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

Re: Proposed Repeal of Certain Exemptions from Commodity Pool Operator Registration, RIN Number 3033-AD30

Dear Mr. Stawick:

We would like to thank the Commission for this opportunity to comment on the proposals (the "Proposals") contained in the Notice of Proposed Rulemaking under Part 4 of the Commission's regulations regarding "Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations" (the "Notice") which would, in part, repeal the exemptions from commodity pool operator registration currently contained in Sections 4.13(a)(3) and 4.13(a)(4) of the Commission's regulations (the "Exemptions").

Katten Muchin Rosenman LLP is a full-service national law firm with offices across the U.S. and an affiliated office in London. We represent a broad array of participants in the commodity futures and over-the-counter derivatives markets, including domestic and foreign commodity pool operators ("CPOs"), commodity trading advisors ("CTAs"), futures commission merchants ("FCMs"), exchanges and clearing organizations, and banks, broker-dealers, and numerous participants in asset management and fund distribution, including "hedge funds" and "funds of funds," investment advisers, investment companies registered with the Securities and Exchange Commission ("SEC"), pension funds, endowments and charitable foundations, institutional investors, family offices, and high net worth individuals.

We believe that the proposed repeal of the Exemptions is not supported by the Commission's stated rationale, will be burdensome, and is unnecessary to achieve the Commission's stated objectives or to address the Commission's perceived regulatory concern. We would strongly encourage the Commission either to maintain the Exemptions in their entirety or to maintain the Exemptions with less drastic modification, and if the Commission determines to repeal the Exemptions, to grandfather existing CPOs relying upon the Exemptions.

Repeal of the Exemptions Will Result in Unnecessary Duplication of Regulation

If the Exemptions are repealed, a very large number of asset managers will be required to register as CPOs with the Commission, even though many of them already will be registered as investment advisers with the SEC, a state regulator or a foreign regulator comparable to the SEC and the Commission. Such repeal will impose disparate and sometimes conflicting requirements on already-regulated firms, even if trading commodity interests (including swaps) is only incidental to such firms' other activities.

The Commission has not justified the need for additional regulation of currently-exempt CPOs with any examples of systemic risk, or abuse that such regulation would be intended to address, nor has it provided any credible support for its assertion that repeal of the Exemptions reflects Congressional intent. We also note the following:

- The Commission has the ability to request information and to examine exempt CPOs who claim the Exemptions under the current regulations.
- Information regarding trading by funds, in the aggregate, generally will already have been reported to the Commission through FCMs, swap dealers and major swap participants.
- The Exemptions do not exempt a fund or its adviser or operator from responsibility for compliance with applicable speculative position limits, rules of any futures exchange or board of trade regarding position accountability, or large trader reporting on Form 40 or through filing of large trader reports, which requirements apply regardless of CPO registration status.
- The additional reports that the Commission is proposing be filed by registered CPOs will be expensive and time-consuming for CPOs to prepare and could inundate the Commission with data, little of which is relevant to, or significant for, the Commission's regulatory mandate.
- Imposing costly registration, compliance and reporting obligations because the Financial Stability Oversight Council ("FSOC") might ask for such information in the future is an inappropriate use of the Commission's regulatory power. The Commission has the power to gather information from CPOs claiming the Exemptions if and when FSOC determines what information it needs and if that information is not already available to the Commission from other reports.

Repeal of CPO Registration Exemptions is Contrary to Congressional Intent Not Necessitated by Dodd-Frank Amendments.

The Commission's assertion that repeal of these Exemptions is required to harmonize the Commission's regulation with Congressional intent has no support in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). There is no direct equivalent under securities laws and regulations to CPO registration and its associated regulatory requirements. As the Commission noted in the Notice, Congress did not repeal the provisions of Sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 (the "Company Act"), which except certain private funds from the definition of "investment company" and the Company Act's substantive and registration provisions. Nor did Congress overturn the Commission's exemptions from CPO registration or modify Section 4m(1) of the Commodity Exchange Act ("CEA") to eliminate the exemption from registration for CTAs with 15 or fewer clients, which elimination would have been a direct corollary to the change to Section 203(b)(3) of the Investment Advisers Act of 1940 (the "Advisers Act"). If Congress had intended to require in all circumstances full registration and oversight by the Commission of operators of pooled investment vehicles that engage in futures or swaps trading to any degree, Congress would have included such a requirement in the amendments to the CEA that were made.

Rather than specifically repeal the Exemptions or direct the Commission to do so, Congress maintained the exemption from CTA registration for SEC-registered advisers who are not engaged primarily in providing commodity trading advice or advising pools primarily engaged in trading or holding commodity interests and amended the relevant section of the CEA[1] to define when a person would be engaged primarily in acting as a CTA and a commodity pool would be engaged primarily in trading commodity interests. Congress similarly maintained in Section 203(b)(6) of the Advisers Act an exemption from registration as an investment adviser for CTAs that are registered with the Commission who do not engage primarily in providing securities advice.

Unlike the SEC, however, which does not regulate a fund "operator" separately from an investment adviser, the Commission regulates and requires registration of a CPO to a fund that trades commodity interests as well as the CTA to that fund, if separate. While a person who acts as both CPO and CTA is exempted from CTA registration if it solely advises pools for which it also acts as the registered or exempt CPO[2], the corollary is not true: a CPO who only operates pools for which it also acts as the registered or exempt CTA is required to register as a CPO absent another exemption. As a result, if the Commission repeals the Exemptions, it will be

[1] CEA §4m(3)

[2] See Commission Regulations §§ 4.14(a)(4) and (5).

imposing its regulation on SEC-registered advisers that Congress expressly intended be exempt from duplicative regulation and who are exempt from CTA registration.

We note that Section 4m(3) of the CEA originally was adopted in connection with the Commodity Futures Modernization Act, which also introduced securities futures products and thus heightened the potential for overlapping jurisdiction of the SEC and the Commission. Similarly, the Dodd-Frank Act has included "swaps" under the CEA, making it probable that almost all collective investment vehicles could be "commodity pools" due to the Commission's expansive interpretation of when a fund is "operated for the purpose of trading in commodity interests. Without the Exemptions from CPO registration or similar exemptions, trading in derivatives – whether on an exchange or over-the-counter and whether for risk mitigation or speculative purposes – will subject funds and their operators to additional cost and burden, even for minimal trading that poses little or no systemic risk and where all relevant information is reported to regulators through other channels.

We also note that many of the Commission's requirements for CPOs are aimed at regulating the marketing and distribution of, and disclosures to investors in, pool interests. In that regard, the Exemptions are more analogous to the private placement exemption in Section 4(2) of the Securities Act of 1933, which applies equally to the offering of commodity pool interests as to other securities, and the private fund exceptions in 3(c)(1) and 3(c)(7) of the Company Act, all of which were left intact by Congress.

The Exemptions Should be Maintained and Additional CPO Exemptions Should be Enacted to Make the Commission's Regulation Congruent and Consistent with Other Regulators.

CPO registration, and the required membership in the National Futures Association ("NFA") with proficiency requirements and compliance rules that are similar in certain respects to, but different from, SEC rules, is costly and burdensome on the registrants and should only be imposed on previously-exempt persons for justifiable regulatory purposes. There is no justifiable regulatory purpose for imposing duplicative regulation on fund operators who are registered with the SEC, a state or a foreign regulator and whose businesses do not consist primarily or in significant part in trading commodity interests. If the Commission were to make its regulation parallel to SEC regulation so that similarly-situated entities are treated consistently, then it should consider exempting from CPO and CTA registration (to the extent not already exempt) the following:

- fund operators that are registered with the SEC and whose funds are not primarily engaged in investing in, trading or holding commodity interests.

- family offices
- venture capital fund operators[3]
- mid-size private fund operators who have less than $150 million in assets under management in the U.S.[4]

Further, the Commission and the SEC should be consistent in their interpretations of these terms.

Finally, if the Commission were to repeal or modify the Exemptions, we respectfully suggest that it should grandfather CPOs who currently rely on these regulations to avoid undue harm without justification, especially where the primary activities of the funds operated by the affected fund "operators" are not trading, investing in or holding commodity interests.

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Please contact Fred M. Santo (fred.santo@kattenlaw.com) or Marilyn Selby Okoshi (marilyn.okoshi@kattenlaw.com) if you wish to discuss our comments further.

Sincerely,

Katten Muchin Rosenman LLP

[3] See Section 203(l) of the Advisers Act.
[4] See Section 203(m) of the Advisers Act.