November 28, 2018

VIA CFTC COMMENTS PORTAL
(https://comments.cftc.gov)

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

Re: RIN 3038-AE76 – Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors

Dear Mr. Kirkpatrick:

The Commodity Futures Trading Commission ("CFTC" or "Commission") has requested comments on the Proposed Rule[1] providing registration relief for various persons who, without the implementation of the Proposed Rule, might otherwise be required to register as a Commodity Pool Operator ("CPO") and/or Commodity Trading Advisor ("CTA"). The Private Investor Coalition, Inc. ("PIC") submits these comments with respect to the portion of the Proposed Rule proposing CPO and CTA Registration Exemptions for Qualifying Family Offices.

PIC was formed in 2009 (i) to serve as the primary resource for disseminating information to and educating its members about legislative, regulatory and compliance initiatives and requirements impacting family offices, and (ii) to be the recognized authority and unified voice on public policy and legislative and regulatory issues impacting the family office community. PIC's membership is composed solely of single family offices who are geographically dispersed throughout the country. PIC and its members also regularly interact with dozens of other family offices and family office organizations throughout the country.

PIC and the family office community appreciate the Commission's initiative in bringing forth the proposed CPO and CTA registration exemptions for qualifying family offices and generally support the approach taken by the Commission under the Proposed Rule. In particular, PIC supports the Commission's adoption of amendments to 17 CFR part 4 to codify family office exemptions from CPO registration under new §4.13(a)(8) and from CTA registration under new §4.14(a)(11).

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[1] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, Notice of Proposed Rulemaking, 83 FR 52902 (October 18, 2018) (the "Proposed Rule").

PIC supports the adoption of the CTA family office exemption under new §4.14(a)(11) as proposed. While PIC generally supports the adoption of the CPO family office exemption under new §4.13(a)(8), PIC respectfully requests the following specific modifications to the Proposed Rule:

1. Change §4.13(a)(8)(ii) to add "Family Client" in addition to "Family Office".

New proposed §4.13(a)(8)(ii) requires that in order for a person to claim the new CPO family office exemption, each pool for which such person claims an exemption from registration must be a "family office." This requirement conflates a family investment vehicle (or "pool") with a family office. It is contrary both to the definition of "family office" under the Security and Exchange Commission's ("SEC") Family Office Rule[2] and to how the vast majority of families organize and operate their family offices (i.e., the family management entity) and family investment vehicles, including those that would be "pools" under the Commission's regulations. As a result, if left unchanged, we believe that most if not all family offices would not be able to satisfy this exemption requirement without implementing significant organizational changes which we do not believe is the Commission's intent.

The term "family office" is specifically defined under the Family Office Rule:

> A family office is a company . . . that:
>
> (1) Has no clients other than family clients . . .;
>
> (2) Is wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities; and
>
> (3) Does not hold itself out to the public as an investment adviser.[3]

Implicit in the above definition is the notion that a family office gives investment advice to its family clients. A family office normally does not receive investment advice from its family clients.

In practice, a "family office" is the management entity established by a family to provide the management, administrative, investment and other support functions that the family desires.

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[2] 17 CFR §275.202(a)(11)(G)-1 (the "Family Office Rule").

[3] 17 CFR §275.202(a)(11)(G)-1(a).

While multiple members of the family may own interests in the family office entity, such ownership is not typically for investment purposes, but the consequence of family governance principles, priorities and/or agreements.

A family office manages the affairs of its family investment vehicles (including "pools") either as a manager, managing member, general partner or under a management agreement with the family investment vehicle. Most family office management entities do not own any assets other than de minimis ownership interests when such entities act as a general partner or managing member of an investment vehicle. Consequently, the "family office" management entity is typically not itself an investment vehicle and therefore not a "pool" under the Commission's regulations.

In addition, most if not all family investment vehicles (e.g., partnerships, LLCs) that are established to hold family investment assets, including futures and swaps, are special purpose investment vehicles and do not function as the "family office". In most cases, these family investment entities do not offer or provide any management services to family clients, including giving investment advice, but are instead the recipient of such services from the family office and/or outside third party investment advisers. Therefore, the vast majority of family investment vehicles (including "pools") are not considered to be a "family office" either in practice or within the meaning of the Family Office Rule.

In short, in most instances, the family office is not organized as or intended to be a "pool" under the Commission's regulations and the family investment vehicles (i.e., the "pools") are not organized or intended to function as the "family office". Rather, those family investment vehicles that are "pools" under the Commission's regulations are "family clients" of the family office.

For the above reasons, we believe that the requirement in proposed §4.13(a)(8)(ii) that the "pool qualifies as a 'family office'" as defined in the Family Office Rule would not only cause confusion, but would exclude most family offices from availing themselves of the new exemption. We believe this would be an unintended consequence of §4.13(a)(8)(ii) as proposed.

To correct this problem, we propose adding "family client" to paragraph 4.13(a)(8)(ii) so that it reads, the "pool qualifies as a 'family office' or a 'family client,' as defined in §275.202(a)(11)(G)-1 of this title". This addition would capture the most common scenarios where a family investment vehicle is a "pool" but not a "family office" as well as the less common scenario where a family investment vehicle is both a "pool" and a "family office" while still limiting the universe of acceptable pools under the proposed CPO family office exemption to those that squarely fall within the Family Office Rule.

2. Make the CPO Family Office Exemption Self-Executing.

In order to claim the CPO family office exemption under proposed §4.13(a)(8), a family office (or applicable family entity) would have to electronically file a notice of exemption with the National Futures Association ("NFA") and thereafter electronically file annual renewal certifications.[4] We believe these filing requirements are unnecessary for family offices.

Simply put, family offices are not and were never intended to be regulated as CPOs, CTAs or Investment Advisers. We believe that all three family office exemptions should be self-executing without the need for family offices to file any notice or claim for exemption. Indeed, the Family Office Rule exemption and the proposed CTA family office exemption (as proposed) are both self-executing. We believe the rationale for a self-executing exemption is equally applicable to the proposed CPO family office exemption.

The fundamental premise supporting the consistent exclusion for family offices from the Commission's and the SEC's consumer protection regulations is that family offices are established by a family to manage the family's own money and the family office does not hold itself out to the general public for hire as a CPO, a CTA or an investment adviser. The Commission underscored this premise in its comments accompanying the Proposed Rule:

> The prohibition against solicitation of non-Family Clients ensures that the exempt CPO is limiting its activities to those associated with the operation of a Family Office, as contemplated by the SEC Family Office Exclusion, which the Commission preliminarily believes would reduce its regulatory interest in such investment vehicles, when compared to other commodity pools.[5]

Similarly, recognizing the nature of family offices, the CFTC staff has historically and repeatedly interpreted the definition of "pool" in Rule 4.10(d) to exclude all types of family investment vehicles from its scope.[6] The applicable interpretative, exemptive, and no-action letters were all premised on the grounds that the family investment vehicles described therein were not within the meaning or intent of the commodity "pool" definition under Rule 4.10(d) or

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[4] *See* 17 CFR §4.13(b).

[5] Proposed Rule, 83 FR at 52915.

[6] *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).

the primary purpose of the CPO registration requirements, which is to protect unsophisticated investors from undesirable managerial and trading practices.[7] In short, the Commission has consistently recognized that the consumer protection concerns that underpin CPO registration requirements are de minimis in the context of family offices and their family clients. The Commission restated this belief in the Proposed Rule:

> The Commission preliminarily believes that the familial relationship inherent in Family Offices provide a reasonable mechanism for protecting the interests of Family Clients and resolving disputes amongst them, and that the regulatory interest is lower than in typical, arms-length transactions where the CPO and the pool participants, or the CTA and its advisory clients, do not have close relationships and/or long-standing family history between them. The Commission also preliminarily believes that these characteristics are a reasonable substitute for the benefits and protections afforded by the Commission's regulatory regime for CPOs and CTAs.[8]

The SEC has reached similar conclusions in the context of the Family Office Rule. "Disputes among family members concerning the operation of the family office could, as we noted in the Proposing Release, be resolved within the family unit or, if necessary, through state courts under laws designed to govern family disputes."[9] "The conditions in the rule are designed to ensure that family offices operating under the rule provide advice only to the family itself and not the general public and, accordingly, the protections of the Advisers Act are not warranted."[10]

If the consumer protections afforded by the Commission's regulatory regimes for CPOs and CTAs are inapposite in the context of family offices, then we submit that requiring family offices to engage in regulatory filings related to such regulatory regimes are inapposite as well. We see little value in requiring such filings in the future. Moreover, uniform treatment across the CPO, CTA and Family Office Rule regulatory regimes will facilitate compliance with and lower the regulatory burdens of each separate regime. The Commission acknowledged as much

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[7] "[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 on Agriculture Report on Commodity Futures Trading Commission Act of 1974, H.R. REP. NO. 975, 93rd Cong., 2d Sess. 79 (1974).

[8] Proposed Rule, 83 FR at 52909.

[9] Family Offices, Securities and Exchange Commission, Final Rule [76 FR 37983, 37984 (Jun. 29, 2011)].

[10] *Id.* at 37994.

in both the CPO No-Action Letter[11] and the CTA No-Action Letter[12]: "The Division further notes that placing both agencies on equal footing with respect to the application of investor protections relevant to this issue will facilitate compliance with both regulatory regimes."[13]

The Commission asserts that the filing requirement will "ensure that at least an annual assessment of whether the CPO of the Family Office remains eligible to rely upon the proposed exemption."[14] In practice, PIC and other practitioners in the space encourage a review of exemption eligibility each time a material change occurs at the family office. For example, PIC advises its members to review eligibility for Family Office Rule and CPO and CTA registration relief when a new family investment vehicle is formed or when a family member becomes a new participant in an investment vehicle or a new client of the family office. For many family offices, such events occur more frequently than annually. For those family offices with infrequent change, mandating an annual filing requirement may foist a burden on them that otherwise serves no material public purpose.

Finally, providing self-executing treatment under proposed §4.13(a)(8) is readily distinguishable from all other §4.13(a) exemptions. Proposed §4.13(a)(8) is the only category of exemption under §4.13(a) that is confined to non-commercial, non-consumer transactions. As noted previously, family offices would be prohibited from providing CPO services to third-party consumers in order to claim and maintain the exemption.[15] Such a restriction does not exist for any other §4.13(a) exemption.

3. Commission's Questions Relating to Proposed Family Office Exemptions.

In addition to the above comments, PIC offers the following comments to the specific questions[16] presented in the Proposed Rule relating to the Proposed Family Office Exemptions:

A. Should CPOs of Family Offices organized as commodity pools be required to annually recertify their eligibility for the proposed exemption under §

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[11] CFTC Staff Letter 12-37 (Nov. 29, 2012) (the "CPO No-Action Letter").

[12] CFTC Staff Letter 14-143 (Nov. 4, 2014) (the "CTA No-Action Letter").

[13] CPO No-Action Letter, p.2; *see, also,* CTA No-Action Letter, p.2.

[14] 83 FR at 52915.

[15] *See* proposed §4.13(a)(8)(i) (pool interests can only be sold to "family clients"), (ii) (pool qualifies as "family office" [or "family client"] (as proposed in this letter)), and (iii) (reasonable belief that each pool participant is a "family client" of a "family office").

[16] Proposed Rule, 83 FR at 52916-17.

4.13(a)(8)? What are the costs and burdens that an annual notice requirement would impose?

PIC does not believe that family offices should be required to certify or recertify their eligibility for the CPO family office exemption. One of the stated objectives of the Proposed Rule is to make CFTC rules, regulations and practices simpler and less burdensome.[17]

As noted above, the Proposed Rule and the CFTC's and SEC's historic and consistent treatment of family offices strongly suggests that there is little or no public interest in monitoring and/or regulating family offices. Therefore, we believe there is little or no public interest in requiring family offices to file claims of exemption under the CPO family office exemption. Moreover, no such claims for exemption are required to be filed under the Family Office Rule or the proposed CTA family office exemption. We believe conformity of treatment under all three family office exemption regimes is the simplest and least burdensome approach that is most likely to facilitate compliance with all three regimes.

For the reasons stated above, we do not believe that a family office claiming the §4.13(a)(8) exemption should be required to certify or recertify its eligibility. PIC respectfully requests that the Commission explicitly exclude §4.13(a)(8) from the claim filing requirement of §4.13(b). We have provided suggested language to this effect in Exhibit A to this letter.

B. Information on BASIC is provided to the public as a means of ensuring that basic information regarding a person's registration status with the Commission is readily available. Given that the persons claiming the proposed CPO exemption for the operation of Family Offices would be prohibited from soliciting non-Family Client participants, should notices filed by Family Offices claiming the proposed CPO exemption in § 4.13(a)(8) be included in NFA's public BASIC database?

PIC strongly objects to any requirement that family offices post claims for exemption on BASIC or any other public forum. We believe any requirement obligating family offices to post information on a public platform violates the privacy rights of family offices and the families they serve and raises certain personal security risks to them as well.

[17] Proposed Rule, 83 FR at 52903.

Under §4.13(b), in order to claim the CPO family office exemption, a family office would be required to disclose:

(i) The name, main business address, main business telephone number, main facsimile number and main email address of the person claiming the exemption;
(ii) The name of the pool or pools for which an exemption is claimed; and
(iii) The section number under which the exemption is claimed (e.g., §4.13(a)(8).[18]

While such information may seem innocuous on its face for normal commercial enterprises, the totality of such information is significant for family offices. In short, §4.13(b)(1) would require every family office claiming the exemption to declare itself to be a family office, identify its investment pools and provide detailed contact information. This requirement would create an immediate and readily accessible target list of more than 500 wealthy family offices nationwide.[19]

Such a target list would promote and likely inundate family offices claiming the exemption with unwelcomed and unsolicited commercial sales pitches from any number of sources.[20] More importantly, the target list creates opportunity for more nefarious contacts that create legitimate security risks for family offices and the families they serve.[21] These are all issues that every family office already deals with on a daily basis. The target list created under the §4.13(b)(1) filing requirement would only exacerbate the problem. Moreover, we can think of no other regulatory scheme where a person or entity has to publicly declare itself to be a family office.

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[18] *See* 17 CFR § 4.13(b)(1).

[19] *See* Proposed Rule, 83 FR at 52909 (Commission notes that more than 500 claims submitted under CPO Family Office No-Action Letter).

[20] *How To Target Wealthy Consumers With Facebook's New Stripped Down Demographic Options*, Forbes.com (Aug. 23, 2018) (https://www.forbes.com/sites/kateharrison/2018/08/23/how-to-target-wealthy-consumers-with-facebooks-new-stripped-down-demographic-options/#15cd3244cf85).

[21] *Security Risks For Wealthy Families Are On The Rise*, WealthManagement.com (Mar. 9, 2017) (https://www.wealthmanagement.com/estate-planning/security-risks-wealthy-families-are-rise); *5 Top Trends in Private Client and Family Office Security That Will Help Shape Priorities in 2018,* hillardheintze.com (Feb. 6, 2018) ("Private clients and their Family Offices are exceptionally attractive targets for criminals." (https://www.hillardheintze.com/private-client-and-family-office-services/private-client-family-office-security-trends-2018).

It is important to remember that family offices and their family clients are individual market participants, not commercial market participants. As such, the personal and financial information of such individuals is accorded special confidential treatment under federal law.

For example, the securities holdings information contained in a family office's 13F filing is personal financial information that is entitled to confidential treatment under both Section 13(f) of the Exchange Act[22] and the Freedom of Information Act[23] and related regulations.

The final sentence of Section 13(f)(3) of the Exchange Act states that "[n]otwithstanding the preceding sentence [obligating the Commission to make 13F filings conveniently available to the public], any such information [*i.e.*, holdings listed on Form 13F] identifying the securities held by the account of a natural person . . . shall not be disclosed to the public." Similarly, FOIA exempts from public disclosure confidential financial information that is not ordinarily made available to the public.[24] "This provision in the Act was more than a simple exemption; it represented an express affirmation of a legislative policy favoring confidentiality of private information furnished government agencies, the disclosure of which might be harmful to private interests. It was manifestly intended to protect that private interest."[25]

As noted above, the disclosure of "family office" information on BASIC would likely have harmful effects on private interests.

More importantly, given the de minimis public and/or regulatory interest in covering family offices under the CPO regulatory regime, we see little public or regulatory benefit in requiring family offices to claim the §4.13(a)(8) exemption through any filing, let alone a public filing.

C. Does the proposed bifurcation of the CTA relief provided to (a) CTAs of Family Offices organized as commodity pools, and (b) CTAs of individual Family Clients clearly and effectively provide relief from registration for CTAs that advise Family Offices in their capacity as an exempt CPO and/or as a CTA to

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[22] Securities Exchange Act of 1934, 15 U.S. Code § 78 et seq. (the "Exchange Act").

[23] 5 U.S.C.A. § 552(b) *et seq.* ("FOIA").

[24] *See* 5 U.S.C.A. § 552(b)(4).

[25] *Westinghouse Elec. Corp. v. Schlesinger*, 542 F. 2d 1190, 1211 (4th Cir. 1976).

individual Family Clients? Is there a clearer or more advantageous way to effectuate such relief?

PIC supports a single, consolidated CTA family office exemption that is agnostic as to whether a family office is either a CPO or a CTA, or both. As drafted, we believe proposed §4.14(a)(11) creates such a consolidated exemption and does not in fact bifurcate between pools and individual family clients.

The proposed provision states, "A person is not required to register . . . as a commodity trading advisor . . . if the person's commodity trading advice is solely directed to, and is for the sole use of, 'family clients' . . . ." Under the Family Office Rule, the term "family client" includes both family investment vehicles that are "pools"[26] and individual family members.[27] Therefore, we believe that proposed §4.14(a)(11), as proposed, would cover any family office that gives commodity trading advice to a family client whether or not such family office is a CPO as long as such advice is limited to family clients, which may include "pools" and individual family clients. If the Commission disagrees with this interpretation of the proposed provision, then we respectfully request the opportunity to work with the Commission to develop language creating a single, consolidated CTA family office exemption.

We would also note that the §4.14(a)(5) exemption may be too narrow to cover most family offices. §4.14(a)(5) states that a family office is exempt as a CTA if "[i]t is exempt as a commodity pool operator and the person's commodity trading advice is directed solely to, and for the sole use of, the pool or pools for which it is so exempt".[28] As noted previously in this letter, most family offices are organized as a single management company. Often, the family office serves as both a CPO when organizing family investment vehicles and as a CTA when giving specific commodity trading advice to family clients, including pools and individual family clients. Because §4.14(a)(5) does not permit the giving of commodity trading advice to individual family clients, but only to pools, we believe that many, if not most, family offices would not be able to claim the §4.14(a)(5) exemption with respect to the family office as a CPO.

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[26] *See* 17 CFR § 275.202(a)(11)(G)-1(d)(4)(ix) (a family pooled investment vehicle is expressly included within the definition of "family client").

[27] *See* 17 CFR § 275.202(a)(11)(G)-1(d)(4)(i) and (ii) (any family member or former family member is a "family client").

[28] 17 CFR § 4.14(a)(5).

PIC believes that a single CTA family office exemption in a single location in the Commission's regulations helps ensure that future regulatory actions concerning family offices or concerning unrelated matters does not inadvertently trigger unintended consequences for unsuspecting parties. Moreover, we believe that a single, consolidated provision is less confusing than a bifurcated approach and will foster better and easier compliance with the CTA family office exemption requirements.

D. Should a notice be required in order to claim the proposed exemption in § 4.14(a)(11) for CTAs of Family Clients? If so, should such CTAs be required to recertify eligibility for such exemption on an annual, or longer term, basis? What are the costs and burdens that such an annual notice requirement would impose on those CTAs?

PIC strongly encourages the Commission not to adopt a filing requirement for proposed §4.14(a)(11). As noted in connection with the CPO family office exemption, such a requirement would pose significant privacy and security issues for family offices. Moreover, such a move would single out family offices for disparate treatment vis-à-vis all other exemptions under §4.14(a) without a clear public policy rationale supporting such disparate treatment. Further, it would create more complexity and greater burdens on the family office community where the public interest in regulating family offices is de minimis.

For the Commission's additional consideration, Exhibit A to this letter contains a redline reflecting the specific language revisions requested by PIC as previously discussed above.

PIC appreciates your consideration of these comments to the Proposed Rule. Please let us know if you have any questions or require any additional information as you continue your review of the Proposed Rule.

Sincerely,

Timothy P. Terry[29]
Secretary

[29] The author wishes to acknowledge the posthumous contributions of Martin E. Lybecker, Esq. (1945-2017) to these comments, a portion of which were derived from previous writings of Mr. Lybecker. Mr. Lybecker was a trusted adviser, counselor and friend to PIC, its members and many family offices and, individually, to the author. He is missed.

EXHIBIT A

Redline of Requested Language Revisions

§4.13(a)

(8) For each pool for which the person claims exemption from registration under this paragraph (a)(8):

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold only to "family clients," as defined in § 275.202(a)(11)(G)-1 of this title;

(ii) The pool qualifies as a "family office~~.~~" or "family client," as defined in § 275.202(a)(11)(G)-1 of this title; and

(iii) The person reasonably believes, at the time of investment, or in the case of an existing pool, at the time of conversion to a pool meeting the criteria of paragraph (a)(8) of this section, that each person who participates in the pool is a "family client" of a "family office," as defined in § 275.202(a)(11)(G)-1 of this title.

§4.13(b)

(b)(1) ~~* * *~~*Any person who desires to claim the relief from registration provided by this section* (other than under § 4.13(a)(8)),

* * *

(ii) Contain the section number pursuant to which the operator is filing the notice (i.e., § 4.13(a)(1), (2), (3), (4)~~;~~ or (5) ~~or (8)~~) and represent that the pool will be operated in accordance with the criteria of that paragraph; and