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Via Electronic Submission: http://comments.cftc.gov

Mr. Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

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

Dear Mr. Kirkpatrick:

Willkie Farr & Gallagher LLP respectfully submits comments on the Commission's proposals regarding commodity pool operators (CPOs) and commodity trading advisors (CTAs) (the Proposal).[1] We believe our suggestions and comments comport with the spirit of Project KISS as well as the authority Congress vested in the Commission, among other things, "to exempt from registration those persons who would otherwise meet the criteria for registration . . . if, in the opinion of the Commission, there is no substantial public interest served by such registration."[2]

We have numerous clients located throughout the United States and abroad with a particular interest in the issues covered by the Proposal. Over the past forty years, Willkie has advised a broad range of U.S. and non-U.S. based CPOs and CTAs, U.S. and non-U.S. commodity pools, and others engaged in activities subject to the Commission's jurisdiction. Our clients also include numerous family investment entities with varying structures.

We are pleased to provide comments on the aspects of the Proposal regarding family offices and the codification of Advisory 18-96. We also provide some additional comments that we believe will enhance the final rules and market participants' compliance with them.

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1 83 Fed. Reg. 52902 (Oct. 18, 2018).

2 CFTC Staff Interpretation 00-98, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,411 (May 22, 2000) (citing H.R. No. 93-975, 93d Cong., 2d Sess. 79 (1974) at 29).

Family Offices

As noted above, the Commission may consider whether there exists a substantial public interest to be served when administering the various aspects of the Commodity Exchange Act (CEA). We note that Commission Staff has taken the view, in connection with granting relief to family offices, that no substantial public interest is served in regulating investment entities whose primary purpose is investing family assets.[3]

Confirm Validity of Prior Staff Letters

Some of our family office clients currently rely on Staff Letters 12-37 and 14-143, which the Commission proposes to codify. As required by those Letters, the family offices meet the conditions of the SEC's "family office" exclusion (SEC Rule 202(a)(11)(G)-1) and, thus, are excluded from the definition of "investment adviser" under the Investment Advisers Act of 1940. We also advise other family entities that do not rely on either the SEC family office exclusion or on Letters 12-37 and 14-143. These family entities generally rely on the line of interpretative letters published by the Commission's staff over many years. Moreover, unlike Letters 12-37 and 14-143, several of these letters concluded that the entities at issue were not commodity pools at all and that the parties that made investment decisions on behalf of these entities were not CTAs.[4]

Language in the preamble to the Proposal suggests that family offices may continue to seek and/or choose to rely upon bespoke relief rather than the family office exemption available under proposed Rule 4.13(a)(8).[5] We respectfully request that the Commission confirm in any adopting release related to the Proposal that interpretative and other Staff letters issued over the years, including those that concluded that certain family investment vehicles were not commodity pools (and that their advisors were not CTAs), may continue to be relied upon by market participants.

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3 *See, e.g., id.* (concurring in the view that the general partners of certain limited partnerships investing family assets would not be CPOs, and that the partnerships would not be commodity pools, on the grounds that "the operation of the Partnerships is not the kind of activity Congress and the Commission intended to regulate in adopting the CPO and pool definitions, respectively").

4 *See, e.g., id. See also* CFTC Staff Interpretation 00-100, [2000-2002 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 28,420 (Nov. 1, 2000); CFTC Staff Interpretation 97-78, [1996-1998 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 27,158 (Sept. 24, 1997).

5 *See* 83 Fed. Reg. at 52908, footnote 53; and 83 Fed. Reg. at 52909 (stating that family offices that are unable to meet the requirements of the proposed family office exemption may continue to seek bespoke relief from the Staff).

Align Proposed Rule 4.13(a)(8) with Proposed Rule 4.14(a)(11) and the SEC Family Office Rule

We note that the Commission does not propose a filing requirement for CTAs to rely on the CTA family office exemption. We note further that reliance on the SEC's family office rule is also self-executing. We respectfully request that the Commission also consider *not* requiring family offices to make a notice filing with either the Commission or the NFA in order to rely on the CPO family office exemption. We have not identified a public policy purpose in requiring such filings. Similarly, we see no reason for family offices to list their investment vehicles.

Should the Commission nonetheless determine that a compelling reason exists for family offices to make notice filings, we respectfully suggest that such a filing identify only the name of the family office and not the various investment vehicles created from time to time by the family office. Moreover, in response to the Commission's Question 8, for privacy and, more importantly, for *confidentiality and personal security* reasons, the names of family offices should not be posted on the NFA website or otherwise made available to the public. Finally, in response to the Commission's Question 7, we see no reason for annual recertification of family office status.

Proposed Rule 4.13(a)(8)(ii) correction

The reference to "pool" in proposed rule 4.13(a)(8)(ii) should be replaced with "commodity pool operator," as the CPO, not the pool, would meet the definition of "family office" under 17 CFR § 275.202(a)(11)(G)-1.

Proposed Amendments to Rule 4.13

Proposed Rule 4.13(a)(4) would codify the relief provided by the Staff in Advisory 18-96.[6] Our substantive comment on this proposal relates to a divergence of views that appears to have arisen in the past few years with respect to the treatment of certain non-U.S. commodity pools. As we understand the Commission's longstanding practice, a non-U.S. domiciled CPO that relies on the exemption from CPO registration provided under Rule 3.10(c)(3)(i) with respect to its qualifying offshore pools is not required to file a notice of exemption with respect to such offshore pools (which, for the avoidance of doubt, are not offered to U.S. persons), even in cases where it registers or files a notice of exemption with respect to one or more other pools for which it acts as CPO and that are offered to U.S. persons, based on principles of deference to home country regulators and preservation of Commission resources. We acknowledge that, more recently, a

[6] We note as an initial matter that 18-96 has always been available on a pool by pool basis. Indeed, identifying the name of the relevant pool remains a condition to perfect an 18-96 exemption today.

conflicting view on this matter seems to have emerged, to the effect that, once a non-U.S. CPO comes within the Commission's regulatory purview by either registering or filing a claim of exemption with respect to a pool that is offered to U.S. persons, such non-U.S. CPO must register or file a claim of exemption with respect to *all* of the pools for which it acts as CPO, even those with no discernible nexus to the Unites States.[7] Language in the Proposal would potentially further lead to ambiguity on this issue. Accordingly, we respectfully request that the Commission clarify, as described below, its position with respect to the non-U.S. pools (offered only to non-U.S. persons) operated by a non-U.S. CPO that historically has relied on Rule 3.10(c)(3)(i).

Advisory 18-96 manifests the position articulated over the years by the Commission of focusing the Commission's regulatory program on protecting U.S. customers and leaving the protection of non-U.S. customers to their respective home country regulators. For example, in 2007, in codifying past Commission and Staff relief for FCMs in the form of new Rule 3.10(c), the Commission reiterated its policy of not seeking to regulate the activities of non-U.S. intermediaries trading on behalf of their non-U.S. customers.[8] To be sure, when non-U.S. intermediaries access U.S. markets, the Commission properly has an interest in their activity. That interest is grounded in the Commission's responsibility to oversee the futures and swaps trading markets in the United States. When such activity is limited to acting on behalf of non-U.S. customers, Rule 3.10(c) provides that these intermediaries are not required to register with the Commission, provided that their U.S. market activity is cleared through a registered FCM.[9]

When originally proposed, Rule 3.10(c) was intended to provide an exemption from registration only for FCMs.[10] We believe it is relevant that the proposal had only a 30 day comment period.[11] In its May 2, 2007 comment letter to the Commission, NFA stated that it frequently received inquiries from non-U.S. entities other than FCMs about their registration obligations.[12] NFA recommended, therefore, that the Commission include, among others, CPOs in the

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7 *See* 83 Fed. Reg. at 52921 (expressing the view that, under Rule 3.10(c)(3)(i), "an offshore CPO that wished to operate pools offered to U.S. persons would be required to choose between the potentially more costly options of having such pools operated by an affiliate registered with the Commission or otherwise eligible for other relief, operating all pools (regardless of location) consistent with another registration exemption, or registering as a CPO and listing all operated pools with the Commission").

8 *See* 72 Fed. Reg. 15637 (April 2, 2007).

9 *See also* CFTC Staff Letter 16-08, [2015-2016 Transfer Binder] Comm. Fut. L. Rep ¶ 33,639 (Feb. 12, 2016), which provides a no-action position with respect to swaps not subject to a clearing requirement.

10 72 Fed. Reg. 15637 (April 2, 2007).

11 The adopting release states that NFA and FIA were the only parties to submit comments. *See* 72 Fed. Reg. 63976 (Nov. 14, 2007).

12 Letter to Eileen A. Donovan, Acting Secretary, CFTC, from Thomas W. Sexton, Vice President and General Counsel, National Futures Association, dated May 2, 2007 (available at https://www.nfa.futures.org/news/newsComment.asp?ArticleID=1823).

category of intermediaries eligible for exemption from registration under Rule 3.10(c). In response to NFA's comment – and without publishing the rule for additional comment – the Commission elected to include CPOs (and others) in the final rule.[13]

Rule 3.10(c)(3)(i) demonstrates deference to the home country regulator with respect to the activities of non-U.S. CPOs and CTAs that have no nexus to the United States other than that they are engaging (on behalf of their non-U.S. customers) in futures, options and swap transactions on U.S. contract markets and SEFs or with U.S. counterparties. Notably, when Rule 3.10(c) was amended, the Commission stated that it was not intending "to *extend* the scope of its regulations with respect to foreign brokers or other foreign intermediaries."[14] Our understanding of the Commission's position as represented by that rulemaking is that a non-U.S. CPO that relies on Rule 3.10(c)(3)(i) with respect to its non-U.S. pools would *not* have to make a filing for each of such non-U.S. pools in the event it offered one or more other pools to U.S. persons.

While we do not believe the Commission has addressed specifically whether a non-U.S. domiciled CPO may rely upon Rule 3.10(c)(3)(i) for its completely offshore commodity pools, while concurrently relying on other exemptions or in a registered capacity for pools offered to U.S. persons, we have not identified a public policy reason for not permitting such reliance. We note, importantly, that a U.S. domiciled CPO is permitted by Rule 4.13(e)(2) to operate qualifying pools pursuant to the exemption provided in Rule 4.13(a)(3) – in other words, as if it were not registered – while simultaneously operating Rule 4.7 or full Part 4 pools. Similarly, a CTA is permitted to advise accounts both as a registered CTA (whether under Rule 4.7 or full Part 4) and as an exempt CTA by virtue of Rule 4.14(c). Thus, Rules 4.13(e) and 4.14(c) make clear that CPOs and CTAs are permitted to act concurrently in both registered and unregistered capacities. Also of significance to this analysis, Rule 4.14(a)(10) permits a non-U.S. CTA to count *only* its U.S. resident clients for purposes of determining its eligibility to rely on the CTA registration exemption in CEA Section 4m(1).

A CPO that brings itself within the scope of the CEA by offering a pool to a U.S. person could have many other non-U.S. investment vehicles offered only to non-U.S. persons. The rules to which those other pools are subject may or may not align neatly with Commission rules notwithstanding that they may offer similar investor protections.[15] While we appreciate that the

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[13] 72 Fed. Reg. at 63976-63977.

[14] Id. at 63977 (emphasis added).

[15] We note that after promulgating (the original) Rule 4.13(a)(4) in 2003, the Staff informally solicited industry input to determine whether to rescind Advisory 18-96. In the end, Advisory 18-96 was not rescinded, but had it been, and had practitioners been subject to the view that a non-U.S. CPO was obligated to file *something* for every one of its pools, even those not offered to U.S. persons, once it offered one pool to a U.S person, such CPOs likely would have had a significant problem. Many offshore pools simply would not have fit into the available exemptions from CPO registration in the Commission's rules. For example, Rule 4.13(a)(3) would not be available unless a pool's trading of commodity interests was *de minimis*. And if the non-U.S. domiciled CPO were registered, it might have had difficulty complying with the reporting requirements of Rule 4.7 or Rule 4.22 with respect to its completely offshore vehicles. The reporting rules in many other jurisdictions differ

Commission is proposing to codify Advisory 18-96, which we believe will bring greater legal certainty to many market participants, we respectfully submit that the codification of Advisory 18-96 should not inadvertently result in non-U.S. domiciled CPOs being precluded from relying on an exemption with respect to their non-U.S. pools that they have been relying upon to this point and around which they have structured their businesses.

Based on what we believe is a plausible reading of the Proposal, a non-U.S. domiciled CPO could be required as a result of the codification of Advisory 18-96 to forego reliance on Rule 3.10(c)(3)(i) with respect to its qualifying non-U.S. pools. In particular, we note that the language of proposed Rule 4.13(b)(2)(i)(A) could be interpreted to require a CPO that registers with the CFTC or which files a notice of exemption under Rule 4.13 with respect to one or more pools operated in the U.S. and/or offered to U.S. persons, within 30 days of such event, to file a notice of exemption under Rule 4.13(a)(4) with respect to *all* non-U.S. pools operated by such CPO, including pools that *are not available* to U.S. persons. The implication of such a reading is that a non-U.S. CPO that is required to register or file a notice of exemption with respect to any of its pools would no longer be permitted to rely on Rule 3.10(c)(3)(i) with respect to its non-U.S. pools that are not offered or sold to U.S. persons, notwithstanding that such pools continue to have no discernible nexus to the United States. The Proposal does not, however, expressly state that this is the case.[16] In the absence of clarity on this point, market participants could face legal uncertainty.

For the reasons articulated above, we respectfully request that the Commission clarify that a non-U.S. domiciled CPO may continue to conduct the operations of its completely non-U.S. vehicles in the manner prescribed by the relevant home country regulator in reliance on Rule 3.10(c)(3)(i) without having instead to rely with respect to such non-U.S. vehicles on the exemption provided under proposed Rule 4.13(a)(4), even in cases where such non-U.S. domiciled CPO has registered or filed a notice of exemption with respect to one or more other pools that are offered to U.S. persons. In other words, consistent with our understanding (and we believe, the understanding of other long-time practitioners), the non-U.S. activities of the non-U.S. domiciled CPO should continue to remain out of scope and not trigger any filing obligation.

Further Clarifications

We also recommend that the Commission confirm or otherwise clarify the following additional points relating to the Proposal:

1. A registered CPO that currently relies on Advisory 18-96 with respect to a non-U.S. pool would not be required to provide a right of redemption to the pool's participants if,

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from those in the U.S. Thus, a CPO would have been faced with the choice of either not making its offering in the U.S. or disrupting how it operates its completely non-U.S. pools.

[16] We note that question 4 of the Proposal refers to a CPO "transitioning from reliance upon § 3.10(c)(3)(i) to the 18-96 exemption." However, the intent of this statement is not immediately apparent.

assuming the adoption of proposed Rule 4.13(a)(4), it relied instead on that exemption or any other exemption available under Rule 4.13.[17]

2. Consistent with Staff Letter 97-48, a pool operated pursuant to an exemption under proposed Rule 4.13(a)(4) should not lose such exemption if the pool's U.S.-based CPO or CTA, as well as the principals or affiliates of either, invested in the pool.

3. The timing of the filing for a Rule 4.13(a)(4) pool should be consistent with other Rule 4.13 filings, *i.e.*, no later than when a subscription agreement is delivered to a prospective participant. If the Commission adopts a consistent approach in this regard, proposed Rule 4.13(b)(2)(A) would not be necessary.

4. Consistent with similar provisions in Rule 4.7, the performance of a commodity pool operated pursuant to any of the exemptions in Rule 4.13 does not have to be included in the disclosure document of the CPO's full Part 4 pools.

5. The numbering in Rule 4.13(b)(2) may need to be revised.

Proposed Rule 4.13(a)(3)(iii)(E)

If adopted in its current form, the Proposal would add a specific reference to non-U.S. persons as permitted investors in a Rule 4.13(a)(3) pool. We note that DSIO published an FAQ in August 2012 which included the following question and answer:

> Q: Regulation 4.13(a)(3) includes a reference to former Regulation 4.13(a)(4), which permits U.S.-based operators of non-U.S. commodity pools that sold interests in such pools solely to non-U.S. persons to claim exemption. Given the rescission of Regulation 4.13(a)(4), does Regulation 4.13(a)(3) continue to include all QEPs and particularly non-U.S. persons as eligible investors?
>
> A: Regulation 4.13(a)(3) continues to include all QEPs, particularly non-U.S. persons, as eligible investors. Commission staff intends to amend Regulation 4.13(a)(3) to make this inclusion explicit in the rule as a typographical correction that would not change the substance of the rule.

[17] *See* 83 Fed. Reg. at 52914.

Rather than specifically mentioning non-U.S. persons as contemplated by the Proposal, the Commission could simply implement the above statement and provide that any QEP is permitted to invest in a pool operated pursuant to Rule 4.13(a)(3). Should the Commission elect to follow this approach, we note that current Rule 4.13(a)(3)(iii)(D) could be deleted and Rule 4.13(a)(3)(iii)(C) could be revised simply to refer to:

> A "qualified eligible person" as that term is defined in § 4.7 of this chapter.

Rule 4.23

We note that CFTC Letter 14-114 expanded the permitted categories of third party record-keepers.[18] We recommend that any final amendments to Rule 4.23(a) take that letter into account.

PQR, PR Reporting Person

We respectfully request that the Commission clarify that the CPO of exempt pools and the CTA of exempt accounts would still not be required to report with respect to the exempt pools or accounts in the event the CPO operates non-exempt pools or the CTA advises non-exempt accounts. In other words, the CPO and CTA would continue to be excluded from the definition of "reporting person" by Rule 4.27(b)(2) with respect to exempt pools and accounts. We believe this approach would be consistent with Rules 4.13(e) and 4.14(c).

Compliance with the Statutory Disqualification Criterion

In response to the aspects of Commission's Question 3 regarding the implementation of the statutory disqualification provision in proposed Rule 4.13(a)(6), we recommend providing sufficient time for CPOs to absorb the rule change. We also recommend that the effectiveness of this provision coincide with the annual update filings due in the first quarter of each year. Finally, we recommend that the Commission generally clarify the process around proposed Rule 4.13(a)(6).

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[18] CFTC Staff Letter 14-114, [2014-2015 Transfer Binder] Comm. Fut. L. Rep ¶ 33,249 (September 8, 2014)

We are available to discuss our comments and recommendations with the Commissioners or their respective staffs at any time. Please feel free to call the undersigned at 212-728-8727 or Deborah Tuchman of this office at 212-728-8491.

Respectfully submitted,

Rita M. Molesworth

cc: The Hon. J. Christopher Giancarlo, CFTC Chairman
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