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*Practice Group:*  
*Investment*  
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## CFTC Provides Relief from CPO Registration to Certain Family Offices

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### Introduction

The Division of Swap Dealer and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (“CFTC” or “Commission”) recently issued CFTC Letter No. 12-37 (November 29, 2012), which granted no-action relief from registration as a commodity pool operator (“CPO”) to certain family offices. Generally, these family offices had relied on the exemption from CPO registration in CFTC Regulation 4.13(a)(4) for their private pooled investment vehicles that trade commodity interests. This exemption required that the operators of such private funds offer interests in such funds only to highly sophisticated investors, but otherwise placed no limits upon the amount of commodity interest trading by such funds. However, the CFTC rescinded Regulation 4.13(a)(4), effective December 31, 2012,<sup>1</sup> resulting in the need for many family offices either to register as a CPO for their private funds or to find another exemption from registration.<sup>2</sup> The relief made newly available by the no-action letter will allow many family offices to continue their operations without expending significant time and cost to register as CPOs or potentially to restructure their private funds to rely upon another exemption. However, this relief is subject to certain conditions, and not all family offices will qualify without restructuring their operations.

### Relief from CPO Registration

Generally, the term “family offices” refers to entities formed by high net worth families to provide a range of services to family members, including wealth and investment management, accounting, tax, estate planning, charitable giving and other services. A family office typically is wholly-owned and exclusively controlled (directly or indirectly) by one or more members of a family and/or entities controlled by a family. As noted in the CFTC letter, the close relationships between the clients and the adviser “greatly reduce the need for the customer protections available pursuant to Part 4 of the Commission’s Regulations,” in part because “any disputes . . . could be resolved within that family unit, or through state courts under laws designed to resolve such family disputes.” The Division also noted that the Securities and Exchange Commission (the “SEC”) “has devoted substantial time and resources to addressing this issue,” resulting in the SEC’s adoption of an exclusion from the definition of “investment adviser” for family offices that would otherwise be required to register as an adviser.<sup>3</sup>

### The Conditions

The Division stated that it will not recommend enforcement action for failure to register with the CFTC as a CPO<sup>4</sup> against any CPO that is a “family office” as defined

<sup>1</sup> See *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012); correction notice published at 77 Fed. Reg. 17328 (March 26, 2012).

<sup>2</sup> CFTC Regulation 4.13(a)(3) provides the most likely alternative exemption for private funds, but it requires that the funds trade commodity interests only to a *de minimis* extent, among other conditions.

<sup>3</sup> See our previous alert, *The Family Office Exclusion from the Definition of Investment Adviser: The SEC Adopts a Final Rule*, available [here](#).

<sup>4</sup> It is important to note that the letter represents the view of the Division only, and does not necessarily represent the position or view of the CFTC or of any other office or division of the CFTC. We understand, however, that the letter was not issued by the Division until each of the CFTC Commissioners had an opportunity to review it.

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by the SEC, provided that such CPO (i) submits a claim of no-action relief, and (ii) remains in compliance with SEC Rule 202(a)(11)(G)-1 (the “SEC Rule”) under the Investment Advisers Act of 1940, as amended (the “Advisers Act”), regardless of whether the CPO seeks to be excluded from the Advisers Act.

### Claiming No-Action Relief

As referred to above, the relief is not self-executing. Rather, an eligible CPO must file a claim to perfect the relief. A claim submitted by a CPO will be effective upon filing, so long as the claim is materially complete. Specifically, the claim of no-action relief must:

- a. State the name, main business address, and main business telephone number of the CPO claiming the relief;
- b. State the capacity (*i.e.*, CPO) and, where applicable, the name of the pool(s),<sup>5</sup> for which the claim is being filed;
- c. Be electronically signed by the CPO;<sup>6</sup> and
- d. Be filed with the Division via email to [dsionaction@cftc.gov](mailto:dsionaction@cftc.gov), stating “Family Office” in the subject line of such email.

This claim of no-action relief must be filed (i) prior to December 31, 2012 for a family office in operation as of December 1, 2012, or (ii) within 30 days of operation for a family office that begins to operate after December 1, 2012. In addition, prior to March 31, 2013 (or, for a family office that begins to operate after that date, within 30 days after it begins to operate as a family office), each family office must confirm that it is a “family office” within the “meaning and intent” of the SEC Rule and that it will notify the Division if it is no longer a “family office” within the “meaning and intent” of the SEC Rule. Notably, this no-action relief does not provide relief from compliance with any other applicable requirements of the Commodity Exchange Act, as amended (the “CEA”), or the Commission’s regulations issued thereunder, including without limitation, all antifraud provisions of the Act.

Family offices claiming the relief should maintain records of their filings to support their claims for exemption from registration and to respond to inquiries from futures commission merchants and other members of the National Futures Association (“NFA”) regarding compliance with NFA Bylaw 1101, which requires NFA members to handle orders only from persons registered under the CEA.

### Limitations of this Relief

Although this relief from CPO registration is a welcome development, not all family offices as currently constituted would qualify. The SEC Rule finalized a definition of “family office” a little more than a year ago. Many family offices have operated for decades prior to the adoption of this definition. Before the SEC’s adoption of the SEC Rule, some family offices applied for and received exemptive relief from the SEC, declaring that their operations did not implicate the policy purposes of the Advisers Act and therefore were not required to register as investment advisers. The SEC did not rescind existing family office exemptive orders, which may be broader than the SEC Rule in some respects and narrower in others. Accordingly, certain existing family offices are in compliance with their respective exemptive orders in lieu of the SEC Rule. These family offices are not eligible for the no-action relief set forth in the CFTC letter, and they would need to seek their own separate relief.

<sup>5</sup> It is unclear whether a new filing must be made after the creation of a new private fund for which the family office would like to claim this no-action relief.

<sup>6</sup> This may be accomplished by attaching a signed PDF statement from the CPO.

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In addition, under the CFTC no-action relief, only an eligible CPO that is a family office can claim relief. The family office itself often does not serve as CPO for all of its private funds. For example, the family office may form a new wholly-owned subsidiary to serve as general partner or managing member (*i.e.*, the CPO) of a new limited partnership or limited liability company, respectively. In addition, depending upon the terms of the partnership agreement, the general partners of a general partnership (rather than the family office) may be deemed to be the CPOs of the partnership under existing guidance from the Commission. Similarly, directors of certain entities organized under foreign jurisdictions typically are deemed to be the CPOs of such entities under existing guidance from the Commission. Before relying upon this no-action relief, each family office must analyze and determine who serves as the CPO(s) of each of its private funds. If the family office itself is not serving as a CPO of a private fund, it may be possible to delegate CPO responsibilities for such fund back to the family office. For example, a wholly-owned subsidiary that acts as general partner of a limited partnership could delegate its CPO responsibilities back to the family office, or the general partners of a general partnership or the individual directors of a foreign entity could delegate their CPO responsibilities to the family office. Notably, the CFTC has required, as a condition of delegating the rights and obligations of a CPO from one person (*i.e.*, the delegator) to another person (*i.e.*, the delegee), that the delegator agree to be jointly and severally liable for any violations of the CEA by the delegee.<sup>7</sup> In circumstances whereby individual family members delegate their CPO responsibilities (*e.g.*, where individual family members serve as directors or general partners), they will likely object to such joint and several liability, and restructuring the relationships may be the preferable alternative.

Finally, it is worth noting that no-action relief is provided only with respect to CPO registration, not commodity trading advisor (“CTA”) registration. CTA registration may be required if the family office engages in the business of providing advice to family members about commodity interests or about investing in funds that trade commodity interests, even if it is primarily engaged in providing securities advice. If a family office provides all of its advice regarding commodity interests to pooled vehicles for which it can claim an exemption from CPO registration,<sup>8</sup> that family office can generally rely upon an available exemption from CTA registration. However, if the family office provides advice regarding commodity interests to other accounts or to private funds for which it does not act as CPO or does not rely upon an “exemption” from registration, it will need to evaluate whether it qualifies for another exemption from CTA registration.

### Conclusion

Family offices that comply with the SEC Rule may enjoy relief from registration as a CPO, assuming that certain conditions are met and the required claim of no-action relief is timely filed. However, reliance upon this relief will require an analysis of current operations, including a determination of who is acting as a CPO for each private fund that trades commodity interests. Certain restructuring of relationships may be advisable. In addition, each family office should consider whether it is subject to a separate obligation to register as a CTA.

<sup>7</sup> See the answer to question 2 under the heading “Who is the Commodity Pool Operator?” in the *Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations*.

<sup>8</sup> It remains unclear whether the Division would deem the current no-action relief to be an “exemption” from registration for this purpose. If the Division does not do so, a family office may be required to register as a CTA for those same private funds for which the Division granted no-action relief from CPO registration, unless a different exemption from CTA registration is available.

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