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Via CFTC Comments Portal
(https://comments.cftc.gov)

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

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

Dear Mr. Kirkpatrick:

We respectfully submit these comments on behalf of a number of our clients in the asset management industry in response to the Commodity Futures Trading Commission (the "Commission" or "CFTC")'s recently proposed amendments to its rules relating to registration and compliance requirements for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs"). 83 Fed. Reg. 52902 (Oct. 18, 2018) (the "Proposals"). Fried Frank advises many clients located in the United States and abroad whose activities would be potentially affected by the Proposals. This letter focuses on several aspects of the Proposals which are of particular significance to our clients and in so doing addresses some of the specific questions on which the Commission is requesting comment,[1] as well as certain related issues.

I. INTRODUCTION

At the outset, we wish to commend the Commission and its staff for their efforts to codify and in certain respects broaden some of the regulatory relief currently provided to CPOs and CTAs through staff letters, an Advisory and other guidance, and to simplify and streamline the application of the Commission's rules in line with the objectives of its Project KISS initiative. While many aspects of the Proposals are quite helpful in advancing these objectives, we believe, however, it is important that the Commission remove a number of potential ambiguities and provide some additional clarification regarding other aspects of the Proposals

1 See 83 Fed. Reg. at 52916.

and modify them in certain respects to minimize the possibility of unintended consequences, including unforeseen compliance burdens. Of course, we are fully supportive of ongoing efforts to reduce regulatory burdens and to provide greater legal certainty with respect to the Commission's regulation of CPOs and CTAs.

II. DISCUSSION

A. Codifying JOBS Act Relief With Respect to Offerings of Commodity Pools Involving General Solicitation

We support the proposed amendments to Rules 4.7(b) and 4.13(a)(3) which are intended to eliminate the existing language restricting marketing and solicitation and to harmonize these rules with the Securities and Exchange Commission ("SEC")'s rule amendments implementing the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act"), consistent with the JOBS Act Relief Letter. See CFTC Letter No. 14-116 (Sept. 9, 2014).[2] The proposed amendments would obviate the current requirement to submit a claim for relief pursuant to the JOBS Act Relief Letter. We therefore support the adoption of these amendments.

B. Non-U.S. Investors in Rule 4.13(a)(3) Exempt Pools

We agree with the Commission's proposal to include non-U.S. persons expressly within the categories of participants eligible to invest in Rule 4.13(a)(3) exempt pools, consistent with CFTC Letter 04-13 and other staff guidance.[3] For this purpose, we presume that the Commission would apply the definition of a "non-United States person" as that term is defined in Rule 4.7(a)(1)(iv). We believe that it would be helpful for the Commission to confirm that point, as well as the validity of prior staff guidance on the categories of participants eligible to invest in Rule 4.13(a)(3) exempt pools.[4]

C. Family Offices and Family Investment Vehicles

We generally support the Commission's proposal to codify the existing no-action relief for family office CPOs and CTAs in new exemptions in proposed Rule 4.13(a)(8) and Rule 4.14(a)(11), respectively, subject to the following comments. We disagree with the proposed requirement that a CPO of a family office submit an initial notice and recertify annually its eligibility for the proposed exemption. In particular, we find such a requirement to be inconsistent with the Commission's stated objective of harmonizing further its registration relief for family offices with the SEC Family Office Exclusion, which is self-executing.[5] For similar

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[2] The JOBS Act Relief Letter provides exemptive relief to CPOs from the existing provisions of Rule 4.7(b) or Rule 4.13(a)(3), subject to certain conditions, including submitting a claim for relief. See 83 Fed. Reg. at 52915-52916.

[3] Id. at 52907.

[4] See CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions - CPO/CTA: Amendments to Compliance Obligations at 3 (Aug. 14, 2012).

[5] 83 Fed. Reg. at 52908-52909 and 52915.

reasons, as well as privacy, security and related concerns, we do not believe that notices filed by or on behalf of family offices claiming the proposed CPO exemption in Rule 4.13(a)(8) should be included in the National Futures Association's public BASIC database.[6]

On a related issue, the Commission recognizes that over many years the staff has responded to one-off requests from family offices for relief from CPO and related registration and regulation by issuing relief letters determining that these types of investment vehicles are not commodity pools.[7] Given that many of these relief letters are interpretative letters, third parties as well as the recipients of these letters and their counsel have continued to rely on them in accordance with applicable Commission regulations. Indeed, consistent with its statements in prior rulemakings affecting family offices, the Commission stated that family offices unable to meet the requirements of the proposed exemption may still avail themselves of relief under Rule 4.13(a)(3), if they so qualify, or they may continue to seek relief on a one-off basis through requests submitted to CFTC staff. See 83 Fed. Reg. at 52909. We therefore respectfully request the Commission to confirm the continuing validity of prior staff relief letters in any final rule release.

D. Offshore Pools/Non-U.S. Persons

The Commission is proposing to add an exemption in a new Rule 4.13(a)(4) to codify the regulatory relief currently provided under CFTC Advisory 18-96 for registered CPOs who operate offshore commodity pools with a limited U.S. nexus (the "18-96 Exemption" or "new Rule 4.13(a)(4)"). Among other things, the proposed 18-96 Exemption would permit a CPO to claim relief from having to register as a CPO with respect to a qualifying pool as well, subject to meeting the other criteria of Advisory 18-96.[8] By codifying Advisory 18-96 within Rule 4.13, the proposed exemption also would provide a registered CPO relief from having to report detailed information on such a pool on Form CPO-PQR, for which Advisory 18-96 currently provides no relief.[9] The Commission is proposing to provide such relief explicitly on a pool-by-

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6 We concur with the view expressed in the comment letter submitted by the Private Investor Coalition that the language in proposed Rule 4.13(a)(8)(ii) should be modified so that it reads that the "pool qualifies as a 'family office' or a 'family client', as defined in §275.202(a)(11)(G)-1 of this title". See Private Investor Coalition, Inc., Comment Letter on Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors (Nov. 28, 2018), https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61888&SearchText=.

7 83 Fed. Reg. at 52908 n.53.

8 Id. at 52904-52906. These other criteria include the following:
(i) the commodity pool is, and will remain, organized and operated outside of the United States; (ii) the commodity pool will not hold meetings or conduct administrative activities within the United States; (iii) no shareholder of or other participant in the pool is or will be a United States person; (iv) the commodity pool will not receive, hold or invest any capital directly or indirectly contributed from sources within the United States; and (v) the CPO, the commodity pool and any person affiliated with them will not undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation from United States persons.

9 The relief includes a proposed amendment to Rule 4.23 which would permit a registered onshore CPO to maintain a qualifying offshore pool's original books and records at the pool's offshore location, rather than at

pool basis, such that a CPO could operate certain of its pools pursuant to the 18-96 Exemption, operate other pools pursuant to an exemption under existing Rule 4.13(a)(3) or other exemptions, or operate other pools as a registered CPO such as under Rule 4.7, Rule 4.12(b), or in full compliance with the Part 4 Rules. In this regard, the Commission expressed the view that "these proposed amendments, if adopted, would ultimately provide more comprehensive relief from CPO and pool regulation than the Advisory alone and more flexibility than the terms of §3.10(c)(3)(i)."[10] The Commission is requesting comment on a number of specific questions pertaining to the proposed 18-96 exemption. See 83 Fed. Reg. at 52916. We address most of these questions in the next section of this letter.

III. ANALYSIS

A. Advisory 18-96 and the Proposed 18-96 Exemption

We appreciate the Commission's attempt to codify and expand the relief currently provided under Advisory 18-96 and we agree that providing such relief would generally be consistent with the Commission's past prioritization of resources.[11] With that said, we respectfully request that the Commission clarify certain ambiguities in the 18-96 Exemption as proposed and modify it in some respects in the interests of minimizing the possibility of unintended consequences, including unforeseen compliance burdens, in particular with regard to the interaction between it and the existing exemption under Rule 3.10(c)(3)(i).

First, we request that the Commission confirm the continuing validity of the various staff letters interpreting and applying Advisory 18-96 in the more than twenty years since its issuance in 1996.[12] Because market participants and their counsel rely on these letters in applying the criteria of Advisory 18-96, it is important that the Commission do so to provide legal certainty to entities currently relying on Advisory 18-96, as well as those entities relying on the 18-96 Exemption in the future if it is adopted.

Second, we request that the Commission clarify that a CPO currently relying on Advisory 18-96 with respect to an offshore pool which subsequently claims an exemption under Rule 4.13 for the pool, including if adopted new Rule 4.13(a)(4), would not be required to provide a right of redemption to the pool's participants. For example, if the Commission adopts the 18-96 Exemption as proposed, a CPO currently relying on Advisory 18-96 with respect to one of its offshore pools would be transitioning to relying on new Rule 4.13(a)(4) for that pool, solely due to a codification of existing relief. Providing a right of redemption in such circumstances is therefore unnecessary to accomplish any of the Commission's objectives in this rulemaking and

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the CPO's main business office in the United States, subject to conditions that are based on the criteria in Advisory 18-96 for relief from the recordkeeping location requirement. See id. at 52906.

10 Id. at 52906.

11 Id. at 52913-52914.

12 See, e.g., CFTC Interpretative Letter No. 97-48 (May 6, 1997) (concluding that a CPO may file a notice pursuant to Advisory 18-96, notwithstanding the ownership of interests in the pool by a U.S. person where that person is, for example, the pool's CPO, CTA, or a principal thereof).

would be inconsistent with the Commission's intent to reduce burdens for CPOs of offshore pools.

Third, in response to the Commission's initial question regarding Advisory 18-96 and the Proposed 18-96 Exemption (83 Fed. Reg. at 52916), we do not believe that CPOs should be required to disclose the exemption to participants in offshore commodity pools because such disclosure would not be meaningful to offshore, non-U.S. investors or consistent with prevailing market practice. If, however, the Commission determines to require such disclosure, it should be sufficient for such disclosure to be included in the offshore pool's offering memorandum or other regularly scheduled statement provided to investors such as a periodic account statement.

Fourth, we wish to note that relief under Advisory 18-96 has always been available on a pool-by-pool basis, so that a registered CPO may operate one or more pools pursuant to its provisions and simultaneously operate other pools pursuant to the Part 4 rules, including in accordance with other exemptions such as Rule 4.7 or Rule 4.13(a)(3). In response to question 2 (id. at 52916), we believe the proposed amendments to Rule 4.13(e) should suffice to establish that the 18-96 Exemption is available for each individual pool meeting the terms thereof, without regard to the claimant's registration status, subject to the other comments noted herein. Likewise, in response to question 5 (id. at 52916), we believe that the language in proposed Section 4.13(e)(3) should be sufficient to make the 18-96 Exemption available on a pool-by-pool basis, again subject to the other comments noted herein.

B. The Interaction Between Rule 3.10(c)(3)(i) and the Proposed 18-96 Exemption

The Commission is also requesting comment on transitioning from reliance upon Rule 3.10(c)(3)(i) to the 18-96 Exemption, and generally on whether the interaction between the exemption under Rule 3.10(c)(3)(i) and the 18-96 Exemption is understood.[13] We are addressing this question at some length because we believe this question presents significant issues for both U.S. and offshore asset managers who frequently rely on a combination of different exemptions with regard to the full range of their different activities, pools, and clients. To provide meaningful regulatory relief in keeping with fully realizing the objectives of this rulemaking, as well as with the overarching goals of the Project KISS initiative, we believe that it is important that the Commission provide additional regulatory clarity and avoid creating unforeseen compliance burdens or other unintended consequences, as already noted and as discussed more fully below.

To begin with, the self-executing exemption in Rule 3.10(c)(3)(i) codifies longstanding Commission and staff policy granting no-action or similar relief on CPO registration to offshore CPOs in respect of qualifying offshore pools.[14] We recognize that the Commission stated in that 2007 release that if a person located outside the United States were to solicit prospective

13 See 83 Fed. Reg. at 52916.

14 See Exemption from Registration for Certain Foreign Persons, 72 Fed. Reg. 63976, 63977 and n.6 (Nov. 14, 2007).

investors in the United States, this exemption would not be available, even if the only investors resulting from the efforts were located outside the United States.[15] However, it is critical to bear in mind that the Commission did not address in that release, and to our knowledge has never addressed, the separate and distinct question of whether an offshore CPO may rely on Rule 3.10(c)(3)(i) with respect to some of its offshore pools in combination with relying on other exemptions with respect to its other pools.

To remove any ambiguity and minimize the possibility of a change that could be potentially disruptive to current practices, we respectfully request that the Commission confirm that an offshore CPO may combine or "bundle" the exemption in Rule 3.10(c)(3)(i) with other exemptions in connection with taking any final action on the 18-96 Exemption, so that both these exemptions would be available to an offshore CPO in a manner consistent with Commission and staff precedent over the decades and longstanding market practice in this area. Moreover, such guidance would advance the Commission's stated objectives of reducing regulatory burdens for CPOs that operate pools in multiple jurisdictions and providing additional regulatory clarity and greater legal certainty, as well as be consistent with the Commission's past prioritization of resources.

To put this issue in proper context, it is worth recalling that the Commission and the staff have recognized over many decades that asset managers frequently need to rely on a combination of different exemptions for different activities, pools, and clients in connection with the applicability of the CPO/CTA rules. This approach permits each sector of an asset manager's activities to be regulated either pursuant to registration and compliance with all or part of the Commission's Part 4 rules where appropriate, or in accordance with the terms of a relevant exemption, and without affecting or burdening activities which are properly not subject to regulation. Under this approach, activities which are properly exempt from regulation remain exempt, and activities which warrant registration and regulation by the Commission remain subject to appropriate regulation, without any regulatory gaps or any adverse impact on U.S. investors. Such an approach provides for more efficient and less burdensome regulation in a manner consistent with the objectives of the CFTC's Project KISS initiative, minimizes the possibility of unintended consequences, including unforeseen compliance burdens, yet addresses the Commission's customer protection concerns.[16] As described subsequently, we believe that the Commission generally has applied this approach over the years to the regulation of CPOs and CTAs, i.e., on a pool-by-pool basis and on a client-by-client basis, rather than entity level regulation which is more characteristic of the regulation of futures commission merchants ("FCMs") and introducing brokers ("IBs"), as in the case of net capital and related financial reporting requirements.

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15 Id. at 63977-63778.

16 Such an approach was endorsed in comments submitted to the Commission in response to its Project KISS initiative. See SIFMA AMG, Comment Letter on Request for Information Regarding Project KISS, KISS Initiative -- Appendix 1, at 42-45 (Sept. 29, 2017), https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61341&SearchText=.

A number of existing provisions of the Commission's Part 4 rules, including Rules 4.5, 4.13(a)(3) and 4.14(c)(2), expressly contemplate that a CPO or CTA may rely on a combination of different exemptions with respect to different activities, pools, or clients.[17] Moreover, the Commission and the staff have confirmed the permissibility of relying on a combination of multiple exemptions in a number of regulatory contexts over the years, including among others Section 4m(1) of the CEA and Rule 4.14(a)(8), and Section 4m(3) of the CEA and Rule 4.14(a)(8).[18]

More specifically, in the cross-border context, Rule 4.14(a)(10) provides that, for purposes of the Section 4m(1) exemption from CTA registration,[19] an offshore CTA may count only clients that are residents of the United States, its territories or possessions, i.e., may disregard all its clients that are non-U.S. residents. Thus, this rule effectively permits an offshore fund manager to advise up to fifteen privately offered funds in the United States without having to register as a CTA, irrespective of its offshore activities. It would be rather anomalous if an offshore fund manager could rely on Section 4m(1) of the CEA and Rule 4.14(a)(10) to remain exempt from CTA registration, yet be unable to remain exempt from CPO registration in precisely the same circumstances due to an inability to combine or bundle Rule 3.10(c)(3)(i) with another available exemption from CPO registration such as Rule 4.13(a)(3).

The Commission determined to codify longstanding registration relief for offshore CPOs and CTAs (in addition to relief for FCMs and IBs) in conjunction with adopting Rule 3.10(c)(3)(i) in 2007 in response to a request from the National Futures Association to provide offshore CPOs and offshore CTAs with greater legal certainty.[20] Nowhere has it ever been stated or even suggested that in doing so the Commission intended to eliminate or curtail then-existing flexibility for offshore CPOs or offshore CTAs. It is irrelevant that the exemption under Rule 3.10(c)(3)(i) is located in the Commission's Part 3 rules rather than in the Part 4 rules, because there is nothing in the wording of this provision or the underlying policy rationale which would support precluding an offshore CPO or an offshore CTA from relying on this exemption in combination with one or more other exemptions.[21]

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[17] See, e.g., Rules 4.5(g) and 4.13(e)(2). See also Rule 4.14(c)(2) (permitting a registered CTA to provide commodity trading advice to certain categories of clients for which an exemption is available as if it were exempt from registration as a CTA).

[18] See 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. 41975, 41978 (Nov. 2, 1987) (Section 4m(1) of the CEA and Rule 4.14(a)(8)); CFTC Letter No. 05-13 (Aug. 15, 2005) (Section 4m(3) of the CEA and Rule 4.14(a)(8)).

[19] Section 4m(1) of the CEA provides a statutory exemption from registration for a CTA who has not furnished commodity trading advice to more than fifteen persons during the course of the preceding twelve month period and who does not hold itself out generally to the public as a CTA.

[20] See 72 Fed. Reg. at 63976-63977. The Commission has proposed to amend this exemption from registration in a manner which is not relevant to this rulemaking. Exemption from Registration for Certain Foreign Persons, 81 Fed. Reg. 51824 (Aug. 5, 2016).

[21] To the contrary, the Commission expressed the intent "to codify its longstanding policy, and not to extend the scope of its regulations with respect to foreign brokers or other foreign intermediaries." 72 Fed. Reg. at 63977.

Consistent with prevailing market practice, we think the better view is that Rule 3.10(c)(3)(i) is a transactional exemption available to an offshore CPO with respect to its qualifying offshore pools on a pool-by-pool basis, rather than an exemption which limits an offshore CPO relying on it solely to offshore pools with offshore participants, without regard to the availability of any other applicable exemption. As we have noted, the Commission did not explicitly address the question of whether an offshore CPO may rely on Rule 3.10(c)(3)(i) with respect to some of its offshore pools in combination with relying on other exemptions with respect to its other pools. It would, however, be counterintuitive and a somewhat surprising regulatory outcome that a U.S.-domiciled entity may rely on a combination of exemptions for purely domestic activities where the Commission's regulatory interests are surely at their highest level, but that a foreign-domiciled entity may not rely on a combination of exemptions for a mix of offshore and domestic activities where the Commission's regulatory interests are of a lesser magnitude, based upon principles of deference to foreign regulatory authorities and prioritization of agency resources.[22]

This approach also would permit an offshore CPO with some U.S. activities to register as a CPO and comply with applicable disclosure, reporting and recordkeeping requirements with respect to those activities and rely on Rule 3.10(c)(3)(i) with respect to its non-U.S. activities, consistent with current market practice. In this manner, U.S. investors receive the protections provided by the Commission's Part 4 rules to the extent applicable. For example, if they qualify as a "qualified eligible person", they receive treatment in accordance with Rule 4.7. We do not believe that the Commission could have intended to preclude such a beneficial outcome which is fully compatible with its concerns regarding the protection of U.S. investors. Nor do we believe that the Commission would wish to discourage foreign-domiciled asset managers from seeking to provide investment opportunities to U.S. investors, impose unforeseen compliance burdens, or deviate from longstanding Commission and staff policy and precedent with respect to the regulation of CPOs and CTAs.[23] We are concerned, however, that these would be unintended consequences of adopting the 18-96 Exemption, as proposed.

In response to question 4 (id. at 52916), it should therefore not be necessary for a qualifying CPO to transition from relying on Rule 3.10(c)(3)(i) to the 18-96 Exemption. Instead, a qualifying CPO should be able to rely on either exemption and combine or bundle either of these exemptions with other exemptions, as appropriate, even though one of these exemptions

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22 Id. at 63977 n.5 (quoting language from 48 Fed. Reg. 35248, 35261 (Aug. 3, 1983)).

23 The Commission and the staff have reiterated many times and granted appropriate relief such that an entity which registers as a CPO to operate one or more commodity pools for which it must be registered may nonetheless continue to qualify for an exclusion from the CPO definition or an exemption from CPO registration with respect to its operation of other pooled investment vehicles for which CPO registration is not required, notwithstanding the entity's registration as a CPO. See, e.g., CFTC Interpretative Letter No. 96-84 (Dec. 3, 1996) (subsequent to its registration as a CPO/CTA, an investment adviser would not be subject to enforcement action for failure to comply with the disclosure, reporting and recordkeeping requirements of Part 4 of the Commission's rules or the registration requirement of Rule 3.12(h)(3)(ii)(B) with respect to Rule 4.5 eligible entities). Notably, the staff took this position with respect to the relevant provisions of both Part 4 as well as Part 3 of the Commission's rules.

may provide broader relief than the other in a particular fact pattern. For example, consistent with current practice, an offshore CPO filing a notice to claim an exemption under Rule 4.13(a)(3) for a pool which may have U.S. investors should be able to continue to rely on Rule 3.10(c)(3)(i) with respect to all its other offshore pools which are not offered or sold to U.S. investors, without affecting its registration status or having to file notices for all those other offshore pools under the proposed 18-96 Exemption if it is adopted in the future.[24]

Additionally, we do not believe that the notice filing which would be required to claim the proposed 18-96 Exemption should be due within 30 days of registering as a CPO or claiming an exemption with respect to pools marketed to U.S. persons, obtaining funds belonging to U.S. persons, or otherwise operated in the United States, its territories, or possessions. As we understand it, the proposed 18-96 Exemption is intended to be available to domestic or offshore CPOs, whether or not registered with respect to their other pools, and irrespective of the applicability of other exemptions. Consistent with our request that the Commission clarify in any final rule release that an offshore CPO be able to rely upon and combine either the proposed 18-96 Exemption or the exemption in Rule 3.10(c)(3)(i) with other exemptions on the same basis, we believe that a notice claiming the proposed 18-96 Exemption should be due at the same time as notices for claiming other exemptions under Rule 4.13 pursuant to Rule 4.13(b)(2), and without affecting the CPO's ability to rely on Rule 3.10(c)(3)(i). Thus, we believe the notice filing for the proposed 18-96 Exemption should be due not later than the time the CPO delivers a subscription agreement for the pool to a prospective participant in the pool. We note that this suggested change to the notice filing requirement for the proposed 18-96 Exemption would be generally consistent with the existing relief under Advisory 18-96.[25]

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24 This result "would be beneficial and consistent with the Commission's past prioritization of agency resources for the regulation of intermediary activities affecting U.S. participants in commodity interest markets." See 83 Fed. Reg. at 52921.

25 See Advisory 18-96, reprinted in Comm. Fut. L. Rep. (CCH) ¶26,659 (April 11, 1996) ("A notice of a claim for exemption must be filed with the Division prior to the date upon which the CPO filing such notice intends to operate pursuant to the terms of the relief available.").

IV. CONCLUSION

We appreciate the opportunity to comment on the Proposals. If the Commission or its staff has any questions concerning these comments, please do not hesitate to contact the undersigned at (212) 859-8292.

Respectfully submitted,

David S. Mitchell

cc: Honorable J. Christopher Giancarlo, Chairman
Honorable Brian D. Quintenz, Commissioner
Honorable Rostin Behnam, Commissioner
Honorable Dawn D. Stump, Commissioner
Honorable Dan M. Berkovitz, Commissioner
Matthew Kulkin, Director, DSIO
Amanda Olear, Associate Director, DSIO