Family Offices Exempt From Registration as Commodity Trading Advisors

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Family offices have existed for over a century and have been formed to implement very important, complex objectives, including investment management, corporate succession, estate, gift, and income tax planning, and charitable giving. All these issues impact the day-to-day management of the now-recognized family office industry. Since the enactment of the Dodd-Frank Act,[1] a family office that is an "investment adviser" — a person who, for compensation, is engaged in the business of giving investment advice to others — has been able to rely on Rule 202(a)(11)(G)-1 (Family Office Rule) under the Investment Advisers Act of 1940 (Advisers Act)[2] for exemption from all of the provisions of the Advisers Act. The Family Office Rule provides that a "family office" must be a company that:[3]

> (1) has no clients other than family clients;
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> (2) is wholly owned by family clients and exclusively controlled (directly or indirectly) by one or more family members and/or family entities; and
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> (3) does not hold itself out to public as an investment adviser.

Another area of compliance has been registration for trading in commodities. A family office might also be a commodities pool operator (CPO) or a commodities trading advisor (CTA) and thus be required to register as such with the Commodity Futures Trading Commission (CFTC). Two years after the enactment of the Dodd-Frank Act, in October 2012, the CFTC's Division of Swap Dealer and Intermediary Oversight (the Division) issued CFTC Letter No. 12-27, taking the position that a family office relying on the Family Office Rule would not have to register as a CPO.[4] For the past few years, an open issue was the applicablility of an exemption from registration for a CTA. The open issue was resolved favorably on November 25, 2014. In a press release, the CFTC announced that the Division had taken the same position with respect to registering as a CTA.[5] As a result, a qualifying family office will be exempt from regulation as an investment adviser by the Securities and Exchange Commission and any relevant states, and as a CPO and/or CTA.

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[1] Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act").
[2] 17 C.F.R. § 275.202(a)(11)(G)-1(c) (2014) . To be precise, a family office "shall not be considered to be an investment adviser for purposes of the [Advisers] Act." *Id.* § 275.202(a)(11)(G)-1(a). One immediate consequence of the manner in which a family office is excluded from the definition of "investment adviser" is that Section 203A(b)(1)(B) of the Advisers Act will apply to prevent a family office from being subject to state laws requiring registration, licensing, or qualification as an investment adviser.

[3] *Id.* § 275.202(a)(11)(G)-1(b).
[4] http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/12-27.pdf.
[5] http://www.cftc.gov/PressRoom/PressReleases/pr7068-14.

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