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April 19, 2012

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

Re: Regulation 4.5 Harmonization

COMMENT

Dear Mr. Stawick:

The Commodity Futures Trading Commission ("CFTC" or "Commission") has requested comment on its proposed harmonization provisions. Specifically, the Commission indicated that it "is considering adopting a family offices exemption from CPO registration, akin to the exemption adopted by the SEC."[1] By way of introduction, I am chair of our law firm's Trusts and Estates Practice Group and, in that capacity, I represent several family offices.

We respectfully request that the CFTC adopt a family office exemption under the definitions of Commodity Pool Operator ("CPO") and Commodity Trading Adviser ("CTA"). Further, under these two new family office exemptions, it should be clear that anyone qualifying under them would also be exempt from any notice filing, disclosure and recordkeeping requirements, including, without limitation, Rules 4.13(a)(5) and (6), 4.13(b), 4.13(c), 4.21, 4.23, 4.31 and 4.32, or any other such requirements.

With respect to the definition of family office, it should, at a minimum, be broad enough to accommodate the wide variety of structures currently employed by and clientele currently served by family offices. Moreover, the definition of family office should include, but not be limited to, the

[1] 77 FR 11348 (February 24, 2012).

scope and extent of prior CFTC interpretive relief provided with respect to family investment vehicles.

The adoption of a family office exemption under CPO and CTA definitions is consistent with both the CFTC's own prior interpretive relief, as well as the Congressional mandate under Section 409 of the *Dodd-Frank Wall Street Reform Act* to alleviate family offices from the regulatory burdens of investment adviser registration. We believe the adoption of a family office exemption under the CFTC's rules governing CPO and CTA registration will appropriately harmonize the treatment of family offices across federal financial market regulatory schemes.

Finally, we support the analyses and conclusions of other commentators on this topic, including, without limitation, that certain letter to you dated April 13, 2012, regarding Regulation 4.5 Harmonization, from Mark D. Young of Skadden, Arps, Slate, Meagher & Flom LLP (a copy of which is enclosed herein for your convenience).

We appreciate the opportunity to comment on this proposal and look forward to working with the Commission throughout the rulemaking process.

Very truly yours,

GIARMARCO, MULLINS & HORTON, P.C.

Julius H. Giarmarco, Esq.

JHG:sr
Enclosure

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April 13, 2012

VIA ELECTRONIC MAIL

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

Re: Regulation 4.5 Harmonization

Dear Mr. Stawick:

We represent The Private Investor Coalition, Inc. (the "Coalition"), a coalition of 48 single family offices.[1] The Coalition is submitting this letter to request that the Commodity Futures Trading Commission (the "Commission") adopt an exclusion from the commodity "pool" definition, thereby excluding operators from commodity pool operator ("CPO") registration, and an exemption from commodity trading advisor ("CTA") registration for single family offices (the "Family Office Exclusion"). Unless otherwise specified, the term "family office" as used in this letter refers to a single family office. The Coalition strongly supports the adoption of a Family Office Exclusion as soon as possible because the Commission recently adopted final rules (the "Final Rules") that repeal the exemption from CPO registration under Rule 4.13(a)(4) and the accompanying exemption from CTA registration under Rule 4.14(a)(8)(i)(D).

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1 "Family offices" are entities established by wealthy families to manage their wealth and provide other services to family members. *See* the Investment Advisers Act Release No. 3098 (Oct. 12, 2010), [75 Fed. Reg. 63753 (Oct. 18, 2010)] ("Proposing Release").

Summary of Position

The Coalition appreciates that the Commission has formally asked for public comment on whether it should adopt a Family Office Exclusion.[2] Commission staff has a 36-year history of granting family office interpretative, exemptive and no-action relief from CPO and/or CTA registration.[3] In so doing, Commission staff has consistently recognized that the operation of a family office is not the kind of activity that Congress and the Commission intended to regulate through CPO and/or CTA registration requirements. In the preamble to the Final Rules, the Commission, by expressly encouraging family offices to rely on previously issued staff interpretative letters, has ratified the staff's conclusion.

Consistent with the foregoing, the Coalition believes that requiring family offices to register as CPOs and/or CTAs as a result of the repeal of Rule 4.13(a)(4) and the amendment to Rule 4.14(a)(8)(i)(D) would be unwarranted and unnecessary. Codifying previously issued relief letters into a Family Office Exclusion would ensure that all family offices, and not only those that have previously received staff letters, receive consistent treatment under the Commission's regulations. A Family Office Exclusion would also accomplish the Commission's stated goals by ensuring congruent and consistent regulation of family offices between the Commission and the U.S. Securities and Exchange Commission ("SEC") and by aligning the Commission's treatment of family offices with the congressional intent of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. 111-203 (2010).[4]

For these reasons, the Coalition strongly urges the Commission to adopt a Family Office Exclusion that would be consistent with the scope of previously issued staff interpretative, exemptive and no-action relief letters and would employ the existing framework the SEC developed in adopting a family office exclusion from the definition of "investment adviser" in the Investment Advisers Act of 1940 ("Advisers Act"). To give effect to a Family Office Exclusion, the Coalition believes the Commission should exclude family clients (as defined in SEC Rule 202(a)(11)(G)-1(d)(4) under the Advisers Act) from the definition of commodity "pool" in Rule 4.10(d)(1), which thereby would exclude the operators of such entities from registering with the Commission as CPOs. The Commission also should exempt family offices themselves (as defined in SEC Rule 202(a)(11)(G)-(1)(b) under the Advisers Act) under Rule 4.14 from registering with the Commission as CTAs as a result of the commodity interest trading advice provided to family clients. Together, these amendments to Rules 4.10 and 4.14 will

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2 Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 77 Fed. Reg. 11345, 11348 (Feb. 24, 2012).

3 This is not the case for other areas addressed in the preamble to the Final Rules.

4 Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 Fed. Reg. 7976, 7978 (Feb. 11, 2011). In its proposing release to amend the compliance obligations of CPOs and CTAs, the Commission stated that the "proposed amendments are designed to (1) bring the Commission's CPO and CTA regulatory structure into alignment with the stated purposes of the Dodd-Frank Act; (2) encourage more congruent and consistent regulation of similarly-situated entities among Federal financial regulatory agencies..." *Id.*

ensure that all family offices receive equal treatment under the Commission's regulations and congruent treatment under the SEC's regulatory structure.

Family Offices

There are estimated to be between 2,500 and 3,000 family offices in the United States.[5] In simple terms, a family office is a professional organization that is wholly-owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities. Because each family is unique, a family office's clientele will tend to vary in accordance with the composition of the family, but in general, the clientele for a family office is limited to family members (including certain former family members) and their affiliated entities, and key employees, members of key employees' families, and their affiliated entities.

The services family offices provide also vary. In proposing to define those family offices that were to be excluded from the definition of "investment adviser" in the Advisers Act, the SEC stated a family office's services will "typically include managing securities portfolios, providing personalized financial, tax, and estate planning advice, providing accounting services, and directing charitable giving, in each case to members of a family."[6] In order to provide these services to family clients, family offices generally hire professional staff, most of whom are not family members. This professional staff can include attorneys, accountants, administrators and investment professionals, among others, each of whom generally receives compensation, pension and employee benefit plans that would be comparable to other private employers.

Family offices advise family members and their entities with respect to exchange-traded and other publicly-listed securities, hedge funds, private equity, venture capital, real estate, and other funds. Family offices often establish partnerships or LLCs in which only family clients and key employees can invest. Many family offices may also use, directly or indirectly, commodity interests as part of their investment strategy. Nonetheless, the structure of the typical family office coupled with the transactions in commodity interests is generally sufficient to give rise to concerns about CPO and CTA registration (or exemption) status.

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5 Family Offices, 75 Fed. Reg. 63753, 63754 (Oct. 18, 2010) (citing Pamela J. Black, *The Rise of the Multi-Family Office*, Financial Planning (Apr. 27, 2010)).

6 75 Fed. Reg. at 63754 (Oct. 18, 2010). In fact, an academic survey of single family offices has shown that aside from wealth management, a family's most important objective in establishing a family office is the consolidation of the family's accounting, tax and estate planning services. *See* Raphael Amit, *et al.*, *Single Family Offices: Private Wealth Management in the Family Context*, Wharton Global Family Alliance (Apr. 1, 2008), available at: http://knowledge.wharton.upenn.edu/papers/1354.pdf (hereinafter "Wharton Study"). From this, the survey concluded that single family offices are "usually seen by the families as a private investment office." *Id.*

Why Adopt A Family Office Exclusion?

1. Staff's 36-Year History of Letter-Based Relief Should Yield to a Generally Applicable Regulation.

Commission staff has been addressing requests for family office relief since 1975.[7] In the 36 years since, staff has issued no fewer than 34 letters granting exemptive relief to family offices.[8] Most of these letters have enunciated the same legal basis for providing exemptive

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[7] CFTC Staff Letter No. 75-2, Comm. Fut. L. Rept. (CCH) ¶20,089 (Jul. 30, 1975). Staff Letter No. 75-2 is the second published letter ever issued by the Commission staff.

[8] *Registration of Family-Owned Corporation as Commodity Pool Operator*, CFTC Interpretative Letter No. 75-2, Comm. Fut. L. Rept. (CCH) ¶20,089 (July 30, 1975); *Joint Account Would Not Operate As Commodity Pool*, CFTC Interpretative Letter No. 83-9, Comm. Fut. L. Rept. (CCH) ¶21,909 (Nov. 3, 1983); *Interpretation of the Term "Pool" in Rule 4.10(d)*, CFTC Interpretative Letter No. 86-10, Comm. Fut. L. Rept. (CCH) ¶23,016 (Apr. 24, 1986); *Request for Relief from Commodity Pool Operator Registration*, CFTC Interpretative Letter No. 93-46, Comm. Fut. L. Rept. (CCH) ¶25,737 (May 19, 1993); *Re: "X,"* CFTC Interpretative Letter No. 93-48, Comm. Fut. L. Rept. (CCH) ¶25,739 (May 19, 1993); *Relief from CPO Registration*, CFTC Interpretative Letter No. 93-58, Comm. Fut. L. Rept. (CCH) ¶25,777 (Jun. 24, 1993); *Request for Interpretation of Rule 4.10(d)*, CFTC Interpretative Letter No. 93-72, Comm. Fut. L. Rept. (CCH) ¶25,801 (Jul. 26, 1993); *Request for Relief from Commodity Pool Operator Regulation*, CFTC Interpretative Letter No. 93-94, Comm. Fut. L. Rept. (CCH) ¶25,860 (Apr. 13, 1993); *Relief from CPO/CTA Registration*, CFTC Interpretative Letter No. 93-100, Comm. Fut. L. Rept. (CCH) ¶25,886 (Oct. 5, 1993); *No-Action Relief from Regulation as a CPO*, CFTC Interpretative Letter No. 94-70, Comm. Fut. L. Rept. (CCH) ¶26,159 (May 23, 1994); *Request for Interpretation of Rule 4.10(d)*, CFTC Interpretative Letter No. 95-15, Comm. Fut. L. Rept. (CCH) ¶26,342 (Feb. 17, 1995); *Rule 4.10(d): Exclusion from the "Pool" Definition Where All Partners Are Related*, CFTC Staff Interpretative Letter No. 95-18, Comm. Fut. L. Rept. (CCH) ¶26,345 (Mar. 3, 1995); *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 Staff Interpretative Letter No. 95-21, Comm. Fut. L. Rept. (CCH) ¶26,348 (Mar. 7, 1995); *Request for Relief from Commodity Pool Operator Regulation,* CFTC Staff Interpretative Letter No. 95-35, Comm. Fut. L. Rept. (CCH) ¶26,376 (Nov. 23, 1994); *Rule 4.10(d): Confirmation that the Partnership and Company Are Not Commodity Pools Where Participants Are Immediate Family Members*, CFTC Interpretative Letter No. 95-55, Comm. Fut. L. Rept. (CCH) ¶26,424 (Apr. 28, 1995); *Re: Exemption from Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11) Where Pool Participants Are Related to Registered Commodity Pool Operator*, CFTC Interpretative Letter No. 95-102, Comm. Fut. L. Rept. (CCH) ¶26,566 (Nov. 27, 1995); *Re: Section 4m(1) of the Commodity Exchange Act—Request for Relief from Registration as a CPO Where All Other Members of Limited Liability Company Are Relatives, Friends or Business Associates of President*, CFTC Interpretative Letter No. 96-11, Comm. Fut. L. Rept. (CCH) ¶26,622 (Jan. 18, 1996); *Re: Request for Interpretation from Rule 4.10(d)(1),* CFTC Interpretative Letter No. 96-24, Comm. Fut. L. Rept. (CCH) ¶26,653 (Mar. 4, 1996); *Re: Request for Confirmation that "Newco" Would Not Be a Commodity Pool under Rule 4.10(d)(1) and its Managers Would Not Be Commodity Pool Operators under Section 1a(4) of the Act and Rule 1.3(cc)*, CFTC Interpretative Letter No. 96-37, Comm. Fut. L. Rept. (CCH) ¶26,687 (May 7, 1996); *Re: Request for Confirmation that "X" Is Not a Commodity Pool under Rule 4.10(d)(1) and General Partner Is Not a Commodity Pool Operator under Section 1a(4) of the Act*, CFTC Interpretative Letter No. 96-51, Comm. Fut. L. Rept. (CCH) ¶26,727 (Jun. 17, 1996); *Re: Rule 4.10(d)—Request for Relief from Commodity Pool Operator Registration,* CFTC Interpretative Letter No. 97-07, Comm. Fut. L. Rept. (CCH) ¶26,974 (Feb. 5, 1997); *Re: Request for Relief from Regulation as a CPO*, CFTC Interpretative Letter No. 97-29, Comm. Fut. L. Rept. (CCH) ¶27,039 (Mar. 21, 1997); *Re: 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, Comm. Fut. L. Rept. (CCH) ¶27,090 (Jun. 23, 1997); *Re: Request that Limited Partnership Not be Considered a Commodity Pool,* CFTC Interpretative Letter No. 97-52,

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relief – the operation of a family entity is simply not the kind of activity that Congress and the Commission intended to regulate when they adopted the definitions of "CPO" and commodity "pool," respectively.[9] Accordingly, in these letters, staff concluded that the family entities at issue were not commodity pools, their operators were not CPOs, and their advisors generally were not required to be registered as CTAs.

In the preamble to the Commission's Final Rules, the Commission ratified staff's long history of excluding family entities from the commodity "pool" definition by expressly encouraging family offices that might be impacted by the Final Rules to consider relying on existing staff interpretative letters or, if necessary, to write staff requesting individualized relief.[10] The Coalition appreciates the Commission's explicit approval of the relief granted in staff's previously issued interpretative letters, but unfortunately, these letters are of limited practical use. The unique nature of each family and each family office makes it unlikely that the facts in a previously issued interpretative letter will align precisely with the facts of a different family office.[11] Each family office that is unable to fit comfortably within the facts of a

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Comm. Fut. L. Rept. (CCH) ¶27,092 (Jun. 24, 1997); *Re: Rule 4.10(d)(1)—Request that a Limited Partnership Comprised of Immediate Family Members Not be Considered a Commodity Pool*, CFTC Interpretative Letter No. 97-78, Comm. Fut. L. Rept. (CCH) ¶27,158 (Sept. 24, 1997); *Re: Section 4m(1)—Request for Relief from Commodity Pool Operator and Commodity Trading Advisor Registration*, CFTC Interpretative Letter No. 97-89, Comm. Fut. L. Rept. (CCH) ¶27,191 (Oct. 27, 1997); *Re: Section 4m(1) of the Act;—Request for No-Action Position from CPO Registration*, CFTC Staff Letter No. 99-43, Comm. Fut. L. Rept. (CCH) ¶27,785 (Sep. 15, 1999); *Re: Section 4m(1) of the Act;—Request for No-Action Position from CPO Registration*, CFTC Staff Letter No. 99-45, Comm. Fut. L. Rept. (CCH) ¶28,112 (Sep. 15, 2000); *Re: Request for CPO Registration No-Action Position under Section 4m(1) of the Act; Request for CTA Registration No-Action Position under Section 4m(1) of the Act*, CFTC Staff Letter No. 99-46, Comm. Fut. L. Rept. (CCH) ¶27,788 (Sep. 29, 1999); *Re: 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 Staff Letter No. 00-98, Comm. Fut. L. Rept. (CCH) ¶28,411 (May 22, 2000); *Re: Rule 4.10(d)(1):—Request that a Limited Partnership Comprised of Family Members Not be Considered a Commodity Pool*, CFTC Staff Letter No. 00-100, Comm. Fut. L. Rept. (CCH) ¶28,420 (Nov. 1, 2000); *Re: Section 4m(1)—Request for Relief from Registration as a CPO; Section 4m(1)—Request for Confirmation of Availability of Exemption from CTA Registration*, CFTC Staff Letter No. 02-07, Comm. Fut. L. Rept. (CCH) ¶28,924 (Jan. 24, 2002); *Re: Regulation 4.10(d)(1)—Request that a limited partnership comprised of family members not be considered a commodity pool*, CFTC Staff Letter No. 09-46, Comm. Fut. L. Rept. (CCH) ¶31,482 (Oct. 20, 2009); *Re: Regulation 4.10(d)(1)—Request for interpretation stating that family investment entities are not commodity pools*, CFTC Staff Letter No. 10-25, Comm. Fut. L. Rept. (CCH) ¶31,585 (Jun. 25, 2010).

9 *See, e.g.*, CFTC Interpretative Letter No. 95-35, Comm. Fut. L. Rept. (CCH) ¶26,376 (Nov. 23, 1994); CFTC Interpretative Letter No. 96-24, Comm. Fut. L. Rept. (CCH) ¶26,653 (Mar. 4, 1996); CFTC Interpretative Letter No. 97-29, Comm. Fut. L. Rept. (CCH) ¶27,039 (Mar. 21, 1997); CFTC Staff Letter No. 00-100, Comm. Fut. L. Rept. (CCH) ¶28,420 (Nov. 1, 2000); CFTC Staff Letter No. 10-25, Comm. Fut. L. Rept. (CCH) ¶31,585 (Jun. 25, 2010).

10 Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252, 11263 (Feb. 24, 2012).

11 Reliance is further complicated by the fact that staff's previously issued letters (including each of interpretative letters to which the Commission cited in footnote 125 of the preamble to the Final Rules) commonly include

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previously issued staff interpretative letter will likely seek its own interpretative or no-action letter. Both family offices and the Commission will then be required to devote considerable resources to letter-based relief, a commitment of resources that seems to be unwarranted because the underlying policy for granting relief is supported by 36 years of history and not otherwise in question.

The limitations and inefficiencies in continued reliance on staff-issued letter-based relief are, in part, the reason that the Commission recently articulated a standard for determining when a regulatory exclusion should be granted to replace longstanding no-action relief. In the preamble to final rules on the registration of foreign boards of trade, the Commission recognized that "where the same type of relief is being granted on a regular and recurring basis...it is no longer appropriate to handle requests for the relief through the no-action process.[12] Rather, such matters should be addressed in generally applicable...regulations."[13] The Coalition agrees with the Commission's standard and believes it should apply equally to exclude family offices from CPO and/or CTA registration.

Congress has evidenced agreement with the Commission's recently articulated standard that, where the same type of relief is being granted on a regular and recurring basis, it is no longer appropriate to handle requests for the relief through the no-action process. In Section 409 of the Dodd-Frank Act, Congress excluded family offices from the definition of "investment adviser" in the Advisers Act and instructed the SEC to adopt rules defining the scope of the family office exclusion that are "consistent with the previous exemptive policy of the [SEC], as reflected in the [SEC's previously issued] exemptive orders."[14] Had Congress believed that requiring family offices to seek SEC exemptive orders was the best allocation of federal resources, it would not have directed the SEC to adopt a specific exclusion.

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some variation of the following language: "The views expressed in this letter are based upon the representations that you have made to us and are strictly limited to those representations. Any different, changed or omitted facts or conditions might render the interpretation taken in this letter void." *See, e.g.* CFTC Staff Letter No. 10-25, Comm. Fut. L. Rept. (CCH) ¶31,585 (Jun. 25, 2010).

12 *See* Registration of Foreign Boards of Trade, 76 Fed. Reg. 80674 , 80675 (Dec. 23, 2011). In this rulemaking the Commission determined that the no-action process should be discontinued after 24 staff-issued no-action letters because it "is generally better suited for discrete, unique factual circumstances [and for situations where neither the [Commodity Exchange Act] nor the Commission's regulations address the issue presented]." *Id.*

13 *Id.*

14 *See* Dodd-Frank Act, § 409(b)(1). It is notable that Congress did not require the SEC to conduct any study or to collect any data prior to defining the scope of its family office exclusion. Rather, Congress simply instructed the SEC to tailor the scope of its exclusion to be "consistent with the previous exemptive policy of the [SEC]..." *Id.*

2. CPO and CTA Registration Was Not Intended for Family Offices.

The legislative history of the Commodity Exchange Act ("CEA") indicates that CPO and CTA registration requirements were intended to protect potential customers or investors from unscrupulous practices.[15] Similarly, the requirements in Part 4 of the Commission's regulations have been designed to "expose and thus help to circumscribe the undesirable business practices" with respect to CPOs and to "specifically eliminate certain undesirable practices which have enticed unsuspecting [clients] into the markets" with respect to CTAs.[16] These types of customer protection concerns are simply not at issue with family offices.

A family office is wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities. The absence of consumer protection-related concerns is a fundamental reason that Commission staff's interpretative, exemptive and no-action letters have concluded that the operation of family entities is not the type of activity that either Congress or the Commission intended to regulate when they adopted the definitions of "CPO" and "pool," respectively.[17] This same rationale underlies Congress' judgment that there is no federal interest in applying the Advisers Act to family offices.[18]

In sum, the Coalition fully supports the conclusions that Commission staff has reached in its unbroken chain of letter-based relief: family offices are not engaged in the type of activity either Congress or the Commission intended to regulate through the application of Part 4 of the Commission's regulations. The Coalition strongly urges that the Commission adopt a regulation excluding family offices from registration. Adopting such regulation is both necessary and appropriate.[19]

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[15] *See* Proposed Comprehensive Scheme for Regulation, 42 Fed. Reg. 9266 (Feb. 15, 1977); Proposed Comprehensive Scheme for Regulation, 42 Fed. Reg. 9278 (Feb. 15, 1977).

[16] *Id.*

[17] *E.g.,* CFTC Interpretative Letter No., 00-98, Comm. Fut. L. Rept. (CCH) ¶28,411 (May 22, 2000) ("...it appears that the operation of the [family investment entities] is not the kind of activity Congress and the Commission intended to regulate in adopting the CPO and pool definitions, respectively").

[18] S. Conf. Rep. No. 111-176, at 75 (2010). A colloquy on Section 409 of the Dodd-Frank Act between two of the Chairman of Committees of jurisdiction on the bill, Senators Lincoln and Dodd, made even clearer the lack of federal interest: "For many decades, family offices have managed money for members of individual families, and they do not pose systemic risk or any other regulatory issues. The SEC has provided exemptive relief to some family offices in the past, but many family offices have simply relied on the 'under 15 clients' exception to the Investment Advisers Act, and when Congress eliminated this exception, it was not our intent to include family offices in the bill." 156 Cong. Rec. S5904 (daily ed. July 15, 2010).

[19] The Coalition notes that "[t]he Commission is authorized to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this chapter." 7 U.S.C. § 12a(5).

3. As Market Participants, Family Offices Would Be Subject to All Other Applicable Requirements of the CEA and Commission's Regulations.

As the staff has long noted in its interpretative, exemptive and no-action letters, relief from CPO and/or CTA registration requirements does not excuse an entity from compliance with any other applicable requirements of the CEA or in the Commission's regulations.[20] For example, staff interpretative letters have stated that excluded family offices would remain subject to the antifraud provisions of the CEA as well as the reporting requirements set forth in Parts 15, 18, and 19 of the Commission's regulations.[21] A codified Family Office Exclusion would operate no differently.

Presently, any market participant responsible for a large futures or swaps position – including the operator of or advisor to any family entity irrespective of its registration status – is subject to the Commission's large trader reporting regime. The Commission's large trader reporting system collects daily information from clearing members, futures commission merchants and traders, allowing the Commission to develop a comprehensive view of activity by large market participants.[22] If any of these large market participants accumulates a "reportable position," it may be required to file the Commission's more detailed Form 40, identifying, among other things, the person or persons controlling the account's trading and whether the reported account is related (either by a financial interest or control) to another account. An excluded family office would remain subject to the full spectrum of these Commission large trader reporting requirements.

Congress has also created numerous additional regulatory requirements with respect to swap transactions to which excluded family offices would be subject. For example, excluded family offices' swap transactions would still be subject to clearing and exchange-trading requirements, reporting and recordkeeping requirements and initial and variation margin requirements. Additionally, an excluded family office would remain subject to the major swap participant and major security-based swap participant registration requirements, if applicable.

Together, the remaining provisions of the CEA and the Commission's regulations ensure that no regulatory gap is created by adopting a Family Office Exclusion.

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20 *See, e.g.*, CFTC Staff Letter No. 10-25, Comm. Fut. L. Rept. (CCH) ¶31,585 (Jun. 25, 2010) ("This letter does not excuse "[its recipient] from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, [the recipient] remains subject to the antifraud provisions of Section 4b of the Act and the reporting requirements set forth in Parts 15, 18, and 19 of the Commission's regulations").

21 *Id.*

22 The Commission's website states that "The aggregate of all large trader positions reported to the Commission usually represents 70 to 90 percent of the total open interest in any given market." available at: http://www.cftc.gov/IndustryOversight/MarketSurveillance/LargeTraderReportingProgram/index.htm.

4. Commission Staff's Family Office Letter-Based Relief Has Never Turned on Systemic Risk Issues; Nor Should A Family Office Exclusion.

In the preamble to the Final Rules, the Commission explained that it does not have a "comprehensive view" of family offices necessary to "assess the universe of firms that may be appropriate to include" within a Family Office Exclusion.[23] Given the Commission's ratification of staff interpretative relief, the Commission does not need to wait for any additional information to exclude family offices from CPO and/or CTA registration. Accordingly, the Coalition supports the Commission's adoption of a Family Office Exclusion consistent with the definitions in the SEC's final rule 202(a)(11)(G) and the CFTC staff's existing letter-based relief.

Throughout the last 36 years, Commission staff has granted interpretative, exemptive and no-action relief to family offices based on the nature of the family investment entities themselves, namely, that they were entities whose investors were all family clients. The determinative question has always been whether there exist reasonably close family (or other similar) relationships among the investors that remove any customer protection concerns.[24] If the answer is "yes," Commission staff has routinely concluded that the family entity is not a pool and the operation of that family entity is not the kind of activity that Congress and the Commission intended to regulate through CPO and/or CTA registration requirements.[25] By ratifying these letters, the Commission accepts that family offices have been, currently are and will continue to be excluded from CPO and/or CTA registration based on the relationships among the investors in a family investment entity.

In a different section of the preamble, the Commission claims that it is "essential" to the adoption of a generally applicable Family Office Exclusion to collect additional information from non-excluded family offices through the Commission's recently adopted systemic risk reporting forms.[26] It is unclear, however, how the Commission's systemic risk forms could facilitate the Commission's adoption of a Family Office Exclusion. First, the forms do not allow for the Commission to identify family office filers as opposed to all other filers.[27] Second, even if the Commission could identify the forms filed by family offices, they would not provide the Commission with any information about the relationships among investors in the family investment entities, which is the determinative factor in granting relief to family offices. Finally, even if a particular family office were subject to the systemic risk reporting requirement (assuming it was unable to rely on an existing staff interpretative letter), the Commission has explicitly invited such family offices to request letter-based relief and thereby remove

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[23] 77 Fed. Reg. at 11263.

[24] *See, e.g., supra* note 17.

[25] *See, e.g., supra* note 9.

[26] 77 Fed. Reg. at 11266.

[27] Without the ability to distinguish between filers, it does not appear that the Commission could isolate family office forms such that it could conduct "an analysis of data regarding [family office] activities." *Id.*

themselves from the Commission's systemic risk reporting requirement. In light of these factors, the Coalition respectfully submits that the Commission's systemic risk reporting forms would not be essential, and likely would not even be helpful, to the Commission in adopting a Family Office Exclusion.

Congress appears to have reached the same conclusion in Title IV of the Dodd-Frank Act. In Section 409, Congress excluded family offices from the Adviser Act's definition of "investment adviser" and instructed the SEC to adopt rules defining the scope of such family office exclusion. Notably, Congress did not require the SEC to conduct any study or to collect any data prior to defining the scope of its family office exclusion. In fact, Congress specifically excluded family offices from systemic risk reporting by limiting the collection of such reports to registered private fund investment advisers.[28] Instead of instructing the SEC to rely on a study or data, Congress simply instructed the SEC to tailor the scope of its exclusion to be "consistent with the previous exemptive policy of the [SEC]..."[29] In response, the SEC crafted, proposed and adopted a family office exclusion.

The Coalition believes that the Commission can and should similarly adopt a Family Office Exclusion. The adoption of a Family Office Exclusion on these grounds would be the most direct route to accomplishing the Commission's stated goal of ensuring congruent and consistent regulation of family offices and bringing the Commission's treatment of family offices in line with the congressional intent of Title IV of the Dodd-Frank Act.

What Should a Family Office Exclusion Cover?

The Coalition respectfully suggests that to ensure congruent and consistent regulation of family offices between the Commission and the SEC, a Family Office Exclusion should borrow from the existing framework the SEC has developed in its family office exclusion in the Advisers Act.[30] The starting point for any Family Office Exclusion should be to exclude "family clients," as defined in SEC Rule 202(a)(11)(G)-1(d)(4) under the Advisers Act,[31] from the

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[28] Dodd-Frank Act §406(e). Section 406 provides the SEC and CFTC authority to jointly promulgate rules "to establish the form and content of the [systemic risk] reports required to be filed with the [SEC] under subsection 204(b) [of the Advisers Act] and with the [CFTC] by investment advisers that are registered both under [the Advisers Act] and the [CEA]." *Id.* Section 404 of the Dodd-Frank Act amended subsection 204(b) of the Advisers Act to allow the SEC to require any *registered investment adviser* to maintain and file reports *regarding private funds* advised by the investment adviser. Dodd-Frank Act §404(2) (emphasis added).

[29] Dodd-Frank Act § 409(b)(1).

[30] The Coalition proposes the Commission adopt a definitional exclusion for "family clients" instead of an exemption from CPO registration because this definitional exclusion is more consistent with the staff's historical treatment of family investment entities and is a closer approximation of the SEC's treatment of family offices (which are excluded, not exempted, from the definition of "investment adviser"). Likewise, the Coalition proposes that the Commission adopt an exemption from CTA registration for family offices because it is generally consistent with staff's previously issued letter-based relief.

[31] 17 C.F.R. § 275.202(a)(11)(G)-1(d)(4).

definition of commodity "pool" in Rule 4.10(d)(1).[32] This definitional exclusion would 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.[33] The registration requirements arising from any commodity interest trading advice provided by a family office to its family clients should be addressed by adding a new paragraph to Rule 4.14.[34] This new paragraph would provide a self-executing 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. To assist the Commission's rulemaking efforts and in deference to its limited resources, the Coalition has provided specific language to accomplish this objective in Appendix A.

In order to adopt a Family Office Exclusion that is faithful to the robust body of staff interpretative, exemptive and no-action relief, the Coalition encourages the Commission to make reasonable accommodations for two types of family clients omitted from the SEC's "family client" definition. First, the Commission should include language that recognizes the immediate in-laws of family members' spouses as "family clients."[35] The SEC's definition of "family client" includes the spouse of the founder of the family office and the spouses of his or her lineal descendants, but does not include any of the in-laws related through these spouses or their lineal descendants. For example, the founder of a family office could not allow his or her spouse's parents' assets to be supervised by the family office. The Coalition believes this definition of "family client" is unduly restrictive and would result in a Family Office Exclusion that is

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[32] Although the Dodd-Frank Act amended the CEA to include a statutory definition of "commodity pool," that statutory definition provides the Commission with express authority to "exclude from the term 'commodity pool' any investment trust, syndicate, or similar form of enterprise..." *See* Dodd-Frank Act, § 721; 7 U.S.C. 1a(10).

[33] *See, e.g.*, CFTC Interpretative Letter No. 95-18, Comm. Fut. L. Rept. (CCH) ¶26,345 (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"); CFTC Interpretative Letter No. 95-21, Comm. Fut. L. Rept. (CCH) ¶26,348 (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"); CFTC Interpretative Letter No. 95-55, Comm. Fut. L. Rept. (CCH) ¶26,424 (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"); CFTC Interpretative Letter No. 96-24, Comm. Fut. L. Rept. (CCH) ¶26,653 (Mar. 4, 1996) ("...[a partnership 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").

[34] An exclusion from the definition of the term "pool" would address the family office's CPO registration requirements, not its CTA registration requirements. Because the family office would be definitionally excluded from CPO status, it could not rely on the existing exemption from CTA registration in Rule 4.14(a)(5). 17 C.F.R. § 4.14(a)(5).

[35] By immediate in-laws, the Coalition means any mother-in-law, father-in law, sister-in-law, brother-in-law, daughter-in-law or son-in-law of family clients (as defined in Rule 202(a)(11)(G)-1(d)(4) under the Advisers Act) and their lineal descendants.

narrower in scope than staff's interpretative, exemptive and no-action relief.[36] Therefore, the Coalition recommends the Commission's Family Office Exclusion make reasonable accommodations to allow family offices to supervise the investments of immediate in-laws of family clients and descendants.

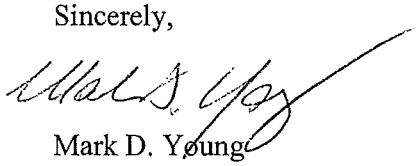
Second, the Commission should include language that recognizes certain trusts of key employees as family clients. The SEC's definition of "family client" includes a trust established by a key employee for the benefit of his family, but only if two conditions are satisfied.[37] First, each settlor or other person who has contributed assets to the trust is a key employee (or, in certain instances, the key employee's spouse).[38] Second, each trustee or other person authorized to make decisions with respect to the trust must be a key employee.[39] This second requirement defeats the key employee's estate tax planning because, if the key employee retains certain powers over the trust (as trustee or otherwise), the key employee will not be considered to have surrendered control over the asset transferred to the trust and, as a result, the assets in the trust will be includible in his estate for estate tax purposes.[40] The Coalition believes that, by making reasonable accommodations with respect to the trustees of these key employee trusts, the Commission's Family Office Exclusion will better reflect the realities of estate tax planning.

The draft rule text in Appendix A also includes the Coalition's recommended accommodations for immediate in-laws and key employees' trusts.

* * *

The Coalition appreciates the opportunity to offer this comment supporting the Commission's consideration of a Family Office Exclusion. We look forward to working with the Commission through the remainder of this rulemaking process and we would be happy to answer any questions the Commission or its staff might have.

Sincerely,



Mark D. Young

On behalf of
The Private Investor Coalition, Inc.

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36 *See, e.g.*, CFTC Interpretative Letter No. 95-21, Comm. Fut. L. Rept. (CCH) ¶26,348 (Mar. 7, 1995) (granting "not-a-pool" relief to a partnership including a son-in-law).

37 17 C.F.R. § 275.202(a)(11)(G)-1(d)(4)(x).

38 *Id.*

39 *Id.*

40 Section 2036 of the Internal Revenue Code of 1986.

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, 6*l*, 6m, 6n, 6*o*, 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. A "family client," as used herein, also includes:

(i) any mother-in-law, father-in law, sister-in-law, brother-in-law, daughter-in-law or son-in-law of family clients and their lineal descendants as defined in Rule 202(a)(11)(G)-1(d)(4) under the Investment Advisers Act of 1940, without giving effect to this sentence; and

(ii) any trust funded exclusively by a key employee in which the key employee's immediate family members and lineal descendants are the sole current beneficiaries.

* * * * *

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. A "family client," as used herein, also includes:

(i) any mother-in-law, father-in law, sister-in-law, brother-in-law, daughter-in-law or son-in-law of family clients and their lineal descendants as defined in Rule 202(a)(11)(G)-1(d)(4) under the Investment Advisers Act of 1940, without giving effect to this sentence; and

(ii) any trust funded exclusively by a key employee in which the key employee's immediate family members and lineal descendants are the sole current beneficiaries.