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July 28, 2011

VIA ELECTRONIC MAIL

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

Re: RW3038-AD30 – Commodity Pool Operators and Commodity
Trading Advisors: Amendments to Compliance Obligations

Dear Mr. Stawick:

The Commodity Futures Trading Commission ("Commission") staff recently held a public roundtable ("Roundtable") to solicit additional comments on numerous aspects of the Commission's proposal to repeal the registration exemptions for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") currently provided in Rules 4.13 and 4.14 of the Commission's regulations.¹ The topics discussed by staff at the Roundtable included family offices and the possibility of adopting a rule to provide registration exemptions for family offices. Skadden, Arps, Slate, Meagher & Flom ("Skadden") appreciates the opportunity to express our views on this issue of importance to our clients and to the family office community generally.

In introducing the Roundtable's family office panel, Commission staff acknowledged that the Proposed Rules would result in incongruent treatment of

¹ On July 6, 2011, Commission staff held a roundtable entitled "CFTC Staff Roundtable Discussion on Proposed Changes to Registration and Compliance Regime for Commodity Pool Operators and Commodity Trading Advisors." On February 11, 2011, the Commission proposed to repeal certain registration exemptions for CPOs and CTAs. Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 Fed. Reg. 7,976 (Feb. 11, 2011) (the "Proposed Rules").

family offices by the Commission and the Securities and Exchange Commission ("SEC"). This is because the SEC has recently adopted rules excluding family offices from the definition of "investment adviser" in the Investment Advisers Act of 1940 ("Advisers Act").²

As noted in our April 12, 2011 comment letter on the Proposed Rules, Commission staff has a long history of providing exemptive relief to family investment vehicles. Staff of the Division of Clearing and Intermediary Oversight ("Division") and staff of the former Division of Trading and Markets have repeatedly interpreted the definition of "pool" in Rule 4.10(d) to exclude specific individuals and family investment vehicles from its scope.³ These interpretative, exemptive and

² Family Offices, 76 Fed. Reg. 37983 (June 29, 2011). One of the SEC staff members listed as a contact for the SEC's family office rule, Sarah ten Siethoff, appeared alongside Commission staff at the Roundtable's panel on family offices.

³ See, e.g., *Rule 4.10(d)(1)--Request for Interpretation That Family Limited Partnerships are Not Commodity Pools, and Section 4m(1) of the Act--Request for Interpretation That General Partners of Family Limited Partnerships are Not CPOs or CTAs*, CFTC Interpretative 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); *Section 4m(1) of the Act--Request for No-Action Position From CPO Registration*, CFTC No-Action Letter No. 99-43 (Sept. 15, 1999) (a limited partnership was not a commodity pool whose partners consisted of immediate family members and a long-term business adviser to the family); *Request for Confirmation That General Partnership is Not a Commodity Pool Under Rule 4.10(d)(1) and Managing General Partner is Not a Commodity Pool Operator Under Section 1a(4) of the Act*, CFTC Interpretative Letter No. 97-50 (June 23, 1997) (enforcement action was not recommended against the managing general partner of a general partnership for failing to register as a CPO thereof, where a general partnership previously not found to be a commodity pool added three new general partners, two of whom were sons of a founding partner and the third was a close friend and long-time colleague of the managing general partner); *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 Interpretative 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); *Request for Interpretation of Rule 4.10(d)*, CFTC Interpretative Letter No. 93-72 (July 26, 1993) (a limited partnership was not a commodity pool where the partnership consisted of the general partner, his wife, and a friend of over 30 years); *Request for Relief From Commodity Pool Operator Regulation*, CFTC Interpretative Letter No. 93-46 (May 19, 1993) (a limited partnership was not a commodity pool where all participants were immediate family members or long-term family friends (and their immediate families) of the general partner); *Re: "X"*, CFTC Interpretative Letter No. 93-48 (May 19, 1993) (a limited partnership was not a

no-action letters all reasoned that the operation of family clients described therein was not the type of activity that either Congress or the Commission intended to regulate when they adopted the definitions of "CPO" and "pool," respectively.⁴

The letter-based relief provided by Commission staff over the years, by itself, if continued, cannot ameliorate the disparate approaches by the agencies, which would only be further exacerbated by the Proposed Rules. During the Roundtable, Commission staff stated that one way to harmonize the regulatory treatment of family offices would be to adopt relief largely identical to the SEC's recently adopted relief, incorporating key terms and concepts by cross-referencing to the SEC's final rule. Staff also directly requested proposals specifically detailing what would be required in rules to grant future exemptive relief.

We support Commission staff's efforts to harmonize the regulatory treatment of family offices and respectfully suggest that one of the alternatives below would best accomplish regulatory relief for family offices in a manner that would be in accordance with the SEC's family office exclusion.⁵ With one exception, we have proposed definitional *exclusions* instead of exemptions from registration (under Rule 4.13 or otherwise) because definitional exclusions are more consistent with the Division's historical treatment of family investment vehicles and are a closer

commodity pool and the general partner was not a CPO thereof where the participants were family members – i.e., the general partner and his wife, sister, brother-in-law, father, mother, grandmother and uncle or entities wholly owned by the these family members); *Interpretation of the Term "Pool" in Rule 4.10(d)*, CFTC Interpretative 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).

⁴ See, e.g., *Rule 4.10(d)(1):--Request for Interpretation That Family Limited Partnerships are Not Commodity Pools, and Section 4m(1) of the Act:--Request for Interpretation That General Partners of Family Limited Partnerships are Not CPOs or CTAs*, CFTC Interpretative Letter No. 00-98 (May 22, 2000) ("...it appears that the operation of the [family investment vehicles] is not the kind of activity Congress and the Commission intended to regulate in adopting the CPO and pool definitions, respectively").

⁵ In proposing these alternatives, we have not included grandfathering language for recipients of prior relief letters in the recommended rule text. We trust that recipients of prior relief letters would be permitted to continue relying upon the relief granted in prior relief letters absent the need to take any further action. Further, we have specifically included language in recommended Rule 4.4(c)(1) that would require the filing of a notice of eligibility "prior to the date upon which such person intends to operate or provide commodity interest trading advice to the family client pursuant to the exclusion provided by this section." This language would ensure that any family office currently operating without prior letter relief would be afforded a window (after the adoption of a family office rule, but prior to the rule's effective date) during which it could file any notice of eligibility required.

approximation of the SEC's treatment of family offices (which are excluded from the definition of "investment adviser").

A Family Client Exclusion from the Commodity Pool Definition.

We believe the approach most faithful to the Division's robust body of interpretative, exemptive and no-action relief in this area would be to exclude "family clients," as defined in Rule 202(a)(11)(G)-1(d)(4) under the Advisers Act,⁶ from the definition of commodity "pool" in Rule 4.10(d)(1).⁷ A definitional exclusion from the term commodity "pool" would, as concluded in numerous of the Division's letters, obviate the requirement that a "family office," as defined in Rule 202(a)(11)(G)-1(b) under the Advisers Act, register as a CPO with respect to its operation of family clients.⁸

⁶ We note that codifying the Division's interpretative, exemptive and no-action letters would result in a definition of "family client" that is broader in scope than the SEC's definition of "family clients." See, e.g., *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 Interpretative Letter No. 95-21 (Mar. 7, 1995) (granting "not-a-pool" relief to a partnership including a son-in-law); *Interpretation of Rule 4.10(d)*, CFTC Interpretative Letter No. 94-26 (Mar. 11, 1994) (granting "not-a-pool" relief to a partnership including "close business associates and personal friends"). While we are recommending rule text that would incorporate the SEC's definition of "family client," we would encourage and support the Commission's adoption of a definition of "family client" that is commensurate in scope with the Division's letter-based relief and includes certain family members (e.g., in-laws) that appear to have been inadvertently omitted from the SEC definition.

⁷ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") amended the Commodity Exchange Act to include a statutory definition of "commodity pool." Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 721, 124 Stat. 1376, 1732 (2010), 7 U.S.C. 1a(10) (as amended by Dodd-Frank). The statutory definition provides the Commission with express authority to "exclude from the term 'commodity pool' any investment trust, syndicate, or similar form of enterprise..." Dodd-Frank §721 (to be codified at 7 U.S.C. 1a(10)(B)).

⁸ See, e.g., *Rule 4.10(d): Exclusion from the "Pool" Definition Where All Partners Are Related*, CFTC Interpretative Letter No. 95-18 (Mar. 3, 1995) ("...the Partnership is not a pool within the meaning and intent of Rule 4.10(d), and therefore, no general partner thereof is a CPO"); *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 Interpretative Letter No. 95-21 (Mar. 7, 1995) ("...the Partnership is not a 'pool' within the meaning and intent of Rule 4.10(d) and...none of the Partnership's partners is a CPO thereof"); *Rule 4.10(d): Confirmation that the Partnership and Company Is Not Commodity Pools Where Participants Are Immediate Family Members*, CFTC Interpretative Letter No. 95-55 (Apr. 28, 1995) ("...neither the Partnership nor the Company is a 'pool' within the meaning and intent of Rule 4.10(d) and...neither the General Partner nor the managers of the Company are CPOs thereof"); *Request for Interpretation from Rule 4.10(d)(1)*, CFTC Interpretative Letter No. 96-24 (Mar. 4, 1996) ("...[a partnership

An exclusion from the definition of the term "pool," however, would not address the registration requirements arising from any commodity interest trading advice provided by a family office to its family clients. To prevent incongruent treatment of family offices by the Commission's and the SEC's regulatory regimes, a new paragraph also should be added to Rule 4.14 that would provide an exemption from CTA registration for family offices with respect to commodity interest trading advice that is directed solely to, and for the sole use of, persons defined as family clients.

In response to staff's request for specific proposals, Appendix A to this comment contains recommended rule amendments that would exclude family clients from the definition of "pool" and exempt family offices from the definition of "CTA."

A Family Office Exclusion from the CPO and CTA Definitions.

An alternative for harmonizing the treatment of family offices across regulatory regimes would be to provide exclusions for family offices from the definitions of "CPO" and "CTA." While excluding family clients from the term "commodity pool" is both simpler and closer to the Division's historical treatment of family investment vehicles, this alternative approach would nonetheless also exclude from the requirements of Part 4 the type of family investment activities that neither Congress nor the Commission intended to regulate when they adopted the definitions of "CPO" and "pool." We suggest that family office exclusions from the definitions of "CPO" and "CTA" be structured similarly to the Commission's longstanding exclusions from the definitions of "CPO" and "CTA" in Rule 4.5 and Rule 4.6, respectively.⁹

We include in this comment, at Appendix B, a recommended Rule 4.4 that would exclude family offices from the definitions of "CPO" and "CTA."

composed of family members] is not a "pool" within the meaning and intent of Rule 4.10(d)(1) and, consequently, [its general partner] is not a CPO thereof").

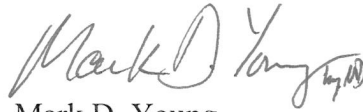
⁹ Rule 4.5 was adopted in 1985. Commodity Pool Operators; Exclusion for Certain Otherwise Regulated Persons From the Definition of the Term "Commodity Pool Operator"; Other Regulatory Requirements, 50 Fed. Reg. 15,868 (Apr. 23, 1985). Rule 4.6 was adopted in 1987. Relief From Regulation as a Commodity Trading Advisor for Certain Persons; Relief From Compliance With Subpart B of Part 4 for Certain Commodity Pool Operators; Disclosure Documents and Annual Reports, 52 Fed. Reg. 41,975 (Nov. 2, 1987).

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We appreciate the opportunity to offer this additional comment on the Commission's Proposed Rules and look forward to working with the Commission through the remainder of this rulemaking process. We would be happy to answer any questions the Commission or its staff might have.

Sincerely,

A handwritten signature in black ink that reads "Mark D. Young" with a stylized flourish at the end.

Mark D. Young

Enclosure

Appendix A: Exclusion from the Definition of "Pool"
And Exemption from Registration as a Commodity Trading Advisor

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6b, 6c, 6l, 6m, 6n, 6o, 12a and 23, as amended by Title VII of the Dodd-Frank Wall-Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (Jul. 21, 2010).

2. Section 4.10 is amended by revising paragraph (d)(1) to read as follows:

§ 4.10 Definitions.

* * * * *

(d)(1) *Pool* means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests; *Provided, however,* That the term "pool" does not include any person defined as a family client in Rule 202(a)(11)(G)-1(d)(4) under the Investment Advisers Act of 1940.

* * * * *

3. Section 4.14 is amended by adding paragraph (a)(11) to read as follows:

§ 4.14 Exemption from registration as a commodity trading advisor.

* * * * *

(a) * * *

(11) It is a family office excluded from the definition of investment adviser under Rule 202(a)(11)(G)-1(b) under the Investment Advisers Act of 1940 and its commodity interest trading advice is directed solely to, and for the sole use of, persons defined as family clients in Rule 202(a)(11)(G)-1(d)(4) under the Investment Advisers Act of 1940.

**Appendix B: Exclusion from the Definitions of
"Commodity Pool Operator" and "Commodity Trading Advisor"**

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6b, 6c, 6l, 6m, 6n, 6o, 12a and 23, as amended by Title VII of the Dodd-Frank Wall-Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (Jul. 21, 2010).

2. Section 4.4 is added to read as follows:

§ 4.4 Exclusion for operators of family office entities from the definitions of the terms "commodity pool operator" and "commodity trading advisor."

(a) *Exclusion from commodity pool operator definition.* Any family office as defined in Rule 202(a)(11)(G)-1(b) under the Investment Advisers Act of 1940 shall be excluded from the definition of the term "commodity pool operator" with respect to the operation of any person defined as a family client in Rule 202(a)(11)(G)-1(d)(4) under the Investment Advisers Act of 1940.

(b) *Exclusion from commodity trading advisor definition.* Any family office as defined in Rule 202(a)(11)(G)-1(b) under the Investment Advisers Act of 1940 shall be excluded from the definition of "commodity trading advisor" with respect to any person defined as a family client in Rule 202(a)(11)(G)-1(d)(4) under the Investment Advisers Act of 1940, *Provided*, That the family office's commodity interest trading advice is directed solely to, and for the sole use of, family clients.

(c) *Conditions of exclusion.* (1) Any person who desires to claim the exclusions provided by this section shall file electronically a notice of eligibility with the National Futures Association through its electronic exemption filing system. The notice of eligibility shall be filed with the National Futures Association prior to the date upon which such person intends to operate or provide commodity interest trading advice to the family client pursuant to the exclusion provided by this section.

(2) Any person who has claimed an exclusion under this section must submit to such special calls as the Commission may make to require the person to demonstrate compliance with the provisions of paragraphs (a) and (b) of this section.

(3) Any person who has claimed an exclusion under this section shall not hold itself out to the public as a "commodity pool operator" or as a "commodity trading advisor."

(4) An exclusion claimed under this section shall cease to be effective upon any change which would render the person as to whom such exclusion has been claimed ineligible under any of the paragraphs of this section.