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

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

Re: RIN 3038-AE76—Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 *Federal Register* 52902 (October 18, 2018).

Dear Mr. Kirkpatrick:

WilmerHale appreciates the opportunity to comment on the Commodity Futures Trading Commission's ("Commission") notice of proposed rulemaking entitled, "Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors," 83 *Federal Register* 52902 (October 18, 2018) ("Proposal"). We submit these comments on behalf of WilmerHale's clients which are family offices.

The Proposal seeks, among other things, to exempt qualifying family offices from commodity pool operator ("CPO") and commodity trading advisor ("CTA") registration with respect to investment management and advisory activities conducted on behalf of their family clients. The proposed exemptions (the "Family Office CPO Exemption" and the "Family Office CTA Exemption," respectively, and together, the "Family Office Exemptions") follow the relief provided to family offices in two no-action letters issued by the Commission's Division of Swap Dealer and Intermediary Oversight ("DSIO").¹

WilmerHale

WilmerHale is a leading, full-service international law firm with 1,000 lawyers located throughout 12 offices in the United States, Europe and Asia. WilmerHale's Futures and Derivatives Practice advises financial market participants on all facets of U.S. commodity futures and derivatives regulatory, transactional and enforcement issues, including the regulation of futures exchanges and

¹ See CFTC Letter No. 12-37 (November 29, 2012) (relating to CPO registration) and CFTC Letter No. 14-143 (November 5, 2014) (relating to CTA registration).

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clearinghouses, commodity pools and commodity trading advisors, swap dealers and futures commission merchants. Family offices are among our clients.

The Proposed Rules

The proposed rules, among their various provisions, generally codify the relief from CPO and CTA registration accorded family offices under CFTC Letters 12-37 and 14-143 (“Family Office Letters”). The Commission is to be commended for its efforts to codify exemptions or other relief that currently are found only in no-action letters, interpretative letters or in guidance. Doing so is an important step in making the regulatory framework more transparent and accessible to all.

Codifying the relief in the Family Office Letters also affords an opportunity to reflect on and to assess whether the proposed rules could improve upon the relief provided in the Family Office Letters and whether the rules as proposed could accomplish their regulatory goals more efficiently. With respect to the proposed Family Office Exemptions, we believe that making the Family Office CPO Exemption self-effectuating would be more efficient and less burdensome, without impairing any *bona fide* regulatory objective.

Commission’s rationale for annual CPO notice filing

Each of the Family Office Letters requires that those claiming the relief submit a one-time notice to the Commission of their claim of relief. This was reasonable because no-action relief is specific to the beneficiary.² By submitting a claim of relief, each filer became a beneficiary of the relief under the Family Office Letters. Providing for a one-time claim of relief was also reasonable because the Commission did not previously have experience granting relief to this category of market participant. Requiring a one-time claim of relief to be filed provided the Commission with information on the number of beneficiaries at the outset and over time. However, neither of these reasons for requiring a one-time filing under the Family Office Letters supports including a requirement under the Family Office CPO Exemption to submit an initial notice and annual recertification.

In proposing the Family Office CPO Exemption, the Commission offers two rationales for requiring the filing of a notice and annual recertification. First, the Commission reasons that the structure of Rule 4.13 currently requires that notice be filed for the various forms of exemption included under the rule and that consistency in the structure of the rule therefore requires that a notice also be required for the Family Office CPO Exemption because it too is included under Rule 4.13, stating that:

² See Commission Rule 140.99(a)(2) (providing that “only the Beneficiary may rely upon the no-action letter”).

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As part of claiming exemptive relief under § 4.13, each person must file an annual notice under § 4.13(b)(4) confirming that the person remains exempt from registration. The Commission proposes to maintain the annual notice filing for all persons claiming relief under § 4.13, including persons claiming the new proposed exemption for Family Offices.³

Secondly, the Commission suggests that an annual recertification will ensure that the family office continues to abide by the terms of the Family Office CPO Exemption, reasoning that:

The Commission believes that the notice requirement should ensure at least an annual assessment of whether the CPO of the Family Office remains eligible to rely upon the proposed exemption.⁴

Both rationales are a slender basis for imposing an on-going notification requirement. First, consistency of structure of the rule is not a substantive rationale for requiring an annual notification. A simple drafting adjustment could be made to exclude the Family Office CPO Exemption from the general notice requirement under Rule 4.13(b). Or, if consistency of structure were of paramount importance, then the Family Office CPO Exemption could be written as a free-standing rule provision.

Second, requiring an annual notification as a means of assuring compliance with the conditions of the exemption is unnecessary. As discussed in greater detail below, the Securities and Exchange Commission (“SEC”) excludes family offices from the definition of “investment adviser.” The same definitions of “family office” and “family client” apply to relief from both the CFTC and SEC regulatory frameworks. Failure to adhere to the conditions of the Commission’s exemption therefore will also constitute a failure to adhere to the SEC’s exclusion. It is doubtful at best that a family office CPO requires a yearly notification to remind it to remain in compliance with the very provisions upon which it relies for relief from two regulatory frameworks. Finally, as discussed below, there is no annual notice required under the Family Office CTA Exemption. Insofar as the eligibility criteria to qualify for both Family Office Exemptions is the same, there is little reason to conclude that although no notification is required with respect to the Family Office CTA Exemption, an annual notification nevertheless is necessary to assure compliance with the Family Office CPO Exemption.

Annual notification and publication on NFA’s BASIC do not further a regulatory interest

An annual notification does not further a fundamental regulatory interest. The Commission justifies an annual exemption notice stating that:

³ Proposal at 52915.

⁴ *Id.*

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Like the other exemptions available under § 4.13, the Commission is proposing to require Family Offices claiming relief from CPO registration to file an annual notice affirming their eligibility. The Commission preliminarily believes that this annual assessment of eligibility would promote transparency regarding the number of entities exempt from registration pursuant to the proposed Family Offices exemption and would enable the Commission to assess its efficacy over time.⁵

The Family Office Letters required filing a one-time notice. This enabled the Commission to determine the relative number of potential beneficiaries of the relief and to assess its efficacy over the six years since CFTC Letter 12-37 was issued.⁶ Having already ascertained the number of family offices currently receiving relief, there is little regulatory need or purpose for proposing an on-going recertification requirement. In this regard, unlike typical pool operators, the specialized requirements to qualify as a family office suggest that the number taking advantage of the Family Office Exemptions are unlikely to vary significantly over time from those currently claiming no-action relief. Having a six-year history of the relative number of family offices that have submitted claims of relief, the Commission is unlikely to glean much additional information from a new, annual filing requirement.⁷

The National Futures Association's ("NFA") "Background Affiliation Status Information Center" (BASIC) serves a vital public interest by providing potential investors with information about industry professionals, including particularly their registration or exemptive status. However, insofar as general members of the public are ineligible from becoming a family client, there is no investor education purpose served by requiring that a notice of exemption for a family office be filed with NFA or such information be included in the BASIC database. A family client would not consult the BASIC system for information about its own family office.⁸

Although including information on BASIC about a family office's exemption is useless from an investor protection perspective, it nevertheless may carry the potential for serious harm to the family office and its family clients. Family offices and the family clients that they serve often take many precautions to safeguard their personal information. Providing that information on a public, searchable database not only unnecessarily intrudes upon their privacy, but may create security

⁵ *Id.* at 52922.

⁶ The Commission states this number as "more than 500." *Id.* at 52909. However, in the cost/benefit discussion the Commission puts the number of affected pool operators (family offices) at 200, filing for an average of 3 pools each. *Id.* at 52923.

⁷ In this regard, there are very few barriers to entry for new CPOs and it is reasonable that their numbers may change and grow over time. However, family offices are not comparable in this manner to other pools that claim relief under Rule 4.13.

⁸ A second use of the BASIC system is by NFA members in conducting their due diligence regarding compliance with NFA Bylaw 1101 (the requirement that NFA members may do business only with entities that, if required to be members of NFA, are members.) However, there are other, equally effective means of ascertaining that information with respect to family offices.

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concerns for such persons. Exposing sensitive personal information with no countervailing public purpose is unwarranted.

Cost-benefit analysis overstates the benefits and understates the cost of the CPO notification requirement

The Commission in its recitation of the benefits of the Proposal cites the fact that unlike the current one-time claim of relief which requires the claimant to prepare the notice itself, the proposed annual notification makes use of an NFA-prepared template. That analysis ignores the obvious, that replacing a one-time notice with an annual filing is not a benefit, regardless of who drafts the document.

Similarly, the Commission cites as a benefit the “harmonization of the Commission’s treatment of family offices with that of the SEC.” The Commission further states that “Family Offices will generally only be required to comply with one standard to determine their registration and compliance obligations with respect to both their securities and commodity interest transactions.”⁹ Again, the Commission’s analysis ignores the fact that by proposing an annual notification requirement for family office CPOs, the CFTC would be unnecessarily introducing a significant dissonance between the requirements of the two agencies. Harmonization would be achieved but for this single, albeit significant, difference. And as explained in greater detail below, this single difference places a substantial burden on family offices.

The Commission quantifies the cost of an annual notification of exemption at 0.5 hours per pool to complete and file the notice, with 200 family offices filing for an average of 3 pools, at an annual cost of \$86 per entity. In isolation, the notification requirement may seem insignificant. The analysis, however, fails to appreciate and account for the substantial, generalized compliance burden that flows from any on-going compliance obligation. The annual exemption notice obligation must be included and maintained in compliance tracking systems. Compliance personnel must track and carry-out this recurring requirement. In the case of family offices, this means that compliance personnel must remain vigilant for the exception—with respect to SEC and Commission registrations an exemption filing is *only* required for the Family Office CPO Exemption. This exception will require the additional focus and attention of compliance personnel.

Responses to specific requests for comment

We respond to the following specific questions that you pose:

⁹ Proposal at 52922.

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7. Should CPOs of Family Offices organized as commodity pools be required to annually recertify their eligibility for the proposed exemption under § 4.13(a)(8)? What are the costs and burdens that an annual notice requirement would impose?

As discussed above, we believe that the burden of an annual recertification is far higher than the minimal cost that the Commission has recognized in its cost-benefit analysis. This is the only point of disharmony between the SEC's exclusion and the Commission's exemption. By introducing a singular exception that must be tracked and filed annually, the initial notice and recertification requirement has the likely potential to distract compliance personnel from attending to other issues, forcing them to focus on this one area of dissonance between the two rule-sets.

As discussed above, there is little regulatory justification for the notification or recertification requirement. The current no-action relief does not include an annual recertification, the Family Office CTA Exemption does not include a notification or recertification requirement and the SEC family office rule is an exclusion, requiring neither a notification or a recertification. The Commission fails to state any compelling reason for introducing this notification requirement applicable only to the Family Office CPO Exemption.

8. 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 are proposed to 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?

Any initial or annual notice claiming the Family Office CPO Exemption should not be included in NFA's BASIC database. As discussed above, the public has no need for the information and its inclusion in a public, searchable database is an invasion of privacy that may have quite serious consequences for the families involved. In the absence of a public need or utility for the information, the conclusion that the information should not be included on the BASIC database is self-evident.

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

Although the bifurcated relief would be effective, it would be clearer if the Family Office CTA Exemption included all aspects of the relief in one provision. The current language of the Family

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Office CTA Exemption would include the advisors to most commodity pools operated by a family office, which would fall within the definition of “family client.” However, in the unlikely event that a commodity pool did not otherwise fall within the definition of “family client,” the proposed Family Office CTA Exemption could be modified to include the advisor of such a collective investment vehicle. Thus, rather than relying on the exemption under Rule 4.14(a)(5), the same result could be achieved by including within the proposed exemption, “any ‘family client’ as defined in §275.202(a)(11)(G)-1 or any collective investment vehicle the operator of which would be subject to Part 4, absent exemption.”

10. 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?

As discussed above with respect to the Family Office CPO Exemption, there is no regulatory or public interest benefit to be served from an initial notice and an annual recertification of eligibility. Except for paragraph (a)(8), Rule 4.14 has operated on a self-effectuating basis. There has been no indication that this has raised issues or caused problems. There is no reason that the Family Office CTA Exemption should not follow this pattern and be self-effectuating. And, in this regard, the success of the operation of Rule 4.14 as a generally self-effectuating exemption with respect to CTAs supports the Family Office CPO Exemption also being self-effectuating.

Conclusion

We commend the Commission for proposing to codify the relief provided in the Family Office Letters. That relief has been tested over the last six years and has worked well. Generally, the proposed Family Office Exemptions remain faithful to the relief provided in the Family Office Letters with one exception, the proposed requirement for CPOs to submit a notification and annual recertification to NFA, with the applicable information to be included in NFA’s BASIC database. As discussed above, this proposed notice and recertification requirement introduces a singular point of dissonance between the rule-sets of the Commission and the SEC regarding family offices. It would result in a compliance burden being placed on family offices despite the Commission failing to articulate a single public policy purpose that the proposed notification regime would further.

The proposal to include information from the notification filings in the BASIC database is particularly troubling. No public utility for including this information has been identified, yet real and tangible harm to families may be a result.

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Finally, it should be stressed that making the proposed Family Office CPO Exemption self-effectuating, like the proposed Family Office CTA Exemption, does not mean that the family office is otherwise not subject to Commission regulation. To the contrary, a family office and its family clients, depending upon their commodity interest trading, may have recordkeeping and reporting obligations under Parts 15, 17, 19, 20, 21, 37 and 43 and 45 of the Commission's rules and would be subject to various provisions of the Commodity Exchange Act in connection with any trading of commodity interests in which they engage.

* * * * *

We appreciate the opportunity to comment on the proposed Family Office Exemptions. Please feel free to contact the undersigned with any questions about these comments.

Respectfully submitted,



Paul M. Architzel

cc: Chairman Chris Giancarlo
Commissioner Brian Quintenz
Commissioner Russ Behnam
Commissioner Dawn Stump
Commissioner Dan Berkovitz
Amanda O'Lear, Associate Director, DSIO
Elizabeth Groover, Special Counsel, DSIO