemption from investment adviser registration on which many family offices relied[8] and absent the family office exclusion many previously unregistered family offices would have been required to register with the SEC as investment advisers. Congress did not include a

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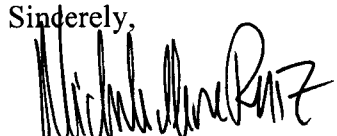
[8] Section 203(b)(3) of the Advisers Act, prior to the effective date of the amendments made by Dodd-Frank, exemptions from investment adviser registration "any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under title I of [the Advisers] Act . . . [.]"

parallel exclusion under the Act with respect to CPOs because the provisions on which many family offices rely for exemption from registration as a CPO are found in the CFTC's regulations and not in the Act, and Congress did not instruct the Commission to eliminate such exemptions. The Proposal is not mandated by Dodd-Frank, but instead reflects the Commission's view of the appropriate use of its discretionary rulemaking authority both under Dodd-Frank and under the Act. As Congress clearly believed that eliminating the exemption on which many family offices relied from registration as an investment adviser called for a parallel exclusion from the definition of investment adviser for such family offices, we think the Commission should take a similar approach.

Since 2003, the exemptions provided under Commission Rules 4.13(a)(3) and (4) have provided much needed certainty to family offices. The Commission's rules for CPOs and CTAs are misplaced as applied to family offices. Unlike other operators and advisors, a family office does not actively and publicly seek out commodity advisory clients and does not pool together the assets of many disparate clients who otherwise would have no connection to each other. Rather, the family members and others to whom the family office provides services consist of closely related individuals and trusts which can effectively handle the family office's affairs internally without the involvement of the Commission. We strongly urge the Commission to craft a rule deeming the investment vehicles advised by family offices not to be commodity pools. Thank you for your consideration of this comment letter.

Sincerely,



Michele Ilene Ruiz

CC: Chairman Gary Gensler
Commissioner Michael Dunn
Commissioner Bart Chilton
Commissioner Jill Sommers
Commissioner Scott O'Malia