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VIA ONLINE SUBMISSION (HTTP://COMMENTS.CFTC.GOV)

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Comments to Proposed Rule – "Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations" (RIN 3038-AD30)

Dear Mr. Stawick:

Fulbright & Jaworski L.L.P. ("Fulbright") respectfully submits these comments on behalf of certain "family office" clients in response to the Commodity Futures Trading Commission's (the "Commission") Notice of Proposed Rulemaking titled "Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations" (the "Proposed Rule"),[1] which implements the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[2] We recognize the Commission's important role in implementing the regulatory initiatives under Dodd-Frank and appreciate the opportunity to provide these comments on the Proposed Rule.

I. Overview

In the Proposed Rule, among other things, the Commission seeks to repeal certain exemptions from rules requiring registration as a Commodity Pool Operator ("CPO") and Commodity Trading Advisor ("CTA") currently provided in Rules 4.13 and 4.14 of the Commission's regulations. As noted in the proposing release, since 2003 the Commission has received over

[1] Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 Fed. Reg. 7976 (Feb. 11, 2011) (hereinafter, "Proposed Rule").

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010) (hereinafter, "Dodd-Frank").

10,000 exemption notices under Rules 4.13(a)(3) and (4) alone.[3] Many of these notices have been filed by family offices.

Family offices are multi-purpose entities that are intended to provide a broad range of services, including investment management services, to members of a single family. A single family office is a professional organization owned, formed, or controlled by the family it serves that is dedicated solely and exclusively to managing the personal, business, and financial affairs of the members of the family and protecting the family's legacy for descendants. Family offices employ a range of structural, organizational, management, and employment arrangements to manage a family's assets. In particular, many family offices operate collective investment vehicles (e.g., family investment partnerships), foundations, trusts and other wealth management vehicles, some of which trade, directly or indirectly, in commodity interests as part of an overall investment management strategy.

We represent certain family offices and have received inquiries regarding the proposed repeal of the registration exemptions provided by Rules 4.13(a)(3) and (4) and the potential need for family offices to register as CPOs absent another exemption or some other form of relief. We respectfully request that the Commission consider the views and suggestions presented below and, prior to adopting a final rule, take action to ensure that family offices, as entities primarily serving the needs of a single family, are not required to register as CPOs or CTAs.

Specifically, for the reasons set forth below, we request that the Commission modify its proposal to eliminate the proposed repeal of Rules 4.13(a)(3) and (4). If the current exemptions are repealed, we request that the Commission provide family offices with specific exemption from CPO registration. Because family investment vehicles do not fall within the fundamental purpose of the CPO registration requirements, such exemption would be appropriate and consistent with the general purpose and intent of Dodd-Frank.

II. The Current CPO Registration Exemptions Under Rules 4.13 and 4.14

Rule 4.13(a)(3) currently exempts a person from registration as a CPO for a pool if: (i) the pool's interests are exempt from registration under the Securities Act of 1933, as amended (the "Securities Act"); (ii) the pool's interests are offered only to certain sophisticated persons, including Qualified Eligible Persons under Rule 4.7 ("QEPs"), accredited investors as defined in Regulation D of the Securities Act, or knowledgeable employees as defined in Securities and Exchange Commission ("SEC") regulations under the Investment Company Act of 1940, as amended; and (iii) 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.

[3] Proposed Rule, 76 Fed. Reg. at 7986 n.69.

Under Rule 4.13(a)(4), persons are exempt from registration as a CPO for a pool if (i) the interests in the pool are exempt from registration under the Securities Act and (ii) the operator reasonably believes that all participants are QEPs or accredited investors (except that natural persons must hold at least $2 million in portfolios of securities or similar investments).

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), as long as the advisor does not hold itself out as a CTA.[4]

In 2003, the Commission adopted these exemptions because, without jeopardizing investor protection, they would "encourage and facilitate participation in the commodity interest markets [that will] benefit . . . all market participants [through] increased liquidity."[5] As explained below, we believe the Commission's 2003 policy judgment remains valid today and that no substantial public interest would be served by repealing these exemptions.

III. The Private Fund Exemptions Should Not Be Repealed

Before rescinding a rule, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[6] This requires an agency to supply a "reasoned analysis" for the rescission of one of its rules.[7] The Commission has not established a "rational connection" or a rulemaking record that justifies rescission of the private fund exemptions. The Commission proposal fails to cite facts suggesting regulatory concerns with private funds whose CPOs and CTAs have relied on these exemptions.

Instead, in support of the exemption repeal, the Commission reasons that by improving transparency and oversight of large private investment funds the repeal will help bring the CPO and CTA regulatory structure into alignment with the stated purposes of Dodd-Frank.[8] By enacting Dodd-Frank, Congress demonstrated that, when it determines an exemption no longer serves the public interest, Congress will amend that exemption, as it did when it eliminated the 15-client private adviser exemption in the Investment Advisers Act of 1940, as amended (the

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[4] For ease of reference, we refer to the exemptions in 4.13(a)(3), 4.13(a)(4) and 4.14(a)(8) as the "private fund exemptions."

[5] Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors; Past Performance Issues, 68 Fed. Reg. 47221, 47223, 47230 (Aug. 8, 2003).

[6] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[7] *Id.*

[8] *See* Proposed Rule, 76 Fed. Reg. at 7985–86.

"'40 Act").[9] However, Congress took no such action with regard to the exemptions the Commission now proposes to repeal and nothing in Dodd-Frank requires eliminating these exemptions. If Congress were concerned that exempt CPOs and CTAs should be registered, Congress could have amended the Commodity Exchange Act (the "CEA") in Dodd-Frank to require exempt CPOs and CTAs to register, but did not.

In relying on Dodd-Frank for support, the Commission states that the repeal will help ensure consistent regulation of similarly situated entities among federal agencies in order to limit regulatory arbitrage.[10] Again, however, Dodd-Frank evidences the opposite. For example, Dodd-Frank eliminated the 15-client private adviser exemption in the '40 Act while keeping the 15-client exemption for CTAs in the CEA, indicating a Congressional recognition that similarly situated entities can be treated differently.[11]

The Commission also reasons that repealing the exemptions will improve accountability and transparency of CPO activities.[12] As an example, the Commission offers that, under the current exemption in Rule 4.13(a)(3), an exempt commodity pool with less than five percent of its liquidation value committed to margin, could still be large enough to be "a major participant in the futures market."[13] Accountability and transparency of market participants with large futures positions already are addressed by the Commission's large trader reporting requirements, which will soon include large swap positions as well.[14] This long-standing foundation of the Commission's surveillance program provides transparency for all major participants in the futures markets. The Commission has stated no reason why its large trader reporting system—which applies to pools and all other market participants—is not adequate to address its accountability and transparency concerns. Nor has the Commission explained why registration of the CPO of a private fund would fill a perceived gap in its existing surveillance system or the additional new reporting and transparency provisions contemplated by Dodd-Frank.

The Commission stated that expanding the universe of registered CPOs and CTAs will help "facilitate a collection of data that will assist the [Financial Stability Oversight Council ("FSOC")] . . . in the event that the FSOC requests and the Commission provides such data."[15]

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[9] *See* Dodd-Frank § 403 (amending '40 Act § 203(b)(3)).

[10] Proposed Rule, 76 Fed. Reg. at 7986.

[11] *Compare* Dodd-Frank § 403 (amending '40 Act § 203(b)(3)) *with* CEA § 4m(1).

[12] Proposed Rule, 76 Fed. Reg. at 7985.

[13] *Id*.

[14] Position Reports for Physical Commodity Swaps, 75 Fed. Reg. 67258 (Nov. 2, 2010) (proposing 17 C.F.R. Part 20).

[15] Proposed Rule, 76 Fed. Reg. at 7978.

Any information the FSOC needs from private funds' CPOs and CTAs already is available to the Commission, or will be available to it once Dodd-Frank is implemented. Under its general special call authority under Rule 21.03 of the Commission's regulations, the Commission can obtain a range of information as broad as it could obtain from a registered CPO or CTA if there is any threat of a market disruption. This special call for information would supplement the information the Commission already receives on a regular basis through large trader reports. There also is information provided in SEC filings by advisers to private funds, as well as the information provided in the current private fund exemption filings made to the National Futures Association by private funds. Indeed, beyond what is already available, the Commission does not identify specific types of additional information necessary to perform its required oversight functions.

The Commission does not provide sufficient facts or reasoning to support the repeal of the well-established private fund exemptions. A strong factual basis of support for the Commission's proposal is necessary, particularly in light of the large number of entities apparently relying on the exemptions.[16] Accordingly, we recommend the Commission modify its proposal to eliminate the repeal of the private fund exemptions.

IV. Family Offices Should Be Provided With Specific Exemption From Registration

As described above, family offices are multi-purpose entities that provide a broad range of investment management services to members of a single family. Many family offices operate collective investment vehicles owned by family members for the purpose of, among other things, trading commodity interests. As a result, absent an exemption or some other form of relief, these family investment vehicles and the family offices that operate them would constitute "pools" and "commodity pool operators," respectively, and they would be required to register as CPOs.[17]

The staff of the Division of Clearing and Intermediary Oversight and the staff of the former Division of Trading and Markets have repeatedly interpreted the definition of "pool" in Rule 4.10(d) to exclude types of family investment vehicles from its scope, typically where all direct or indirect participants were members of the same immediate or extended family, trusts for their benefit or the benefit of their issue and, in certain instances, long-time business associates of the

[16] *See id.* at 7986 n.69.

[17] Rule 4.10(d) defines the term "pool" to mean "any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests." CEA § 1a(5) and Rule 1.3(cc) define "commodity pool operator" in a similarly broad fashion. The Commission has stated that whether a particular entity is operated "for the purpose" of trading commodity interests and, therefore, is a commodity pool within the meaning and intent of Rule 4.10(d) depends on "an evaluation of all the facts relevant to the entity's operation." Revision of Commodity Pool Operator and Commodity Trading Advisor Regulations, 46 Fed. Reg. 26004, 26006 (May 8, 1981).

applicable family.[18] The applicable interpretative and no-action letters were generally premised on the grounds that the family investment vehicles described therein were not within the meaning and intent of the commodity "pool" definition under Rule 4.10(d) or the primary purpose of the CPO registration requirements, which is to protect unsophisticated investors from undesirable managerial and trading practices.[19]

Nevertheless, for various reasons, family offices have still found it necessary or desirable to file notices of exemption under Rule 4.13(a)(3) or (4). Exemptive and no-action letters may only be relied upon by the beneficiaries thereof, and interpretative letters are binding only upon the Commission division issuing it, and not upon the Commission itself.[20] In addition, family offices employ a broad range of organizational and management structures that vary from family to family. Consequently, many family pools and family offices do not fit squarely within the four corners of the previously issued interpretative letters and are therefore uncomfortable relying on such letters.

If Rules 4.13(a)(3) and (4) are repealed without the Commission taking other appropriate action, many family offices, including those that have filed notices of exemption under such Rules, will be required to register or seek their own interpretative or no-action letters, notwithstanding the fact that the regulation of such persons is outside the intent and purpose of the CPO registration rules. Such an outcome would be unduly burdensome for both these family offices and the

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[18] *See, e.g., Rule 4.10(d)(1):--Request for Interpretation That Family Limited Partnerships are Not Commodity Pools Section 4m(1) of the Act:--Request for Interpretation That General Partners of Family Limited Partnerships are Not CPOs or CTAs*, CFTC Letter No. 00-98 (May 22, 2000) (several family limited partnerships were not commodity pools and the general partners were not CPOs thereof where each member of the partnerships, including the general partners, was a member of the same extended family (i.e., three cousins and their immediate families) or trusts for their benefit or the benefit of their issue); *Section 4m(1) of the Act;--Request for No-Action Position From CPO Registration*, CFTC No-Action Letter No. 99-45 (Sept. 15, 1999) (a limited liability company was not a commodity pool whose members consisted of immediate family members and a long-term business associate of the family); *Rule 4.10(d): Confirmation That the Partnership is Not a Commodity Pool Where Participants are Immediate Family Members and One Long-Term Adviser*, CFTC Interpretive Letter No. 95-21 (Mar. 7, 1995) (a general partnership was not a commodity pool where the partners were immediate family members, trusts beneficially owned by these immediate family members and a long-term advisor to the family); *Interpretation of the Term "Pool" in Rule 4.10(d)*, CFTC Interpretive Letter No. 86-10 (Apr. 24, 1986) (a limited partnership was not a commodity pool where the partners consisted of two limited partnerships with partners from two unrelated families (including a 20-plus year associate of one family) and an individual unrelated to the families).

[19] "[L]egislative history of [the CPO registration requirements] indicated that it was intended to bring CPOs within the Commission's jurisdiction for the purpose of protecting unsophisticated investors from undesirable managerial and trading practices." *See Request for Interpretation of Rule 4.10(d)*, CFTC Interpretative Letter No. 86-17 (June 24, 1986) (citing Statement of Dr. Clayton Yeutter, Assistant Secretary of Agriculture, House Committee of Agriculture Report on Commodity Futures Trading Commission Act of 1974, H.R. Rep. No. 975, 93rd Cong., 2d Sess. 79 (1974)).

[20] *See* Rule 140.99(a).

Commission,[21] and would be inconsistent with the intent of Congress. In enacting Dodd-Frank, Congress recognized that there is limited federal interest in regulating family offices that generally provide advice only to members of a single family. Therefore, when eliminating the 15-client exemption under the '40 Act, Congress directed the SEC to provide family offices with a broad exemption from registration as an investment adviser that "recognizes the range of organizational, management, and employment structures and arrangements employed by family offices."[22] In deciding whether to eliminate Rules 4.13(a)(3) and (4), the Commission should consider not just the general purpose and intent of Dodd-Frank, but also Dodd-Frank's clear mandate regarding family offices.

Thus, we respectfully request that, if the Commission proceeds to repeal Rule 4.13(a)(3) or (4), the Commission exempt family offices from the CPO registration requirements, whether through: (i) the issuance of a clarification; (ii) the adoption of a new rule; (iii) the adoption of an exemption from CPO registration that is substantially similar to the exclusion of family offices from the definition of "investment adviser" under § 202(a)(11) of the '40 Act that is ultimately adopted by the SEC;[23] or (iv) other means. Any such exemption should be broad enough to apply to a range of family office structures and circumstances, including: (i) family offices that are not wholly-owned by the family members; (ii) operators of family pools whether or not they receive compensation; (iii) family pools whose ownership extends beyond immediate family members; and (iv) operators of pools that otherwise meet the criteria set forth in the "not a pool" interpretative letters previously issued in the family office context.[24]

V. Previously Exempt Entities Should Be Provided Grandfather Relief or Sufficient Time to Comply

In the Proposed Rule the Commission requested comment as to whether previously exempt entities should be grandfathered from registering as CPOs and CTAs. Such previously exempt entities should be grandfathered. Since 2003, thousands of persons have spent time and resources to structure their business activity in justifiable reliance on the private fund exemptions in Rules 4.13(a)(3) and (4). It would be burdensome and disruptive to require these persons to restructure their businesses and now become subject to regulation as CPOs and CTAs, particularly in light of the limited identified benefits from such additional regulation.

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[21] Although some of these family offices could claim relief under Rules 4.7 or 4.12, any requirement to register would still unnecessarily intrude upon the privacy of family members and impose increased administrative costs on family offices without providing any corresponding benefit to the participants in family pools or the public and would still be inconsistent with the intent of the CPO registration requirements.

[22] *See* Dodd Frank § 409(b)(2).

[23] *See Family Offices*, Investment Advisers Act Rel. No. 3098 (Oct. 12, 2010).

[24] *See* discussion in footnote 17.

The Commission also requested comment regarding the amount of time previously exempt entities will need to come into compliance with the proposed changes. Given the volume of new regulatory burdens imposed on entities involved in the derivatives markets and the substantial resource constraints associated with compliance under Dodd-Frank, entities that would be required to register for the first time as CPOs and CTAs should be allowed the maximum amount of time possible to comply with the rules. In addition, certain private funds may be eligible for other Commission exemptions, but may need to modify their operations in order to qualify for a different exemption from CPO registration. The Commission should provide such entities with sufficient time to qualify for other available exemptions. Thus, should the Commission proceed with the repeal and decide against grandfathering previously exempt entities, we recommend that the Commission provide entities at least 18 months to come into compliance with the proposed changes.

VI. A *De Minimis* Exception for Private Finds Should Be Provided

The Commission requested comment as to whether there should be a *de minimis* exemption under Rule 4.13, and, if so, what the *de minimis* threshold should be. We believe there should be a *de minimis* exception and that the Commission should acknowledge that there is a level of trading that is so modest that registration as a CPO is of no regulatory significance.[25] The Commission also should consider increasing the level of *de minimis* trading above the current five percent level so that persons who have already organized private funds to have a *de minimis* amount of commodity interest trading are not inadvertently required to register solely because the definition of commodity interest is expanded to include swaps, which are traded by many private funds. The inclusion of swaps in the definition of commodity will result in an increase in the percentage of trading in commodity interests in the existing portfolios of many private funds. A corresponding increase in the *de minimis* trading threshold is thus appropriate.

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We are grateful for the opportunity to comment on the Proposed Rule and hope that our comments are able to assist the Commission in its ongoing rulemaking efforts. Please feel free to contact me at (202) 662-4552 should the Commission or its staff have questions or wish to discuss any of the issues raised in this letter.

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[25] In the preamble to the proposed rules creating the exemption, the Commission acknowledged that a *de minimis* exception was appropriate. The exemption was proposed to the Commission by the National Futures Association, which recommended a five percent of liquidation value threshold. *See* Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors, 68 Fed. Reg. 12622, 12624, 12626 (Mar. 17, 2003). At that time, the Commission gave serious consideration to using a lower threshold, but after due deliberation, followed the recommendation of numerous commenters and promulgated the five percent threshold. *See* 68 Fed. Reg. at 47223. In this proposing release, the Commission has failed to explain why it is abandoning its prior position that a *de minimis* exemption is appropriate.

Respectfully,

/S/ Michael L. Loesch

Michael L. Loesch

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