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April 12, 2011

VIA ELECTRONIC MAIL

Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 Twenty-First Street, N.W.
Washington, D.C. 20581
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Re: RW3038-AD30 – Commodity Pool Operators and Commodity Trading Advisors:
Amendments to Compliance Obligations

Dear Mr. Stawick:

The Commodity Futures Trading Commission ("CFTC" or "Commission") has requested comment on its proposal to repeal certain exemptions from rules requiring registration as a Commodity Pool Operator ("CPO") and Commodity Trading Advisor ("CTA") currently set forth in Rules 4.13 and 4.14 of the CFTC's regulations.¹ As the CFTC has noted in the proposing release, since 2003 over 10,000 exemption notices have been filed under Rules 4.13(a)(3) and (4) alone.² Many of these notices have been filed by members of the Private Investor Coalition, Inc. ("Coalition"). The Coalition's membership is made up of more than 65 single family offices from around the country. On behalf of the Coalition, we therefore respectfully submit these comments. The Coalition also endorses unreservedly the views regarding family offices expressed in the comment letter filed by Skadden, Arps, Slate, Meagher & Flom LLP.

¹ Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 Fed. Reg. 7,976 (Feb. 11, 2011) (the "Proposed Rules").

² 76 Fed. Reg. 7,986, n. 69.

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The CFTC adopted these exemptions in 2003 because they would "encourage and facilitate participation in the commodity interest markets [that will] benefit . . . all market participants [through] increased liquidity..." without jeopardizing the protection of investors.³ The policy judgment reached by the Commission in 2003 remains completely valid today. Accordingly, we respectfully request that the Commission withdraw its proposed repeal of these exemptions. If the Commission should determine, however, to repeal these exemptions, we respectfully request that the CFTC provide an exemption for family offices, whose investment activities do not implicate the accountability and transparency concerns of the Commission.

I. Current 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: (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 under Rule 4.7 ("QEPs"), accredited investors as defined in Regulation D of the Securities Act, or knowledgeable employees as defined in SEC regulations under the Investment Company Act of 1940, as amended (the "Investment Company Act"); 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), persons are exempt from registration as a CPO for a pool if (a) the interests in the pool are exempt from registration under the Securities Act, and (b) 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 4.13(a)(4), as long as the advisor does not hold itself out as a CTA.⁴

³ Additional Registration and Other Regulatory Relief for Commodity Pool Operators and Commodity Trading Advisors; Past Performance Issues, 68 Fed. Reg. 47,221, 47,223 (Aug. 8, 2003).

⁴ For convenience, we refer to the exemptions in 4.13(a)(3), 4.13(a)(4) and 4.14(a)(8) as the "private fund exemptions."

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II. The CFTC Should Not Repeal the Private Fund Exemptions

The Coalition believes that no public policy purpose would be served by repealing these exemptions. The Commission argues that repeal of these exemptions will help bring the CPO and CTA regulatory structure into alignment with the stated purposes of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. 111-203 (2010), by improving transparency and oversight of large private investment funds.⁵ If Congress had been concerned that exempt CPOs and CTAs should be registered, Congress could have amended the Commodity Exchange Act (the "CEA") to require exempt CPOs and CTAs to register, but it did not. Similarly, if Congress had believed that the private offering requirement in the exemptions now subject to the CFTC's proposed repeal was too broad, Congress could have narrowed or eliminated the private offering exemption in the Securities Act, but it did not. In contrast, Congress did remove the so-called private adviser exception in Section 203(b)(3) of the Investment Advisers Act of 1940, as amended (the "Investment Advisers Act")⁶, but took no such action with regard to the exemptions the CFTC now proposes to repeal.⁷

The CFTC states that repeal of the exemptions will help ensure consistent regulation of similarly situated entities among federal agencies in order to limit regulatory arbitrage.⁸ But the Dodd-Frank Act removed private adviser exception in the Investment Advisers Act while retaining the 15-client exemption for CTAs in the CEA; surely, one is entitled to infer that Congress knowingly intended similarly situated entities to be treated differently for different purposes.⁹

⁵ 76 Fed. Reg. 7,985-86.

⁶ Section 403 of the Dodd-Frank Act, amending Section 203(b)(3) of the Investment Advisers Act of 1940.

⁷ The only changes the Dodd-Frank Act made to the CEA in respect of CPOs and CTAs are the definitional changes to 'commodity pool', CPO and CTA to include swaps and similar changes to CEA § 4m to include swaps. §§ 721(a) and 749(b) of the Dodd-Frank Act. The amendments to § 4m(3) also underscore the exception from CTA registration for CTAs who advise pools not primarily engaged in commodity interest trading. §749(b) of the Dodd-Frank Act, amending CEA § 4m(3).

⁸ 76 Fed. Reg. 7,986.

⁹ Compare Section 403 of the Dodd-Frank Act, amending Section 203(b)(3) of the Investment Advisers Act, with CEA § 4m(1).

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The CFTC argues that the repeal of these exemptions will improve accountability and transparency of the activities of CPOs.¹⁰ The Coalition believes that accountability and transparency of market participants with large futures positions are already addressed by the CFTC's large trader reporting requirements, which will soon include large swap positions as well.¹¹ This long-standing foundation of the Commission's surveillance program provides transparency for all major participants in the futures markets, whether a single person, private fund, or public corporation. The Commission itself has noted that more than 10,000 notices of claims for exemptive relief that have been filed under Rules 4.13(a)(3) and 4.13(a)(4), but is unable to cite to even a single abuse.¹²

Based upon the foregoing, the Coalition urges the CFTC to withdraw its proposal.

III. Family Offices Should Be Afforded a Special Exemption From Registration.

Many members of the Coalition have already been relieved from CPO registration in reliance on the exemptions from registration provided by Rules 4.13(a)(3) and 4.13(a)(4). Should the Commission proceed with its repeal of these exemptions, we respectfully request that the CFTC consider the suggestions presented below and, prior to such repeal, take action to ensure that family offices are not required to register as CPOs or CTAs.

To the extent that the Commission is not familiar with single family offices, 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 legacy for descendants.¹³ Single family offices

¹⁰ 76 Fed. Reg. 7,985.

¹¹ Position Reports for Physical Commodity Swaps, 75 Fed. Reg. 67,258 (proposed Nov. 2, 2010) (proposing 17 C.F.R. Part 20).

¹² 76 Fed. Reg. 7,986, n. 69.

¹³ Single family offices have been defined as "professional organizations dedicated to managing the personal fortunes and lives of very wealthy families... Their charge [is] to protect their particular family's investments and assets for both current and subsequent generations." Amit, R., Leichtenstein, H., Prats, M. Julia, Millay, T. and Pendleton, L., Single Family Offices: Private Wealth Management in the Family Context, IESE, Wharton (2006-2007).

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provide investment support to family members and their affiliated entities,¹⁴ which investment support may include asset allocation, selection of third-party managers, monitoring reporting, discretionary management, and formation and management of investment vehicles for investment by family members and affiliated entities. Many single family offices also provide professional and administrative services such as: income tax advice, estate planning, education and succession planning, budgeting, coordination of professional relationships, and coordination of charitable, philanthropic, and other community affairs of family members.¹⁵ As part of this set of services, many single family offices provide administrative services to trusts established by members of the family for estate planning and tax purposes, and employees of single family offices commonly serve as trustees of family trusts.¹⁶ Single family offices often provide services to foundations and charitable organizations established and funded by members of the family.

Preservation of wealth is an important investment objective of a single family office and, thus, single family offices typically employ a variety of investment strategies, usually with modest to no leverage.¹⁷ Single family offices may transact and custody securities with

¹⁴ Single family offices may provide advice directly to family members, to trusts, limited partnerships, limited liability companies, or other entities owned or controlled by family members, and to foundations and endowments formed by family members, family trusts, or other family investment entities.

¹⁵ Multi-family offices are entities formed by persons seeking to profit from the provision of investment advice and other services to multiple, unrelated families. The management, investment, and other policies of a multi-family office are determined solely by its owners. Multi-family offices are commercial, for-profit enterprises designed to maximize profit of the multi-family office for the benefit of the owners of the multi-family office, and are generally operated independently without the oversight or control of the families they serve. The Coalition believes that multi-family offices are readily distinguishable from single family offices.

¹⁶ Family trusts generally are formed to benefit members of the family (as well as close relatives of spouses), although residual and contingent beneficiaries commonly include charitable organizations, churches, universities, or family friends and collateral relatives, to avoid the potential for escheat or distribution to “laughing heirs” (distant relatives) in the event no lineal descendants survive the full term of the trust. These residual and contingent beneficiaries of family trusts generally are not considered “clients” of the single family office and do not pay fees to, or receive services from, the single family office.

¹⁷ The investment advisory services provided by single family offices are significantly different than those provided by a company that is in the business of being an investment adviser, who would typically solicit clients by offering them the investment adviser’s own, well-defined investment

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financial institutions, but do not make markets in derivative products or make markets like brokers and dealers. To the extent a single family office maintains investment discretion over some part of the family's assets, it may invest directly in exchange-traded and other publicly-listed securities; others direct their investments into hedge funds, private equity, venture capital, real estate, and other funds managed by third-party managers. Many single family offices invest, directly or indirectly, in commodity interests as part of an overall investment management strategy. Single family offices generally retain professional staff, most of whom are not members of the family, including attorneys, accountants, administrators, and investment professionals, among others. In order to attract and retain qualified personnel to serve the single family office's interests, single family offices offer their employees the normal range of compensation, pension, and employee benefit plans common at private employers.

As a result of their activities, absent an exemption, exclusion, or other form of relief, many of 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.¹⁸

Recognizing the nature of family offices, the CFTC staff has 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 applicable family.¹⁹ The applicable interpretative,

strategies. In contrast, a single family office's office investment advisory services are simply available to members of the family, who determine in their sole discretion whether to make use of that particular functionality of the single family office.

¹⁸ 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 CFTC 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 facts relevant to the entity's operation." Revision of Commodity Pool Operator and Commodity Trading Advisor Regulations, 46 Fed. Reg. 26,004, 26,006 (May 8, 1981).

¹⁹ 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

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exemptive, and no-action letters were all 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.²⁰

Nonetheless, many family offices have still deemed it necessary or desirable to file notices of exemption under Rule 4.13(a)(3) or 4.13(a)(4) and to use, in effect, such exemptions as safe harbors. There are at least two reasons for this. First, exemptive and no-action letters may only be relied upon by the beneficiaries thereof, and interpretative letters are binding only upon the CFTC division issuing it, and not upon the CFTC itself.²¹ Second, family offices employ a broad range of organizational, management, investment, and employment structures, and arrangements that vary from family to family. Consequently, many family pools and family offices do not fit squarely within the four corners of the facts and circumstances set forth in the previously issued interpretative letters, and are therefore not comfortable relying on such letters.

If Rule 4.13(a)(3) or 4.13(a)(4) is repealed without the CFTC taking any other appropriate action, many family offices that have filed notices of exemption under such Rules will be required to register or seek their own "not a pool" interpretative or no-action letters even though the regulation of such persons is outside the intent and purpose of the CPO registration rules. Not only would such an outcome be unduly burdensome for both these family offices and the Commission²², but it would be inconsistent with the clear and stated intent of Congress when

family – i.e., three cousins and their immediate families), or trusts for their benefit or the benefit of their issue).

²⁰ "[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).

²¹ *See* Rule 140.99(a).

²² 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.

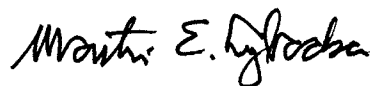
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enacting the Dodd-Frank Act. Section 409 of the Dodd-Frank Act recognizes that there is no federal interest in regulating family offices that generally provide advice only to members of a family and that the application of the Investment Advisers Act to family offices "would unnecessarily intrude upon the privacy" of family members.²³ When eliminating the private adviser exception in the Investment Advisers Act, Congress therefore directed the Securities and Exchange Commission (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."²⁴ It would certainly be ironic if the Commission eliminated Rules 4.13(a)(3) and 4.13(a)(4) notwithstanding the perfectly clear intent of Section 409 of the Dodd-Frank Act regarding the lack of any Federal interest in the activities of family offices.

We therefore respectfully request that, if the CFTC proceeds to repeal Rule 4.13(a)(3) or 4.13(a)(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" in Section 202(a)(11)(G) of the Investment Advisers Act that is ultimately adopted by the SEC,²⁵ or (iv) other means. Finally, the Commission should follow Congress' treatment of family offices in Section 409 of the Dodd-Frank Act and exempt family offices from the CTA registration requirements as well.

We appreciate the opportunity to comment on this proposal and look forward to working with the Commission throughout this rulemaking process.

Sincerely,



Martin E. Lybecker

²³ S. Conf. Rep. No. 111-176, at 75 (2010).

²⁴ See § 409(b)(2) of the Dodd-Frank Act.

²⁵ See *Family Offices*, Investment Advisers Act Release No. 3098 (Oct. 12, 2010).

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

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