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April 24, 2012

Submitted Electronically and via FedEx

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

COMMENT

Re: Regulation 4.5 Harmonization

Dear Mr. Stawick:

We are pleased to submit this comment letter on proposed harmonization provisions[1] released by the Commodity Futures Trading Commission (the "Commission"). We respectfully request that the Commission adopt a family office exclusion from registration as a commodity trading advisor ("CTA") and/or a commodity pool operator ("CPO") akin to the family office exclusion adopted by the U.S. Securities and Exchange Commission (the "SEC") in Rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940, as amended (the "SEC Family Office Rule").

Withers Bergman LLP is an international private client law firm with offices around the world. We serve as counsel to more than 80 single-family offices in the U.S., Europe, South America, Asia, the Middle East and Africa. We have not written this letter on behalf of any particular

[1] *See* Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. 11345 (Feb. 24, 2012).

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client, although many of our clients will benefit from a family office exclusion from regulation by the Commission.

During the course of our representation, we have gained significant experience and familiarity with the organizational and operational structures and needs of family offices. Among the multitude of functions that single-family offices serve, many act as investment advisors to family members and family-owned entities. In this capacity, family offices provide advice not only with respect to investments in securities that are under the purview of SEC regulation, but also with respect to commodity interests that fall within the scope of the Commission's regulatory authority.

Typically, our family office clients have relied on an exemption from registration as CPOs under Rule 4.13(a)(4), which was repealed under final rules adopted by the Commission on February 9, 2012, and/or an accompanying exemption for CTAs under Rule 4.14(a)(8)(i)(D), which was significantly curtailed as a result of the repeal of Rule 4.13(a)(4).[2] Without the availability of these exemptions, many single-family offices will be forced to register with the Commission as CPOs and/or CTAs.

The impact of the Commission's recent actions is particularly burdensome on our family office clients because of the breadth of the definition of a commodity pool.[3] Many family offices form collective investment vehicles for tax and other reasons that have nothing to do with the operation of a pool in the traditional sense. Yet the formation of a family-only collective investment vehicle could subject a family office to Commission registration as a CPO even if its only commodities positions were in pools operated by others.

We urge the Commission to adopt a family office exemption from registration that mirrors the SEC Family Office Rule. As we explain below, the Commission's long history of granting relief to family offices through no-action and interpretative letters strongly suggests that the Commission does not seek to regulate family offices. Further, we do not believe that Congress intended to subject family offices to regulation by the Commission, or that the Commission intended to regulate family offices in a manner inconsistent with the SEC.

The Commission has Consistently Granted Exemptive Relief to Family Offices

The Commission's prior exemptive relief, granted through no-action and interpretative letters, indicates it has no interest in the regulation of family offices. As noted in the letter submitted to the Commission on behalf of The Private Investor Coalition, Inc. ("PIC") by Skadden, Arps, Slate, Meagher & Flom LLP on April 13, 2012 (the "PIC Letter"), the Commission has issued at least 34 letters granting exemptive relief to family offices over a 36-year period. The Commission has consistently taken the position in these exemptive letters that, when the definitions of commodity "pool" and "CPO" were adopted, it was not the intention of Congress or the Commission to regulate the activities of family offices. In fact, the Commission implicitly acknowledged this position when

[2] Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, CFTC Rel. No. RIN 3038-AD30 (2012) (the "Adopting Release").

[3] *See* 17 C.F.R. 4.10(d)(1).

it stated on page 44 of the Adopting Release that "family offices continue to be permitted to write in on a firm by firm basis to request interpretative relief from the registration and compliance obligations under the Commission's rules and to rely on those interpretative letters already issued to the extent permissible under the Commission's regulations."

However, reliance on the Commission's prior exemptive letters, and the sets of facts unique to each such letter, is not an acceptable alternative for family offices and is in fact likely to result in the Commission devoting more of its resources to an increased number of exemptive requests as family offices seek regulatory relief. As the Commission is doubtless aware, the circumstances of each family office that has received exemptive relief thus far are unique and, therefore, as a technical matter cannot be relied upon by other family offices. This uncertainty will cause many family offices to apply to the Commission for exemptive relief based on their specific circumstances. This seems an unnecessary waste of the Commission's resources in light of its generally applicable policy for almost four decades of exempting family offices from regulation as CPOs and CTAs.[4]

Congress and the Commission Did Not Contemplate Inconsistent Regulation of Family Offices

The operation of family entities is not the type of activity that Congress intended to regulate, as customer protection concerns are not of paramount importance in such situations.[5] Congress took a similar position in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") when it specifically excluded family offices from systemic risk reporting requirements in its amendments to the Investment Advisers Act of 1940, as amended. In taking this position, Congress highlighted the SEC's previous exemptive policy with respect to family offices and instructed the SEC to adopt a family office exclusion consistent with such policy.[6]

By also excluding family offices from regulation as CPOs or CTAs, the Commission would remain true to its previously stated intention to ensure "congruent and consistent regulation of similarly-situated entities among Federal financial regulatory agencies...."[7] In particular, the Commission could ensure that it regulates family offices consistently with the SEC by adopting an exemptive framework based on the SEC Family Office Rule. The Commission's adoption of (1) an exclusion of "family clients" (as defined in the SEC Family Office Rule) from the Commission's definition of commodity "pool," (2) a related exclusion of "family offices" (as defined in the SEC Family Office Rule) from registration as CPOs, and (3) an exclusion of family offices from registration as CTAs, would yield a consistent regulatory result for family entities.

If the Commission fails to adopt a clear family office exclusion modeled on the SEC Family Office Rule, we would expect many of our clients to file individual applications for exemptive relief.

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[4] We note that the SEC specifically highlighted the desire to avoid, as much as possible, the need for family offices to burden the SEC with individual applications for exemptive orders when it proposed the initial version of the SEC Family Office Rule.

[5] *See*, for example, CFTC Interpretative Letter No. 00-98. Comm. Fut. L. Rept. (CCH) ¶28,411 (May 22, 2000).

[6] *See* Dodd-Frank Act, § 409(b)(1).

[7] Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 Fed. Reg. 7976, 7978 (Feb. 11, 2011).

Although the Commission has indicated that it will continue to encourage applications of this nature, we believe the expense to our clients of any such application would be unreasonably burdensome. We also believe the Commission ultimately would find reliance on this mechanism to be an inefficient use of administrative resources in light of the fact that our clients would simply seek confirmation that the underlying principles consistently articulated in the Commission's prior 36 years of exemptive letters apply to their particular circumstances.

As to other matters addressed in the PIC Letter but not otherwise addressed here, we endorse the views expressed by PIC.

We would welcome the opportunity to discuss the foregoing concerns in more detail or to assist the Commission in any efforts to implement a family office exclusion from regulation.

Sincerely,

David S. Guin
Head of U.S. Securities Practice Group