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May 31, 2011

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

Re: RW3038-AD 30-Commodity Pool Operators and Commodity Trading
Advisors: Amendments to Compliance Obligations

Dear Mr. Stawick:

I appreciate the opportunity to provide Fried, Frank, Harris, Shriver & Jacobson LLP's comments to the Commodity Futures Trading Commission (the "Commission" or "CFTC") on behalf of certain of our family office clients with respect to its proposal to repeal several exemptions from rules requiring registration as a commodity pool operator ("CPO") and a commodity trading advisor ("CTA") currently set forth in Rules 4.13 and 4.14 of the Commission's regulations.¹ We represent certain family offices who are concerned that, if the Commission moves forward with repeal of the exemptions from CPO registration under Rules 4.13(a)(3) and Rule 4.13(a)(4) and the associated exemption from CTA registration under Rule 4.14(a)(8)(i)(D), they may need to register as CPOs or CTAs, in the absence of obtaining interpretative, exemptive, no-action or similar relief. We believe that such a result would not be consistent with the intent or the stated purposes of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §1 *et seq.* or the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203 (2010) and, if it decides to proceed with repeal of Rule 4.13(a)(3) or Rule 4.13(a)(4), we urge the Commission to make clear that family offices are not required to register as CPOs or CTAs.²

¹ Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 Fed. Reg. 7976 (February 11, 2011) (the "Proposed Rules").

² Although this letter is solely intended to address the issues posed by the proposed repeal of Rule 4.13(a)(3) and Rule 4.13(a)(4) for family offices, we agree completely with the views expressed by other commenters that the Commission should withdraw its proposed repeal of these exemptions. In particular, we believe that the Commission has not provided an adequate basis or a sufficient rationale to support repeal of these exemptions and that no regulatory policy or purpose would be served by repeal.

As the Commission is aware, family offices are entities organized by wealthy families to provide services to family members, including estate planning, tax, accounting, financial planning and asset management. In that connection, many family offices operate collective investment vehicles or similar entities primarily owned by family members for the purpose of facilitating investment of their wealth across multiple asset classes in a cost effective and efficient manner. Collective investment vehicles operated by family offices may engage in direct trading of commodity interests or obtain exposure to commodity interest trading by investing in underlying investment funds or funds of funds that trade such instruments, whether directly or indirectly. Under the broad definitions of the terms “commodity pool” and “commodity pool operator”, these family investment vehicles and the family offices that operate them could be “pools” and “commodity pool operators”, respectively, and the family offices could be required to be registered as CPOs, absent an exemption, an exclusion or other form of relief.³

Over many years the CFTC staff has recognized again and again that family investment vehicles are not within the meaning and intent of the “pool” definition in Rule 4.10(d) and that the registration of family offices as CPOs would not serve any useful purpose. Most recently, in CFTC Interpretative Letter No. 10-25, the Division of Clearing and Intermediary Oversight confirmed that, among other things, a family investment vehicle which engaged in futures trading was not a pool and therefore its manager was not required to register as a CPO.⁴

In spite of the numerous precedents and the ability to request an individual interpretative, exemptive or no-action letter, many family offices understandably have chosen to rely on the exemption from CPO registration under Rule 4.13(a)(3) or Rule 4.13(a)(4) or have filed notices of a claim of exemption under those rules as a precautionary measure. Among other reasons, family offices typically vary in terms of their organizational, management, investment and employment structures and arrangements, so that it frequently proves less burdensome and more straightforward to rely upon these rules rather than to attempt to rely upon an existing interpretative letter

³ CEA § 1(a)(5) defines a CPO as “any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility. . . .”; Rule 4.10(d)(1) defines a “pool” as “any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests.” The CFTC has stated that whether a particular entity satisfies the “for the purpose of trading commodity interests” requirement 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. 26,004, 26,006 (May 8, 1981).

⁴ See, e.g., Regulation 4.10(d)(1): Request for Interpretation Stating That Family Investment Entities are Not Commodity Pools, CFTC Interpretative Letter No. 10-25 (June 25, 2010); Regulation 4.10(d)(1)-Request That a Limited Partnership Comprised of Family Members Not be Considered a Commodity Pool, CFTC Interpretative Letter No. 09-46 (Oct. 20, 2009); Rule 4.10(d)(1): Request That a Limited Partnership Comprised of Family Members Not be Considered a Commodity Pool, CFTC Letter No. 00-100 (Nov. 1, 2000).

or, failing that, to submit an individual request for relief.⁵ For similar reasons, including their limited scope and restrictive nature, family offices frequently are unable to rely upon the exemptions from CPO registration under Rule 4.13(a)(1) and Rule 4.13(a)(2). For example, Rule 4.13(a)(1) permits an exempt CPO to operate only one commodity pool at any time, and Rule 4.13(a)(2) limits the number of participants in any pool to 15 participants and caps the amount of gross capital contributions an exempt CPO may receive for pool participations to \$400,000. In the latter regard, while a CPO seeking to rely on Rule 4.13(a)(2) may exclude nuclear family members and their spouses (and their contributions) in determining eligibility for the exemption, family investment vehicles operated by family offices often permit participation by a broader range of family members, including, among others, members of the extended family such as aunts, uncles, cousins, in-laws and their descendants.

As a consequence, if the Commission decides to move forward with the Proposed Rules and repeal Rule 4.13(a)(3) or Rule 4.13(a)(4) without providing a broad exemption for family offices or similar relief, many family offices that have relied on these rules may become subject to registration or be compelled to request their own interpretative, exemptive or no-action letters, despite the CFTC staff's longstanding recognition that CPO registration and regulation of family offices is unnecessary and does not advance any policy or purpose under the CEA. In addition, the number of family offices that may become subject to CPO registration and regulation in such circumstances is likely to increase if, in connection with implementing Dodd-Frank, the Commission adopts recently proposed amendments to its Part 4 rules that would add a definition of the term "commodity interest" in a new Rule 4.10(a) which would include a reference to the term "swap" as defined in Section 1a(47) of the CEA.⁶

We also believe that requiring CPO or CTA registration and regulation of family offices would be inconsistent with the policies relating to family offices reflected in Dodd-Frank. We believe that the policies underlying Congress' desire to require registration as a CPO or CTA are similar to those requiring registration as an investment adviser pursuant to the Investment Advisers Act of 1940 (the "Advisers Act"). In connection with eliminating the fifteen-client exemption under the Advisers Act, Congress directed the Securities and Exchange Commission (the "SEC") in Dodd-Frank to provide family offices with a broad exemption from registration as an investment adviser under the Advisers Act which recognizes the range of organizational, management, and employment structures and arrangements employed by family offices.⁷ This provision indicates that Congress believed it appropriate and warranted to avoid imposing registration obligations on family offices. That being the case, it is

⁵ See CFTC Rule 140.99(d) (Only the recipient may rely upon an exemptive letter or a no-action letter; however, an interpretative letter may be relied upon by persons other than the recipient.)

⁶ See 76 Fed. Reg. 11701 (March 3, 2011) (Amendments to Commodity Pool Operator and Commodity Trading Advisor Regulations Resulting From the Dodd-Frank Act).

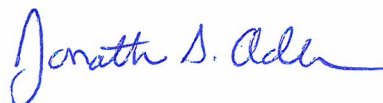
⁷ See Dodd Frank § 409(b)(2). Pursuant to the Congressional mandate in Dodd-Frank, the SEC has proposed an exclusion of family offices from the definition of "investment adviser" in Section 202(a)(11)(G) of the Advisers Act. See Family Offices, Investment Advisers Act Release No. 3098 (October 12, 2010).

difficult to understand why the Commission would propose taking an action that would remove the availability of the exemptions under Rules 4.13(a)(3) and Rule 4.13(a)(4), on which many family offices rely, without exempting family offices.

Based upon the foregoing, in the event the Commission decides to repeal Rule 4.13(a)(3) or Rule 4.14(a)(4) and the associated exemption from CTA registration in Rule 4.14(a)(8), we respectfully urge that the Commission exempt family offices from CPO registration and regulation, whether by means of (i) the issuance of a CFTC or staff advisory, (ii) the adoption of a new rule, (iii) the adoption of a new 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 Advisers Act that is ultimately adopted by the SEC (see Note 8 supra), or (iv) other similar means.

We thank the Commission for giving us the opportunity to comment on the Proposed Rules and for its consideration of our suggestions and recommendations. If you have any questions, please feel free to contact me at 212.859.8662.

Sincerely yours,



Jonathan S. Adler

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