

The Failure of Archegos Capital Management and the Modern Family Office Industry

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Abstract

In March of 2021, one of the most dramatic collapses of a financial firm in history quietly took place. The firm, Archegos Capital Management, was structured as a family office. A family office is a little-known type of investment manager that has traditionally been used to manage only the assets of wealthy families. Principally because they were never intended to manage the money of outside investors, family offices have historically avoided regulation under the Investment Advisers Act of 1940, which is the primary source of regulation for the investment management industry. The Dodd-Frank Wall Street Reform and Consumer Protection Act solidified their exemption from the Advisers Act regulatory regime with the adoption of the Family Office Rule, a rule which specifically removes family offices from the definition of “investment adviser” and thus the provisions of the Advisers Act. Combined with new registration and reporting requirements for private fund advisers created by Dodd-Frank, the Family Office Rule initiated a change in the composition of the family office industry. Former hedge fund investors began to convert their hedge funds into family offices to avoid the more stringent registration and reporting requirements imposed by Dodd-Frank. Hedge fund investors embrace riskier strategies than traditional family offices. Perhaps no one typified this pattern more than Bill Hwang, the founder of Archegos. Hwang employed strategies at Archegos that he used at his former hedge fund. These involved taking highly leveraged and concentrated positions in a handful of stocks. He worked with multiple of the world’s largest investment banks to obtain the leverage necessary to take positions that amounted to five times his firm’s capital. After a series of events drove down the value of his portfolio, Hwang was unable to pay his creditors what they were owed and Archegos failed. The banks that worked with Archegos

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collectively suffered billions of dollars in losses. The pattern is reminiscent of the 2008 mortgage crisis where significantly leveraged investments by private funds contributed to bank losses, which in turn led to a recession. Regulators and lawmakers have taken notice and some are calling for reform. Reform advocates call for greater transparency from family offices and seek to bring them within the existing regulatory framework for investment advisers. Reform opponents contend that the family office industry does not threaten the stability of the financial system and that the original justifications for the family office exemption are extant in spite of the changing composition of family office investors.

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I. Introduction

Few people probably know what it feels like to lose \$20 billion dollars. Even fewer probably know what it feels like to do it in two days. Bill Hwang is perhaps the only one. In late March of 2021, the former hedge fund investor with an impressive financial

industry pedigree² saw his family office, Archegos Capital Management (Archegos), suffer one of the most dramatic and sudden failures of a financial firm in history. The investment firm imploded after a series of events drove down the value of its portfolio, forcing Hwang to liquidate its holdings in a futile attempt to meet margin calls from his lenders.³ In forty-eight hours, his \$20 billion portfolio, which Hwang had managed since he had seeded Archegos with \$200 million of his own money, was wiped out.⁴

This was not the first time Hwang's trading activity landed him in dire straits, albeit for different reasons. In 2012, he shuttered his hedge fund Tiger Asia Management after pleading guilty to using insider information to short Chinese bank stocks.⁵ Adding to the duplicity of his fraud, Hwang was found to have manipulated the prices of those securities to enhance the value of his hedge fund's

² Juliet Chung & Andrew Jeong, *Who Is Archegos Fund Manager Bill Hwang?*, WALL ST. J. (Mar. 29, 2021), <https://www.wsj.com/articles/who-is-archegos-fund-manager-bill-hwang-11617037264> (“Mr. Hwang is a former protégé of hedge-fund titan Julian Robertson, who founded Tiger Management in 1980 and turned an initial \$8.8 million investment from family and friends into nearly \$22 billion.”).

³ Scott Wapner, *ViacomCBS, Discovery Plunge Due in Part to Forced Liquidation of Archegos Capital Positions*, CNBC (Mar. 27, 2021), <https://www.cnbc.com/2021/03/27/archegos-capital-forced-position-liquidation-contributes-to-viacom-discovery-plunge.html> [<https://perma.cc/F9SQ-D8TT>] (“Media stocks ViacomCBS and Discovery, which have seen massive gains this year, came under unusually heavy selling pressure late this week and were said to be at least two of the stocks in question, along with the Chinese internet names Baidu, Tencent, Vipshop and several others.”).

⁴ Erik Schatzker, *Bill Hwang Had \$20 Billion, Then Lost It All in Two Days*, BLOOMBERG (Apr. 8, 2021), <https://www.bloomberg.com/news/features/2021-04-08/how-bill-hwang-of-archegos-capital-lost-20-billion-in-two-days> [<https://perma.cc/PS3U-3L9S>] (“[Hwang] parlayed . . . \$200 million left over from his shuttered hedge fund into a mind-boggling fortune by betting on stocks. . . . And then, in two short days, it was gone.”).

⁵ Alex Kirshner, *The Dumbest Financial Story of 2021*, SLATE (Mar. 30, 2021, 4:27 PM), <https://slate.com/business/2021/03/archegos-capital-management-dumbest-financial-story-2021.html> [<https://perma.cc/E6LY-JTLP>] (“The SEC said Hwang and his business had short-sold three Chinese bank stocks based on inside information . . .”).

short positions.⁶ For these offenses, the Securities Exchange Commission (SEC) imposed a \$44 million fine.⁷

The Tiger Asia Management scandal justifiably earned Hwang a dubious reputation.⁸ No one should have thought twice if the SEC permanently banned him for life from all trading activities. Regulators in Hong Kong banned him from trading for four years,⁹ but the SEC opted for a more lenient five-year minimum ban only on managing client funds.¹⁰ Shockingly, less than a year after receiving his punishment, Hwang was able to establish Archegos, through which he invested his own money.¹¹ What is more surprising is that many of the world's largest banks were lining up to do business with Hwang's new venture.¹² Credit Suisse and Nomura, in particular, were eager to offer Archegos their prime brokerage services—an investment bank's suite of services aimed at lending money and

⁶ *Id.* (“The SEC also said Hwang ‘attempted to manipulate the prices of publicly traded Chinese bank stocks in which Hwang’s hedge funds had substantial short positions by placing losing trades in an attempt to lower the price of the stocks and increase the value of the short positions.’”).

⁷ *Id.* (“That year, Hwang pleaded guilty to insider trading and agreed to a \$44 million securities and Exchange Commission fine.”)

⁸ See Tabby Kinder & Leo Lewis, *How Bill Hwang Got Back Into Banks’ Good Books – Then Blew Them Up*, FIN. TIMES (Mar. 29, 2021), <https://www.ft.com/content/b7e0f57b-3751-42b8-8a17-eb7749f4dbc8> (“Concerns about his reputation and history were offset by a sense of the huge opportunities from dealing with him, according to two of Archegos’ prime brokers.”).

⁹ Don Weinland, *Tiger Asia and Executives Punished for Market Misconduct*, S. CHINA MORNING POST (Oct. 10, 2014, 6:10 AM), <https://www.scmp.com/business/banking-finance/article/1613279/tiger-asia-and-executives-punished-market-misconduct> [<https://perma.cc/TXC5-A2KL>] (“The Market Misconduct Tribunal . . . banned the company and Hwang from securities trading in the city for four years.”).

¹⁰ Kate Kelly et al., *He Built a \$10 Billion Investment Firm. It Fell Apart in Days*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/2021/04/03/business/bill-hwang-archegos.html> (“Mr. Hwang was barred from managing public money for at least five years.”).

¹¹ Kinder & Lewis, *supra* note 7 (“12 months after he was forced to return money to investors, Hwang was back in the game. He set up a secretive new family office called Archegos Capital Management.”).

¹² *Id.* (“[M]any of the world’s top investment banks were fiercely competing for its business.”).

securities to private funds so they can leverage their positions.¹³ Goldman Sachs was one of the last major banks to shed its reservations about Hwang, but it too removed Hwang from its blacklist in 2020 when the potential fees associated with acting as Archegos' prime broker became too enticing to pass up.¹⁴ In addition to Credit Suisse and Nomura, Goldman Sachs joined Morgan Stanley, UBS, Wells Fargo and Mitsubishi on the list of banks with exposure to Archegos.¹⁵

Hwang used these banks' prime brokerage offerings to invest in a highly concentrated portfolio of stocks using total return swaps — a complex derivative that allowed Archegos to invest in those stocks without having to put up the cash to buy actual shares—to dramatically increase his leverage.¹⁶ When these investments faltered, Hwang was unable to pay the banks what they were owed under the swap agreements and the banks faced billions of dollars of losses.¹⁷

¹³ Hayley McDowell, *The Collapse of Archegos Capital Management*, THE TRADE (July 16, 2021, 10:22 AM), <https://www.thetradenews.com/the-collapse-of-archegos-capital-management/> [https://perma.cc/2BPL-6JLU] (“To make big trades, hedge funds typically borrow money from prime brokers, allowing them to leverage the cash they hold and increase their positions – potentially earning far greater returns if their bets come good but also, on occasion, losing more money than they hold in client funds.”).

¹⁴ Kinder & Lewis, *supra* note 7 (“Goldman Sachs took the longest to remove him from its blacklist.”).

¹⁵ Christian Hetzner, *Here's How Much the Big Banks Have Lost So Far From the Archegos Collapse*, FORTUNE (Apr. 27, 2021), <https://fortune.com/2021/04/27/heres-how-much-big-banks-have-lost-so-far-from-the-archegos-collapse/> [https://perma.cc/TF7L-Y4RR] (listing the major banks with exposure to Archegos).

¹⁶ Quentin Webb et al., *What Is a Total Return Swap and How Did Archegos Capital Use It?*, WALL ST. J. (Mar. 30, 2021), <https://www.wsj.com/articles/what-is-a-total-return-swap-and-how-did-archegos-capital-use-it-11617125839> (“Total return swaps are contracts brokered by Wall Street banks that allow a user to take on the profits and losses of a portfolio of stocks or other assets in exchange for a fee. Swaps allow investors to take huge positions while posting limited funds up front, in essence borrowing from the bank.”).

¹⁷ Rupert Neate & Kayleena Makortoff, *Regulators Around the World Monitor Collapse of US Hedge Fund*, THE GUARDIAN, (Mar. 29, 2021, 4:09 PM), <https://www.theguardian.com/business/2021/mar/29/credit-suisse-nomura-ar>

The fall of Archegos should ring a familiar bell to financial regulators. Although on a smaller scale, Archegos' risky and leveraged bets and its failure to meet margin calls mirror the bets made on mortgage-backed securities that precipitated the 2008 financial crisis.¹⁸ In particular, two Bear Stearns-backed hedge funds that had invested heavily in mortgage-backed securities collapsed in July 2007, sparking Bear Stearns' failure itself, which initiated the entire financial crisis.¹⁹

Part of the regulatory reform that followed the 2008 financial crisis was a crackdown on investment advisers to private funds, requiring many advisers to register with the SEC that were not required to before.²⁰ The aim of this reform was to assess the systemic risk posed by private funds.²¹ This was accomplished by requiring a whole new class of investment advisers to file with the SEC certain information, including trading history and use of leverage,²² so that the Financial Stability Oversight Council (FSOC)

chegos-sell-off-hedge-fund [<https://perma.cc/LTE3-QJ3Y>] (“The investment banks Nomura and Credit Suisse on Monday warned investors that they are facing huge losses from their exposure to Archegos.”).

¹⁸ David Brown, *Archegos Chaos Raises the Spectre of the 2008 Financial Crisis*, S. CHINA MORNING POST (Apr. 5, 2021, 10:00 AM), <https://www.scmp.com/comment/opinion/article/3128329/archegos-chaos-raises-spectre-2008-financial-crisis> (“Archegos’ difficulties seem less resonant with the 1998 of the Long-Term Capital Management hedge fund than the wider contagion risks posed by the financial crash of 2008.”).

¹⁹ Luther R. Ashworth, *Is Hedge Fund Adviser Registration Necessary to Accomplish the Goals of the Dodd–Frank Act’s Title 7*, 70 WASH. & LEE L. REV. 652, 682 (2013) (“At that point, two Bear Stearns hedge funds ‘that had invested heavily in CDOs failed.’ . . . Bear Stearns’s failure, sparked by the collapse of two of its hedge funds, was the beginning of an economic contagion that infected the United States.”).

²⁰ *Id.* at 654 (“The PFIARA directly regulates the hedge fund industry by requiring certain hedge fund advisers to register with the Securities and Exchange Commission . . . under the Advisers Act of 1940 . . .”).

²¹ *Id.* at 684 (“The PFIARA has two goals: (i) to provide better protection to private fund investors from private fund advisers; and (ii) to assess systemic risk posed by private funds.”).

²² Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 1001 (2020) (“Registration [as an investment adviser] would require public disclosure about family operations, office staffing, the amount of assets under management, and the office’s trading history.”).

could assess systemic risk.²³ However, a certain type of money manager has almost always avoided registration with the SEC as an investment adviser: the family office.²⁴ Family offices are entities established by wealthy families to manage their wealth, and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) specifically preserved their unregulated status.²⁵

Hwang took advantage of this blind spot in the regulatory regime by structuring Archegos as a family office.²⁶ In theory, family offices deserve less regulatory scrutiny because they are not marketed to the public and traditionally have been used to conservatively invest the personal fortunes of the world's wealthiest families.²⁷ Financial regulators have historically had good reason to not consider family offices a significant contributor of systemic risk to the financial system. The Archegos saga tells a different story. The implosion of Archegos sent ripples through the financial system that reached from the balance sheets of the world's largest banks all the way to the investing public.²⁸ Today, Archegos' risky behavior no longer makes it an outlier in the family office industry. While the

²³ Ashworth, *supra* note 18, at 684 (“The [goal of assessing systemic risk] is to be accomplished by requiring registered advisers to file certain information with the SEC that the FSOC can then use to assess systemic risk.”).

²⁴ CHUCK COLLINS & KALENA THOMHAVE, FAMILY OFFICES: A VESTIGE OF THE SHADOW FINANCIAL SYSTEM 16 (2021) (“Family offices had historically been excluded from regulation under the Investment Advisers Act of 1940 . . .”).

²⁵ Press Release, Securities and Exchange Commission, SEC Adopts Rule Under Dodd-Frank Act Defining “Family Offices” (June 22, 2011), <https://www.sec.gov/news/press/2011/2011-134.htm> [<https://perma.cc/6TQW-GXQN>] (announcing the Family Office Rule).

²⁶ Gregory Zuckerman et al., *Inside Archegos's Epic Meltdown*, WALL ST. J. (Apr. 1, 2021), <https://www.wsj.com/articles/inside-archegoss-epic-meltdown-11617323530> (“Mr. Hwang returned clients' money in 2012 and turned his firm into an office to manage his family's wealth.”).

²⁷ *Id.* (“Because [family offices] don't market to outside investors, they are far less regulated than similar vehicles such as hedge funds, which have to regularly disclose their investments.”).

²⁸ See Divya Balji, *Rattled Archegos Stocks Investable Again After \$194 Billion Blow*, BLOOMBERG (Apr. 9, 2021, 4:11 PM), <https://www.bloomberg.com/news/articles/2021-04-09/rattled-archegos-stocks-investable-again-after-194-billion-blow> [<https://perma.cc/SMY7-V647>] (discussing the impact of Archegos-related losses on the share prices of popular publicly traded stocks).

traditional family office model was to steadily preserve and accumulate family wealth,²⁹ family offices that embrace risky hedge fund-like investment strategies have proliferated in recent years.³⁰

Archegos' implosion has focused attention on the family office industry. A growing class of commentators has begun to call for enhanced regulation of family offices as their risk profiles have become more complex and their impacts on systemic risk in the financial system have become more apparent.³¹ This Note will examine the evolving family office industry and explore whether regulatory reform is appropriate. Part II will trace the history of family offices and the regulatory structure that has governed their place in the investment management industry. Part III will revisit the Archegos saga in greater detail. Part III will also cover other family offices that engage in risky investment strategies that have proliferated over the last decade, and will discuss the extent to which family offices add systemic risk to the financial system. Part IV will examine current proposals aimed at enhancing regulatory oversight of the family office industry and evaluate the merits for such proposals.

II. The History of Family Offices

A. What is a family office?

The family office, as it is generally understood today, originated in 1882 when oil magnate John Rockefeller, feeling bogged down by managing his vast wealth, hired Frederick T. Gates to handle that task.³² Gates created the first example of what would

²⁹ Tait, *supra* note 21, at 1000–01 (“[T]he Private Investor Coalition . . . argued that ‘family offices are aimed at preserving wealth and making conservative investments, not trying to beat markets over time.’”).

³⁰ Gregory Zuckerman, *Family Offices Like Archegos Take Big Risks Like Hedge Funds*, Wall St. J. (Mar. 31, 2021), <https://www.wsj.com/articles/family-offices-like-archegos-take-big-risks-like-hedge-funds-11617223998> (“As they have grown in size, some family offices have embraced the riskier investment strategies used in previous decades by the most aggressive hedge funds. This is a departure from more traditional family office investments in stocks and bonds—as well as private equity and venture capital, which in recent years have become much more competitive.”).

³¹ See *infra* notes 151–155.

³² Devin Clemens, *The Evolutionary History of the Modern Family Office*, THARAWAT MAG.,

come to be known as a single family office: a team of professional and administrative staff that oversaw wealth management activities for the Rockefeller family.³³ For nearly a century, family offices were few in number, founded primarily by the families of late nineteenth and early twentieth century industrialists.³⁴ In the 1980s, family offices became more prevalent, a trend that has continued to the present day as the amount of wealth held by the wealthiest families has increased disproportionately to overall wealth.³⁵ The majority of family offices in existence today were founded in the year 2000 or later.³⁶

Family offices are as varied as the families that establish them. While investment management is the central function of a family office, family offices routinely provide tax, estate, and philanthropic planning as well.³⁷ In some cases, family offices arrange for more personal services like concierge services³⁸ and personal security.³⁹ So too does each family office differ in terms of its leadership and governance. Many young family offices have a family member to run the firm, while it is more common for family offices that are several generations old to employ a non-family

<https://www.tharawat-magazine.com/stories/evolutionary-history-family-offices/> [<https://perma.cc/NT8K-AMG3>] (“It is said that, when faced with the insurmountable task of managing his assets and philanthropy, JD Rockefeller enlisted the services of Frederick T Gates.”).

³³ *Id.*

³⁴ *Id.*

³⁵ Lucy Warwick-Chen, *Family Offices: A History of Stewardship*, FIN. TIMES (Oct. 20, 2017), <https://www.ft.com/content/403a2cb4-a9cb-11e7-ab66-21cc87a2edde> (“It wasn’t until the 1980s that family offices started to multiply, first in the US, then elsewhere. It was around that time that the wealth held by families began to grow at a significantly faster rate.”).

³⁶ UBS, CAMPDEN RESEARCH, THE GLOBAL FAMILY OFFICE REPORT 10 (2019) (summarizing the results of a survey of the family office industry).

³⁷ Nathan Crow & Gregory Crespi, *The Family Office Exclusion Under the Investment Advisers Act of 1940*, 69 SMU L. REV. 97, 99 (2016) (describing the multi-dimensional services offered by family offices).

³⁸ See *Family Office Services*, ALPEN PARTNERS, <https://alpenpartners.com/wealth-management/family-office-services/> [<https://perma.cc/3DWE-FGNH>] (last visited Jan. 10, 2022) (advertising concierge services to family office clients).

³⁹ Warwick-Chen, *supra* note 34 (“Family offices in Latin America . . . often co-ordinate security for individuals.”).

member professional as the CEO.⁴⁰ The same pattern emerges for whether or not a family office utilizes a board of directors.⁴¹

Family offices have become a symbol of each family's uniqueness and status as one of the world's elite families. In addition to all the practical advantages family offices offer, they also provide an opportunity for at least some families to engage in a little self-aggrandizing reflection on belonging to a modern-day dynasty. One particular family office's annual meeting was known to include a retelling of the family history and emphasize to each family member the importance of who they were, where they came from, and why they were different.⁴²

Despite all of the things that make each family office different, one thing is true for each: it takes a lot of money to form one. Estimates for the required level of assets under management to form a viable family office vary considerably, from \$200 million to \$1 billion.⁴³ Such a large principal is necessary to ensure that the family office can generate enough returns to cover its overhead, which in most cases will include substantial salaries for, at a minimum, a chief investment officer and a general counsel.⁴⁴ However, there are entities that call themselves family offices operating with as little as \$50 million.⁴⁵ One of the hallmarks of family offices is that they can put their millions of dollars of assets under management to use in virtually any way, investing in any type

⁴⁰ RAPHAEL AMIT ET AL., SINGLE FAMILY OFFICES: PRIVATE WEALTH MANAGEMENT IN THE FAMILY CONTEXT 5, (describing patterns in family office governance).

⁴¹ *Id.* at 5 (describing different governance structures for family offices).

⁴² Tait, *supra* note 21, at 993 (describing the self-aggrandizing rituals known to take place at the meetings of some family offices).

⁴³ Crow & Crespi, *supra* note 36, at 103 ("One family wealth expert put the number at \$ 200 to \$ 300 million, while another put it as high as \$ 500 million to \$ 1 billion.").

⁴⁴ Matthew Smith, *Do I Need a Family Office? A Guide for the Rich and Not So Famous*, KIPLINGER (Mar. 24, 2021), <https://www.kiplinger.com/retirement/estate-planning/602492/do-i-need-a-family-office-a-guide-for-the-rich-and-not-so-famous> [<https://perma.cc/6FSP-D5FQ>] (describing the costs involved with establishing a family office).

⁴⁵ Crow & Crespi, *supra* note 36, at 103 ("[T]here are many family offices with investable assets in the range of \$ 50 to \$ 200 million that identify themselves as family offices and perform the same functions as their larger peers . . .").

of financial product that aligns with the risk profile and goals of the family.⁴⁶ Traditionally, family offices have invested conservatively with wealth preservation and steady accumulation as their objectives.⁴⁷

Family offices have grown into something more than just a niche tool for the ultra-wealthy, as they have been for most of their history. Today, family offices are impactful players in capital markets and constitute a full-fledged sector of the asset management industry, albeit one that is still only accessible by the ultra-wealthy. There are thousands of single-family offices in the United States (as opposed to multiple family offices, discussed below) that have trillions of dollars in assets under management.⁴⁸ Globally, the total assets managed by family offices is estimated between \$6 trillion and \$10 trillion, which exceeds the amount of assets managed by hedge funds.⁴⁹ Consulting firms that cater to high-net-worth families looking to outsource the management of their family offices abound,⁵⁰ and multiple trade associations have popped up since the 1980s that connect participants in the family office industry with one another.⁵¹

⁴⁶ RISHI YADAV, CAPGEMINI, *THE GLOBAL STATE OF FAMILY OFFICES* 14 (2012) (“Family offices invest in a range of wealth management products such as funds, funds-of-funds, ETFs, private equity . . .”).

⁴⁷ *Id.* at 16 (“[F]amily offices should reconsider their conservative investment strategies focused on wealth preservation.”).

⁴⁸ YADAV, *supra* note 45, at 3 (estimating the number assets under management by U.S. family offices at \$1.2 trillion, a figure that has surely increased significantly since this report was published).

⁴⁹ Robin Wigglesworth et al., *Archegos and the \$10TRN World of Family Offices*, FIN. REVIEW (Apr. 6, 2021, 12:15 PM), <https://www.afr.com/wealth/investing/archegos-and-the-10trn-world-of-family-offices-20210406-p57gtp> [<https://perma.cc/6XSE-7PAF>] (estimating the global AUM of family offices at around \$10 trillion); Joe Light & Benjamin Stupples, *A \$6 Trillion Family Office World Fights Post-Archegos Crackdown*, BLOOMBERG (Apr. 22, 2021, 10:49 AM), <https://www.bloomberg.com/news/articles/2021-04-22/a-6-trillion-family-office-world-fights-post-archegos-crackdown> [<https://perma.cc/SVX5-ECCGM>] (estimating the global AUM of family offices at \$6 trillion).

⁵⁰ See, e.g., PATHSTONE, <https://www.pathstone.com/> [<https://perma.cc/SCY4-AA2N>] (last visited Aug. 15, 2021).

⁵¹ See, e.g., PRIVATE INV’R COAL., <https://privateinvestorcoalition.com/> [<https://perma.cc/YB2X-QF66>] (last visited Aug. 15, 2021); BOSTON FAMILY OFFICE ASS’N, <https://bostonfoa.org/> [<https://perma.cc/A9FX-8DWE>] (last visited Aug. 15, 2021).

Growing popularity of family offices has led to the innovation of the multi-family office, an amalgamation of separate wealthy families that desire the family office model but seek economies of scale by pooling assets and sharing the same wealth manager.⁵² A recent survey of two hundred and six high-net-worth individuals revealed that about seventy-five percent of them prefer multi-family offices to traditional wealth management firms and investment advisors when given the choice between the two.⁵³ Multi-family offices allow high net worth investors to enjoy the same benefits that single family offices provide to the richest families in the world: responsiveness, customizability, and a holistic approach to managing their affairs.⁵⁴ However, unlike single family offices, multi-family offices lack one critical benefit for their clients as they must register with the SEC as investment advisers and satisfy the costly concomitant regulatory costs.⁵⁵ Still, the development of the multi-family offices signals a demand for specialized asset management for the wealthy.⁵⁶ That demand is not likely to abate and will likely spur more growth in the family office industry.

B. How have family offices been regulated?

⁵² Bob Dannhauser, *Challenges for Family Offices: Customized Services Versus Economies of Scale*, CFA INST. (Mar. 22, 2013), <https://blogs.cfainstitute.org/investor/2013/03/22/challenges-for-family-offices-customized-service-versus-economies-of-scale/> [<https://perma.cc/YLR8-S4PQ>] (“Multiple family offices are also gaining in popularity, allowing for cost sharing of staff and other resources across the combined assets of multiple families.”).

⁵³ Russ Alan Prince, *The Ultra-Wealthy Prefer Multi-Family Offices to Wealth Managers*, PRIVATE WEALTH MAG. (Jan. 29, 2020), <https://www.fa-mag.com/news/the-ultra-wealthy-prefer-multi-family-offices-to-wealth-managers-53825.html> [<https://perma.cc/E8TY-MK9Z>] (“In a survey of 206 ultra-wealthy individuals, about three-quarters of them prefer to work with multi-family offices.”).

⁵⁴ *Id.* (“Almost all the ultra-wealthy who prefer multi-family offices cite responsiveness and taking a holistic approach as critical reasons for their attraction to the model.”).

⁵⁵ Eddie Brown & Paul Ferguson, *A Tale of Two Offices*, FA MAG. (Jan. 2, 2020), <https://www.fa-mag.com/news/a-tale-of-two-offices-53291.html> [<https://perma.cc/ZTL4-FQSF>] (“Multi-family offices . . . are generally organized as registered investment advisors . . .”).

⁵⁶ *See* Prince, *supra* note 52 (“About four out of five are looking for state-of-the-art solutions and see multi-family offices as the best provider of exceptional services and products.”).

1. Investment Advisers Act of 1940

The family office’s primary role of advising families on wealth management places it squarely within the definition of “investment adviser” under the Investment Advisers Act of 1940 (the Advisers Act). Under the Advisers Act, an investment adviser is

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.⁵⁷

Because each family office differs in its structure, it is possible that any given family office may not satisfy each element of the definition, and therefore not qualify as an investment adviser. For example, not every family office charges its family client and therefore receives no compensation.⁵⁸ However, family offices have historically seemed to acknowledge that they meet the definition of “investment adviser” under the Advisers Act.⁵⁹

Satisfying the statutory definition of “investment adviser” ordinarily imposes the broad regulatory regime established by the Advisers Act. This regulatory regime arose out of a congressional initiative to curb abusive practices in the investment management industry, and which remains the primary source of regulation for the

⁵⁷ 15 U.S.C. § 80b-2(a)(11) (2018).

⁵⁸ Scott A. Moehrke, et al., *Family Offices: Structuring for Investment Adviser Compliance*, KIRKLAND & ELLIS (Dec. 13, 2018), <https://www.kirkland.com/publications/private-investment-and-family-office-insights/2018/12/family-offices-structuring> [<https://perma.cc/3LKJ-9XVG>] (“[I]f no advisory compensation is paid to the family office . . . the Advisers Act generally will not apply.”)

⁵⁹ Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37,983 (June 29, 2011) (“We are troubled by comment letters we receive by counsel to some family offices that appear to acknowledge that their clients were operating as unregistered investment advisers, although they were not eligible for the private adviser exemption and had not obtained an exemptive order from us.”).

industry today.⁶⁰ Investment advisers must register with the SEC by filing Form ADV.⁶¹ Form ADV provides the SEC with basic information about the investment adviser, including its various trade names, principal places of business, the identity of person who controls the adviser, how the adviser's operations are financed, the disciplinary history of the adviser, the types of advisory services provided, and the fees charged by the adviser.⁶²

Registering as an investment adviser also triggers a variety of duties that an investment adviser must perform. The investment adviser must maintain required books and records relating to their business and subject itself to periodic examinations by the SEC.⁶³ Registered investment advisers must also adopt and implement formalized policies and procedures that are designed to ensure compliance with the federal securities laws, adopt a code of ethics to apply to the adviser's employees, and designate a chief compliance officer.⁶⁴

For most of the Advisers Act's history, the registration requirement did not extend to most private fund advisers.⁶⁵ The now repealed section 203(b)(3) exempted from registration any investment adviser that had fewer than fifteen clients, did not hold itself out to the public as an investment adviser, and did not serve as an investment adviser to a registered investment company.⁶⁶ Family

⁶⁰ Crow & Crespi, *supra* note 36, at 105 (“Congress enacted the Advisers Act in 1940 in response to an SEC report documenting the proliferation of abusive practices in the burgeoning investment advisory industry.”)

⁶¹ JOSEPH A. FRANCO & KARL-OTTO HARTMANN, INVESTMENT MANAGEMENT REGULATION 120 (2019) (“Prospective [SEC] registrants register by filing electronically Form ADV . . .”).

⁶² *Id.* (identifying the type of information collected on Form ADV).

⁶³ Moehrke et al., *supra* note 57 (describing requirements that investment advisers are required to satisfy under the Investment Advisers Act).

⁶⁴ *Id.* (“Registered investment advisers must maintain detailed compliance procedures . . . have a designated chief compliance officer” and “are required to adopt a code of ethics.”)

⁶⁵ COLLINS & THOMHAVE, *supra* note 23, at 18 (“Family offices had historically been excluded from regulation under the Investment Advisers Act of 1940 . . .”).

⁶⁶ Jacob Johnson, *Direct Regulation of Hedge Funds: An Analysis of Hedge Fund Regulation After the Implementation of Title IV of the Dodd-Frank Act*, 16 DEPAUL BUS. & COM. L. J. 1, 11 (2018) (“Most importantly, PFIARA removed the private adviser exemption contained in the Advisers Act, which exempted advisers of private funds from mandatory registration who: (1) had less than 15 clients during the preceding 12 months, (2) do not

offices often availed themselves of this exception to avoid registration when they managed the assets of fifteen or fewer family members.⁶⁷

If family offices had more than fifteen clients, they could still apply to the SEC for a special exemptive order.⁶⁸ The SEC has the authority to exclude from the Advisers Act's coverage any adviser it deems "not within the intent" of the Advisers Act's definition of "investment adviser."⁶⁹ The SEC liberally granted these exemptions, believing that family members receiving investment advice from their family offices did not require protection from the abusive practices that the Advisers Act intended to address.⁷⁰ An SEC exemptive order not only voids the registration requirement for family offices; it removes a family office from the definition of "investment adviser" and thus the other requirements of the Advisers Act do not apply.⁷¹ For example, the antifraud provision found in section 206 of the Advisers Act, which serves as the basis for many enforcement actions against investment advisers, does not apply to investment advisers in receipt of an exemptive order.⁷²

Many family offices failed to use either of these two proper channels to avoid the requirements of the Adviser Act.⁷³ In spite of the widespread lack of compliance, the SEC rarely brought enforcement actions against family offices acting as unregistered

hold themselves out to the public as investment advisers, and (3) do not advise registered funds subject to the Investment Company Act of 1940.").

⁶⁷ Crow & Crespi, *supra* note 36, at 110 ("Many family offices were also able to take advantage of this [private adviser] exemption if they managed funds on behalf of fewer than fifteen family members or entities.").

⁶⁸ Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37,983 (June 29, 2011) ("[T]he family office will need to register under the Advisers Act (unless another exemption is available) or seek an exemptive order from the Commission.").

⁶⁹ 15 U.S.C. § 80b-2(a)(11)(H) (2018) (granting the SEC authority to remove persons from the definition of "investment adviser").

⁷⁰ Crow & Crespi, *supra* note 36, at 115 ("Historically, family offices that fell outside the private adviser exemption have sought and obtained from us orders under the Advisers Act declaring those offices not to be investment advisers within the intent of section 202(a)(11) of the Advisers Act.").

⁷¹ *Id.* at 115 ("[O]ffices that received exemptive orders became exempt from all of the Advisers Act's provisions.").

⁷² *Id.* at 113 (describing the anti-fraud provision in the Advisers Act).

⁷³ *Id.* at 115 ("In spite of these two methods available for family offices to avoid the Advisers Act, it seems that many of them still failed to utilize either of them.").

investment advisers.⁷⁴ The lax regulatory atmosphere caused many in the family office industry to believe they were unregulated by the Advisers Act.⁷⁵

2. Investment Advisers Act of 1940 Post Dodd-Frank and the Family Office Rule

After the 2008 financial crisis, financial regulators sought out the sources of systemic risk that led to the implosion of the nation's financial system. The use of leverage by hedge funds quickly became a target for the architects of Dodd-Frank.⁷⁶ When toxic mortgage-backed securities held on the balance sheets of the nation's largest banks began to fail, those banks called in their loans to the hedge funds who had used those banks' money to significantly lever themselves.⁷⁷ To pay the banks, or at least attempt to, the hedge funds were forced to sell their liquid securities positions.⁷⁸ This set off a cycle of deleveraging, which depressed the prices of publicly traded securities, ultimately causing the entire U.S. stock market to shed thirty-eight percent of its total value.⁷⁹

Congress addressed the risks posed by private funds in Title IV of the Dodd-Frank Act, otherwise known as the Private Fund Investment Advisors Registration Act of 2010 (PFIARA).⁸⁰ PFIARA

⁷⁴ *Id.* at 115 (“The SEC's liberal granting of exemptive orders and its lack of enforcement actions seems to have created an atmosphere in which family offices perceived that the Act did not apply to them.”).

⁷⁵ *Id.* at 115.

⁷⁶ Ashworth, *supra* note 18, at 682 (“Soon more serious systemic risk consequences came to light as a result of the massive amount of leverage in the financial system, ‘particularly among investment banks and hedge funds.’”).

⁷⁷ *Id.* at 682 (“Because banks and other institutions needed cash on their balance sheets, they began ‘calling outstanding loans of hedge funds and other institutional investors.’”).

⁷⁸ *Id.* at 682 (“Many of these hedge funds were highly leveraged, so they also had to sell liquid assets to pay the banks.”).

⁷⁹ *Id.* at 683 (“Ultimately, the crisis in the housing market spread to the capital markets, and the U.S. stock market plummeted by over 38% in 2008.”).

⁸⁰ Johnson, *supra* note 65, at 11 (“Included within Dodd-Frank is the Private Fund Investment Advisors Registration Act of 2010 (‘PFIARA’), which changes the registration requirements of hedge fund advisers by requiring certain unregistered investment advisers to register with the SEC under the Advisers Act.”).

removed the private advisers' exemption formerly contained in section 203 of the Advisers Act.⁸¹ Post Dodd-Frank, advisers to private funds, except those who manage venture capital funds or private funds with less than \$150 million in assets, are required to register with the SEC by filing a Form ADV.⁸² The SEC uses the information reported on Form ADV to develop a risk profile for each investment adviser.⁸³ It monitors Form ADVs and conducts examinations on advisers whose ADVs raise red flags suggesting misconduct.⁸⁴ Although registered and unregistered advisers are subject to examinations by the SEC, registration makes the prospect of an examination more likely as the SEC chooses to focus its resources on registered advisers.⁸⁵

Dodd-Frank took information gathering on private funds a step further than requiring them to file Form ADV. It specifically allows the SEC to require registered advisers to private funds to file information with the SEC regarding the amount and type of assets under management, leverage, counterparty credit risk, trading, valuation, and other information that is “necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk.”⁸⁶ The tool used to accomplish this

⁸¹ *Id.* at 11 (“Most importantly, PFIARA removed the private adviser exemption contained in the Advisers Act”).

⁸² *Private Fund Adviser Overview*, SEC. EXCH. COMM’N., <https://www.sec.gov/divisions/investment/guidance/private-fund-adviser-resources.htm> [<https://perma.cc/V9PY-H7DY>] (last visited Aug. 16, 2021) (describing registration requirements for private fund advisers).

⁸³ Ashworth, *supra* note 18, at 687 (“The SEC states that the data collected from Form ADV is used ‘to protect investors’ and ‘to create risk profiles of investment advisers.’”).

⁸⁴ *Investor Bulletin: Form ADV — Investment Adviser Brochure and Brochure Supplement*, SEC. EXCH. COMM’N. (Aug. 27, 2020), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_formadv.html [<https://perma.cc/AV25-ND9Q>] (“The SEC reviews the information from [Form ADV] to manage its regulatory and examination programs.”).

⁸⁵ Mary Shapiro, Chairman, U.S. Sec. & Exch. Comm’n, Opening Statement at SEC Open Meeting: Dodd-Frank Act Amendments to the Investment Advisers Act (June 22, 2011), <https://www.sec.gov/news/speech/2011/spch062211mls-items-1-2.htm> [<https://perma.cc/6ZFF-LQHE>] (discussing Dodd-Frank Amendments and their impact on registration requirements).

⁸⁶ 15 U.S.C. § 80b-4(b)(3) (2018) (detailing required information includes amount of assets under management and use of leverage, counterparty credit risk exposure, trading and investment positions, valuation policies and

information gathering is Form PF and all registered private fund advisers are required to file it with the SEC.⁸⁷ All registered private fund advisers are required to provide a baseline level of information about the private funds they manage, including the fund's gross and net assets, its largest equity stakeholders, and its use of leverage.⁸⁸ The information contained in Form PF is designed to allow the FSOC to monitor systemic risk introduced into the financial system by the private fund industry.⁸⁹ If the FSOC identifies a common practice in the private fund industry that increases the level of systemic risk, it can make recommendations to regulatory agencies to adopt new policies or safeguards.⁹⁰ If it determines that a particular private fund is engaging in activity that threatens financial stability, the FSOC can subject that fund to supervision by the Federal Reserve Board.⁹¹

The Dodd-Frank Act thus imposes a set of drastically more stringent registration and reporting requirements on investment advisers to private funds than any that previously existed. Section 409 of Dodd-Frank directs the SEC to formally define the term "family office" so that entities meeting the definition can be excluded from the Advisers Act's requirements.⁹² Congress did not create an

practices of the fund, types of assets held, side arrangements or side letters, trading practices, and such other information that the SEC determines necessary and appropriate in the public interest).

⁸⁷ Ashworth, *supra* note 18, at 689 ("The SEC requires all registered hedge fund advisers under the Advisers Act to file Form PF.").

⁸⁸ *Private Fund Adviser Overview*, SEC. EXCH. COMM'N., <https://www.sec.gov/divisions/investment/guidance/private-fund-adviser-resources.htm> [<https://perma.cc/V9PY-H7DY>] ("Most advisers file Form PF annually to report general information such as the types of private funds advised (e.g., hedge funds or private equity), each fund's size, leverage, liquidity and types of investors.").

⁸⁹ FRANCO & HARTMANN, *supra* note 60, at 120 (describing the Form PF filing process).

⁹⁰ Ashworth, *supra* note 18, at 692 ("The FSOC interprets the data and decides whether hedge funds' activities or trends 'could create or increase the risk of significant liquidity, credit, or other problems spreading' across U.S. financial markets.").

⁹¹ Wulf A. Kaal, *The Systematic Risk of Private Funds After the Dodd-Frank Act*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 163, 185 (2015) ("The Dodd-Frank Act gave FSOC the power to subject a nonbank financial company to extensive supervision by the Federal Reserve.").

⁹² Gwendolyn A. Williamson & Mary C. Moynihan, *SEC Adopts Rule Defining "Family Offices" Under Dodd-Frank Act*, PERKINS COIE (June 27,

exemption from only the registration requirements of the Advisers Act for family offices. Instead, it favored a carve-out from the definition of “investment adviser” that would cover family offices, thus removing them entirely from the Advisers Act’s coverage.⁹³ Congress recognized an interest in allowing wealthy families to manage their money as they saw fit, signaling a belief that inter-family decisions about personal wealth management were not the province of the federal government.⁹⁴ Although nothing in the legislative history of the Family Office Rule explicitly points to it, a sense that the traditionally conservative nature of family office investment strategies were unlikely to add systemic risk to the financial system probably factored into the Family Office Rule’s rationale as well.

3. *The Family Office Rule Requirements*

In 2011, the SEC adopted Rule 202(a)(11)(G)-1 (the Family Office Rule), formally removing family offices from the provisions of the Advisers Act.⁹⁵ The Family Office Rule imposes three conditions needed to satisfy the definition of “family office”: the only clients must be “family clients”; the family office must be controlled exclusively by the family clients; the family office cannot hold itself out to the public as an investment adviser.

2011),

<https://www.perkinscoie.com/en/news-insights/SEC-adopts-rule-defining-family-offices-under-dodd-frank-act.html> [https://perma.cc/M6H9-5G5T] (“[S]ection 409 of the Dodd-Frank Act also directed the SEC to adopt a rule defining the term ‘family office’ in order to identify the entities eligible for the exclusion.”).

⁹³ Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37,983 (June 29, 2011) (“Family offices, as so defined, are excluded from the Act’s definition of ‘investment adviser,’ and are thus not subject to any of the provisions of the Act.”).

⁹⁴ S. REP. NO. 111-176, at 75 (2010) (Conf. Rep.) (“The Committee believes that family offices are not investment advisers intended to be subject to registration under the Advisers Act. The Advisers Act is not designed to regulate the interactions of family members, and registration would unnecessarily intrude on the privacy of the family involved.”).

⁹⁵ Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37,984 (June 29, 2011) (“Family offices, as so defined, are excluded from the Act’s definition of ‘investment adviser,’ and are thus not subject to any of the provisions of the Act.”).

First, a family office can only provide investment advisory services to family clients.⁹⁶ Family clients encompass current and former family members, certain employees of the family office who are allowed to co-invest, charities funded by family clients, estates of current and former family members, trusts existing for the benefit of current family members, and companies wholly owned by, and operated for the benefit of, family clients.⁹⁷

Second, a family office must be wholly owned by family clients and exclusively controlled by one or more family members or family entities.⁹⁸ The final version of the Family Office Rule's use of the word "exclusively" emphasizes that control cannot be shared with an entity separate from the family office. The Family Office Rule does not define control, but the SEC has addressed its understanding of this requirement in some contexts. For example, family offices organized as a corporation would have exclusive family control if a majority of its board is comprised of family members.⁹⁹ In other contexts, where a family office does not utilize a governance structure with a board of directors for example, the SEC has not clarified the control requirement. It seems obvious that a determinative factor would be the level of influence over firm decisions retained by non-family members.¹⁰⁰

Finally, the Family Office Rule prohibits a family office from holding itself out to the public as an investment adviser if it wishes to meet the definition of "family office."¹⁰¹ Allowing the family office

⁹⁶ *Id.* ("[T]he exclusion is limited to family offices that provide advice about securities only to certain 'family clients.'")

⁹⁷ *Id.* (identifying the entities that qualify as "family clients").

⁹⁸ *Id.* ("The final rule requires that, to qualify for the exclusion from regulation under the Advisers Act, the family office must be wholly owned by family clients and exclusively controlled, directly or indirectly, by one or more family members or family entities.").

⁹⁹ *Staff Responses to Questions About the Family Office Rule*, SEC. EXCH. COMM'N,

<https://www.sec.gov/divisions/investment/guidance/familyofficefaq.htm> [<https://perma.cc/NTP7-QQ5Q>] (answering questions about the control prong of the Family Office Rule).

¹⁰⁰ Crow & Crespi, *supra* note 36, at 131 (describing the factors that would probably be used to analyze the control factor in applying the Family Office Rule).

¹⁰¹ Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37,983 (June 9, 2011) ("[T]he final rule prohibits a family office

to hold itself out to the public would contravene the justification for this rule which rested on the assumption that families have a right to manage their own money as they wish, but not that of outside clients.

The Family Office Rule effectively preserved the previous favorable exemptive policy for family offices.¹⁰² Family offices meeting this definition do not face the costs of registering with the SEC or the concomitant compliance costs.¹⁰³ Similarly, the Family Office Rule obviates the need for family offices to obtain an exemptive order from the SEC.¹⁰⁴ The SEC estimated that this would save the family office a combined \$200 million to \$1 billion in forgone legal bills.¹⁰⁵ The Family Office Rule was crafted so favorably to family offices that some family offices previously registered with the SEC were actually allowed to deregister under the terms of the new definition.¹⁰⁶ This was a curious result in the wake of Dodd-Frank which was intended, in part, to enhance the oversight of the private fund industry.

III. Archegos Revisited and the Contemporary Family Office Industry

A. The Hedge Fund to Family Office Trend

The Archegos saga belies many of the common characteristics that traditionally defined the family office industry. For one, Hwang is not the scion of a wealthy ancestor whose fortune he is trying to stretch into eternity. Instead, he is the son of a pastor who immigrated to the United States as a teenager who later became wealthy in his mid-thirties after a successful investment career.¹⁰⁷

relying on the rule from holding itself out to the public as an investment adviser.”).

¹⁰² *Id.* (“The scope of the rule is generally consistent with the conditions of exemptive orders that we have issued to family offices.”).

¹⁰³ *Id.* (“[F]amily offices, as defined by this rule, will not be subject to the mandatory costs of registering with the Commission as an investment adviser and the associated compliance costs.”).

¹⁰⁴ *Id.* (“[T]he rule will benefit family offices . . . by eliminating the costs of seeking . . . individual exemptive orders.”).

¹⁰⁵ *Id.* (“[T]he rule will provide a benefit ranging from \$200 million to \$1 billion by eliminating the costs of applying for . . . exemptive orders.”).

¹⁰⁶ *Id.* (“Some investment advisers currently registered with us may qualify as family offices under the rule and have the choice to deregister.”).

¹⁰⁷ Sarah Pulliam Bailey, *Billionaire at the Center of a Wall Street Fiasco Gives Millions to Evangelical Ministries*, WASH. POST. (Apr. 1, 2021),

Interestingly, Hwang's humble start echoed through most of his adult life. He seemed to eschew the personal extravagances that typify Wall Street billionaires by, for example, living in a relatively modest home in suburban New Jersey.¹⁰⁸ His devout Christian faith also always remained central in his life. Hwang would organize Archegos' staff every Friday to hold bible studies,¹⁰⁹ and he has conducted interviews discussing his faith-driven investing approach wherein he seems just as much like an evangelical preacher as he does a sophisticated Wall Street whale.¹¹⁰ Even the name of his firm, "Archegos," is a Greek word that translates to "leader" and which has been used as a reference to Jesus.¹¹¹ Hwang's humility and piety surely made him an outlier personality in the finance world. Of course, one does not have to come from opulent or godless beginnings to form a family office. Bill Gates, Sergey Brin, and Oprah Winfrey are just a small sampling of self-made billionaires who formed family offices to manage the wealth built on their achievements.¹¹² But Hwang does not fit neatly into this category of

<https://www.washingtonpost.com/religion/2021/04/01/bill-hwang-multi-billionaire-wall-street-fiasco-evangelical-ministries/>
[<https://perma.cc/AA4B-7HRT>].

¹⁰⁸ Katherine Burton & Sridhar Natarajan, *Where is Bill Hwang, the Man Who Lost \$20 Billion After Archegos Collapsed?*, BLOOMBERG (Aug. 9, 2021),

<https://www.bloomberg.com/news/features/2021-08-09/where-is-bill-hwang-the-man-who-lost-20-billion-after-archegos-collapsed>
[<https://perma.cc/2XW4-H47X>] (describing Hwang's New Jersey home where he has lived for years).

¹⁰⁹ Katherine Burton et al., *God and Man Collide in Bill Hwang's Dueling Lives on Wall Street*, BLOOMBERG (Apr. 1, 2021), <https://www.bloomberg.com/news/articles/2021-04-02/god-and-man-collide-in-bill-hwang-s-dueling-lives-on-wall-street> [<https://perma.cc/6PJX-LKK9>] (describing Hwang's practice of regularly holding bible studies).

¹¹⁰ FULLER Studio, *Faith and Work | Bill Hwang on Investing in People*, YouTube (Mar. 7, 2018), <https://www.youtube.com/watch?v=vnbeQ-WFOUU> [<https://perma.cc/96EM-VYQH>] (interviewing Hwang about the intersection of his faith and career).

¹¹¹ J. Julius Scott, Jr., *Archegos in the Salvation History of the Epistle to the Hebrews*, 29 J. OF THE EVANGELICAL THEOLOGICAL SOCIETY 47, 47 (1986) ("[A]rchêgos as a title for Jesus appears . . . four times in the [New Testament] . . .").

¹¹² Tait, *supra* note 21, at 1003 ("Numerous ultra-high-wealth individuals--from Bill Gates to Leslie Wexner, Sergey Brin, and the Koch

family office founder either. Instead, he is part of a recent trend of former hedge fund investors converting themselves into family offices.¹¹³ The trend is undoubtedly spurred on by the Family Office Rule which, by keeping family offices free from the regulatory requirements and associated costs of the Adviser Act, renders family offices a more attractive alternative to the newly regulated private fund industry.¹¹⁴ As of 2017, more than three dozen hedge fund investors had returned investor capital in order to adopt the family office model.¹¹⁵ Iconic investor George Soros was among them.¹¹⁶ Soros cited the registration and reporting requirements imposed on private funds by Dodd-Frank as a primary reason for the change.¹¹⁷ The list of hedge funds-turned-family offices keeps adding prominent names from the investing world. John Paulson and David Tepper are two of the latest hedge fund investors who have closed up shop to convert to hedge funds in the last year.¹¹⁸

brothers--all have family offices . . . Oprah Winfrey has a family office . . .”).

¹¹³ Tom Burroughes, *Hedge Funds That Morph Into Family Offices – The Archegos Fallout*, WEALTHBRIEFING (Apr. 1, 2021), <https://www.wealthbriefing.com/html/article.php?id=190715> [<https://perma.cc/5SJB-CPX3>] (“There has been a trend over the past 10 years of hedge fund firms morphing into family offices by ceasing to manage third-party funds . . .”).

¹¹⁴ Tait, *supra* note 21, at 1003 (“Because of all these advantages, ‘[f]amily offices . . . are now a must-have accessory for the American super-rich’ and are ‘arguably the fastest-growing investment vehicle in the world.’”).

¹¹⁵ Anupreeta Das & Juliet Chung, *New Force on Wall Street: The ‘Family Office,’* WALL ST. J. (Mar. 10, 2017, 5:18 PM), <https://www.wsj.com/articles/the-new-force-on-wall-street-family-offices-1488991396> (“Since 2011, roughly three dozen hedge funds have converted into family offices after returning their clients’ money . . .”).

¹¹⁶ *Id.* (noting that George Soros converted his hedge fund to a family office).

¹¹⁷ *Id.* (“Mr. Soros cited increasing regulation as one reason. U.S. regulators require hedge-fund firms with more than \$150 million in assets to disclose their strategies and how much they manage.”).

¹¹⁸ Svea Herbst-Bayliss, *Hedge Fund Celebrity John Paulson Shuts Firm to Become a Family Office*, REUTERS (Jul. 1, 2020, 12:06 PM), <https://www.reuters.com/article/us-paulson-hedgefund/hedge-fund-celebrity-john-paulson-shuts-firm-to-become-a-family-office-idUSKBN2426MF> [<https://perma.cc/97T3-26RS>] (“Hedge fund manager John Paulson, whose multi-billion payoff on a bet against the overheated housing market a decade

How do hedge fund investors force themselves into the family office paradigm? Or, more importantly, how are they changing it? A tracing of Hwang's journey to forming Archegos may shed light on the answers to those questions.

Hwang began his hedge fund career working for legendary hedge fund investor Julian Robertson at Robertson's firm Tiger Management.¹¹⁹ Robertson closed Tiger Management in 2000 but seeded a number of hedge funds launched by his disciples which became known as "Tiger Cubs."¹²⁰ Hwang's Tiger Asia Management was among them and received a \$25 million investment from Robertson.¹²¹ Tiger Asia Management enjoyed rapid success and at its peak oversaw more than \$8 billion.¹²² Before closing its doors in 2013, Tiger Asia Management was the premier Asia-focused hedge fund.¹²³ Hwang's successful career at the helm of Tiger Asia

ago turned him into an industry superstar, will stop managing money for outside clients and turn his firm into a family office."); William Watts, *David Tepper is the Latest Hedge-Fund Heavyweight to Go the Family-Office Route*, MARKETWATCH (May 23, 2019, 1:36 PM), <https://www.marketwatch.com/story/david-tepper-is-the-latest-hedge-fund-heavyweight-to-go-the-family-office-route-2019-05-23> [<https://perma.cc/TL9Y-QZRV>] ("David Tepper, considered arguably the greatest investor of his generation, is preparing to return clients' money and convert his hedge-fund firm to a family office. . .").

¹¹⁹ Chung & Jeong, *supra* note 1 ("Mr. Hwang is a former protégé of hedge-fund titan Julian Robertson . . .").

¹²⁰ Harriet Agnew & Laurence Fletcher, *Tiger Cubs: How Julian Robertson Established a Dynasty of Hedge Funds*, FIN. TIMES (Jun. 4, 2021), <https://www.ft.com/content/e1d1c558-9a87-4843-9cd8-29ab203b7911> (describing how Robertson seeded 50 hedge funds after Tiger Capital Management closed).

¹²¹ Chung & Jeong, *supra* note 1 ("Mr. Hwang founded Tiger Asia Management LLC in 2001 with support from Mr. Robertson.").

¹²² Nathan Vardi, *How Troubled Trader Bill Hwang Quietly Amassed \$10 Billion*, FORBES (Apr. 2, 2021, 6:30 PM), <https://www.forbes.com/sites/nathanvardi/2021/04/02/how-troubled-trader-bill-hwang-quietly-amassed-10-billion/?sh=5da54d727c09>

[<https://perma.cc/G83K-A4XB>] ("At its peak, Hwang's Tiger Asia Management oversaw \$8 billion of assets and Hwang had made a lot of money for Robertson, who was a big investor in the firm and shared in its economics.").

¹²³ Juliet Chung & Maureen Farrell, *Ex-Tiger Asia Founder Triggers \$30 Billion in Large Stocks Sales*, WALL ST. J. (Mar. 28, 2021), <https://www.wsj.com/articles/ex-tiger-asia-founder-triggers-30-billion-in-lar>

Management built him a personal fortune that he would later use to incept Archegos.¹²⁴

But before he could form Archegos, Hwang had to navigate a criminal fraud charge brought by the SEC.¹²⁵ Hwang plead guilty to using material nonpublic information disclosed by investment banks to make profitable trades.¹²⁶ He shorted Chinese bank stocks based off the confidential information he received and was able to cover those short positions with private placement shares purchased at a significant discount to the market price.¹²⁷ He also attempted to manipulate the market prices of the stocks he was shorting by depressing their share prices which netted his fund \$496,000 in fraudulent management fees.¹²⁸ Hwang paid \$44 million in fines in a related civil lawsuit¹²⁹ and received a minimum five-year ban on managing public money in the United States.¹³⁰

Hwang's insider trading scandal at Tiger Asia Management is more than an aside about his investment career. The five-year ban on managing client funds probably hastened his transition to a family office where no such restrictions applied to managing his own money. Moreover, insider trading scandals as a precursor to converting a hedge fund to a family office seem to be somewhat of a trend. Leon Cooperman and Steve Cohen, two prominent hedge fund

ge-stocks-sales-11616973350 (“Tiger Asia was based in New York and went on to become one of the biggest Asia-focused hedge funds . . .”).

¹²⁴ Schatzker, *supra* note 3 (“[Hwang] parlayed . . . \$200 million left over from his shuttered hedge fund into a mind-boggling fortune by betting on stocks.”).

¹²⁵ Chad Bray & Reed Albergotti, *Fund Pleads Guilty to Wire-Fraud Charge*, WALL ST. J. (Dec. 12, 2012), https://www.wsj.com/articles/SB10001424127887323981504578175381113803630?mod=article_inline (“New York hedge-fund Tiger Asia Management LLC pleaded guilty to a criminal fraud charge Wednesday and agreed to pay \$44 million to settle civil allegations by U.S. securities regulators that it engaged in insider trading of Chinese bank stocks.”).

¹²⁶ *Id.* (describing the SEC investigation into Tiger Asia Management).

¹²⁷ *Id.* (“In its lawsuit, the SEC alleged that Mr. Hwang, of . . . Tiger Asia made short sales in Chinese banks stocks based on confidential information received in private placement offerings between December 2008 and January 2009.”).

¹²⁸ *Id.* (describing Tiger Asia's alleged price manipulation).

¹²⁹ *Id.* (“Mr. Hwang and Tiger Asia also have agreed to pay \$44 million to settle a separate, but related civil lawsuit . . .”).

¹³⁰ Kelly et al., *supra* note 9 (“Mr. Hwang was barred from managing public money for at least five years.”).

investors, converted their hedge funds to family offices after settling insider trading allegations of their own.¹³¹ The similarities between Hwang and Cohen in particular are striking and illustrate the difficulties family offices pose to financial regulators. Like Hwang, Cohen was an extremely successful hedge fund manager, founding and operating SAC Capital Advisers (SAC).¹³² He and his firm were also widely rumored to engage in insider trading.¹³³ The government conducted a years-long investigation into SAC that eventually resulted in many of its employees going to prison but ultimately produced insufficient evidence to convict Cohen himself of anything.¹³⁴ His company settled a criminal charge that involved a two-year ban on managing client money.¹³⁵ After that two-year period began, Cohen, who likely had close to \$10 billion in personal funds,¹³⁶ immediately converted to a family office which allowed him to continue managing massive amounts of money while simultaneously demonstrating his investing ability to outside investors who would happily invest with him again when his ban was served.¹³⁷ Viewed in this context, the ability to open family offices makes SEC bans look like a relatively painless time-out for unscrupulous investors for whom it is questionable if they should retain the power to invest market-moving sums of money at all.

¹³¹ *Do Wealthier Hedge Fund CEOs like Leon Cooperman Get Away with Insider Trading?*, SOVEREIGN WEALTH FUND INST. (Nov. 5, 2020), <https://www.swfinstitute.org/news/82416/do-wealthier-hedge-fund-ceos-like-leon-cooperman-get-away-with-insider-trading> [<https://perma.cc/88PN-QLBY>] (describing how both Leon Cooperman and Steve Cohen formed family offices after insider trading investigations).

¹³² SHEELAH KOLHATKAR, *BLACK EDGE* 88 (Random House, 1st ed. 2017) (“SAC’s returns had averaged 30 percent over the previous eighteen years, an impossibly high level of performance that was several times greater than the average market return.”)

¹³³ *Id.* at 76-77 (describing the suspicion among federal law enforcement that SAC was insider trading).

¹³⁴ *Id.* at 244, 247, 281 (describing the details of the investigation of SAC conducted by the SEC and how they struggled to charge Steve Cohen with any wrongdoing).

¹³⁵ *Id.* at 288 (describing SACs punishment).

¹³⁶ *Id.* (describing Cohen’s restructuring of his hedge fund as a family office).

¹³⁷ *Id.* at 289 (describing Cohen’s intention to start a new hedge fund after serving his ban).

With Tiger Asia Management behind him, Hwang founded Archegos in 2013 without ever filing a single form with the SEC.¹³⁸ As is true for most hedge funds turned family offices, Archegos had the feel of a premier professional investment firm. It occupied offices in the New York Times building in Manhattan where a team of analysts hired by Hwang worked daily to manage his wealth.¹³⁹ The only substantive legal requirement Hwang had to satisfy was returning outside investors' money and substituting his personal funds.¹⁴⁰ Since Hwang funded Archegos solely with \$200 million of his own money, he satisfied the “family client” prong of the Family Office Rule.¹⁴¹ Hwang easily satisfied the other two prongs of the Family Office Rule. By retaining control over the firm's operations and investment decisions, Hwang satisfied the ownership and control prong of the Family Office Rule, as no one but Hwang had any control or ownership interest in Archegos.¹⁴² Furthermore, because he never held himself out as an investment adviser to the public, Hwang satisfied the final prong of the Family Office Rule.¹⁴³ In fact, he barely held himself out as a family office investor. Most people were

¹³⁸ Letter from Americans for Financial Reform, to Allison Herren Lee, Acting Chair, Securities and Exchange Comm'n (Mar. 31, 2021), <https://ourfinancialsecurity.org/2021/03/letter-to-regulators-in-the-wake-of-a-archegos-the-sec-should-end-13f-loopholes/> [<https://perma.cc/V5J2-X788>] (“Archegos has never filed a single form with the SEC due to an exemption in the Dodd-Frank Wall Street Reform and Consumer Protection Act . . . which exempts family offices managing solely their own finances from registering under the Investment Advisers Act of 1940.”).

¹³⁹ Bloomberg Quicktake, *How to Lose \$20 Billion in Two Days*, YOUTUBE (Aug. 10, 2021), <https://www.youtube.com/watch?v=MhMhg97fmzE> [<https://perma.cc/YT9M-BMUS>] (describing the offices and operation of Archegos).

¹⁴⁰ Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37, 983 (June 9, 2011) (limiting the application of the family office rule to offices that do not manage outside investor capital).

¹⁴¹ Schatzker, *supra* note 3 (“[Hwang] parlayed . . . \$200 million left over from his shuttered hedge fund into a mind-boggling fortune by betting on stocks.”).

¹⁴² *See* Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37,984 (June 29, 2011) (“The final rule requires that, to qualify for the exclusion from regulation under the Advisers Act, the family office must be wholly owned by family clients and exclusively controlled, directly or indirectly, by one or more family members or family entities.”).

¹⁴³ *See id.* (“[T]he final rule prohibits a family office relying on the rule from holding itself out to the public as an investment adviser.”).

completely unaware of Archegos' existence and only the small fraternity of Tiger Cubs was generally aware of Hwang's success.¹⁴⁴ Only this group knew about the bewildering returns Hwang was achieving.¹⁴⁵

Archegos was undeniably a family office as it is defined in the Family Office Rule. Thus, Hwang's structuring Archegos as one was not illegal.¹⁴⁶ His ability to do so should raise questions, however, about the ease with which large hedge fund investors can enter the largely unregulated family office market. Analyzing the Family Office Rule ten years after its adoption makes it appear less like a special dispensation for families seeking personalized wealth management than it does a loophole for former private fund investors to return to the unregulated and secretive environment they occupied pre-Dodd-Frank.

B. Impact on Systemic Risk

The ability for hedge fund investors to easily convert to family offices is only part of the discussion. It is what they do once they become family offices that informs the discussion on whether they increase systemic risk in the financial system.

A common theme has emerged that sheds further light on why some hedge fund investors are eager to switch to the family office format: it allows them to take on more risk. John Arnold, a billionaire from his former energy-focused hedge fund, closed his hedge fund after concluding that the only way to achieve "outsize[d] returns" was in the private world.¹⁴⁷ Michael Platt, another successful hedge fund investor, made the decision in order to shed "the shackles

¹⁴⁴ Vardi, *supra* note 121 ("Inside the close-knit and secretive group of Tiger Cubs, it was well-known Hwang had become extremely wealthy, but word of Hwang's success never leaked out.").

¹⁴⁵ *Id.* ("It was well known within Tiger that Bill was worth more than Julian. He had multiple 100% years.").

¹⁴⁶ See Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37,984 (June 29, 2011) (enumerating the requirements to keep a family office legal).

¹⁴⁷ Das & Chung, *supra* note 114 ("Where can we capture outsize returns and protect our capital? The only way to do that is in the private world," said Allen Gibson, who oversees investments for Mr. Arnold's family office.)

imposed by more cautious institutional investors.”¹⁴⁸ Those institutional investors, such as pension funds, have grown in number, diminishing the influence of risk-loving high-net-worth investors that formerly comprised the main hedge fund client base.¹⁴⁹ The conservative objectives of institutional clients seems to clash with the favored investing styles of hedge fund investors, driving them to pursue those strategies with their own funds as family offices. The influx of these investors into the family office industry has complicated the overall risk profile of the industry, but at a minimum has increased the number of family offices that like to “swing for the fences” with their investments.¹⁵⁰

How does transplanting hedge fund investors into the family office world magnify overall systemic risk? Again, a deeper dive into Hwang’s management of Archegos will answer that question and show how the current state of the family office industry belies the “veneer of conservatism and safety” that historically attached to family offices.¹⁵¹

Hwang forged his tolerance for risk under the tutelage of Robertson at Tiger Management. When a poorly executed bet cost the hedge fund \$2 billion, Robertson was quick to calm his acolytes.¹⁵² Hwang took that as a lesson to not shy away from risky opportunities and has since described himself as an offense-minded investor.¹⁵³ At Tiger Asia Management, Hwang invested huge sums

¹⁴⁸ Robin Wigglesworth et al., *Diminishing Returns: Hedge Funds Look to Keep it in the Family*, FIN. TIMES (Jan. 25, 2019), <https://www.ft.com/content/47ba9fdc-201c-11e9-b126-46fc3ad87c65>.

¹⁴⁹ *Id.* (citing the increase in pension fund clients as a reason why hedge fund managers are exiting the industry).

¹⁵⁰ Zuckerman, *supra* note 29 (“Hedge funds used to take on lots of risk and swing for the fences, but now it’s often family offices . . . A growing number of family offices are comfortable with risk, according to professionals in the business.”).

¹⁵¹ Elliot Wilson, *Wealth Management: ‘Real Family Offices Don’t Do This Kind of Thing’*, EUROMONEY (Apr. 28, 2021), <https://www.euromoney.com/article/28gk7ajcyshu8i2dcokxs/wealth/wealth-management-real-family-offices-dont-do-this-kind-of-thing> [<https://perma.cc/92Z6-WJHF>].

¹⁵² Schatzker, *supra* note 3 (recounting a tale of Julian Robertson’s tolerance for risky bets gone awry).

¹⁵³ *Id.* (sharing a former colleague’s memory of Hwang telling his firm to go “on offense”).

in highly concentrated positions of publicly traded securities and used leverage to magnify his exposure.¹⁵⁴

At Archegos, Hwang deployed the same strategy that he used at Tiger Asia Management. He accumulated huge positions in popular publicly traded media companies including ViacomCBS and Discovery.¹⁵⁵ Both companies were investing heavily in streaming technology making them, in Hwang's estimation, attractive investments.¹⁵⁶ He gradually increased his use of leverage over time and by late March of 2021, he was using five times as much borrowed money as Archegos had under management.¹⁵⁷ Adding to the complexity, Hwang obtained his leverage through the use of total return swaps.¹⁵⁸ Total return swaps are contracts sold to investors by investment banks that allow the investor to "take on the profits and losses of a portfolio of stocks or other assets in exchange for a fee."¹⁵⁹ Total return swaps enable investors to amass huge positions in a particular asset without the capital needed to buy the asset outright.¹⁶⁰ Under a swap agreement, the bank owns the underlying asset and makes payments to the investor based on the total return of the portfolio.¹⁶¹ If the underlying assets perform poorly, however, the

¹⁵⁴ *Id.* (describing Hwang's fondness for using leverage to boost returns).

¹⁵⁵ Juliet Chung & Margot Patrick, *What is Archegos and How Did it Rattle the Stock Market*, WALL ST. J. (Apr. 6, 2021), https://www.wsj.com/articles/what-is-archegos-and-how-did-it-rattle-the-stock-market-11617044982?mod=series_archegos ("[Archegos] played a part in the strong rally—and subsequent fall—in shares of ViacomCBS Inc. [and] Discovery Inc.").

¹⁵⁶ Alexis Goldstein, *These Invisible Whales Could Sink the Economy*, BUS. TIMES (May 20, 2021), <https://www.businesstimes.com.sg/opinion/these-invisible-whales-could-sink-the-economy> [<https://perma.cc/EEM2-X6BT>] ("Discovery and ViacomCBS were investing in streaming services, a booming sector.").

¹⁵⁷ Schatzker, *supra* note 3 ("By late March [Archegos'] leverage was 5x or more.").

¹⁵⁸ Chung & Patrick, *supra* note 154 ("Archegos took big, concentrated positions in companies and held some positions via something called 'total return swaps.'").

¹⁵⁹ Webb et al., *supra* note 15.

¹⁶⁰ *Id.* ("Swaps allow investors to take huge positions while posting limited funds up front, in essence borrowing from the bank.").

¹⁶¹ *Id.* (describing how total return swaps function).

investor must compensate the bank for its losses.¹⁶² A bank has the right to issue a margin call if it senses risk increasing.¹⁶³ A margin call is a demand for more collateral to support the assets held by the bank.¹⁶⁴ If the investor fails to comply, the bank can sell the assets, which can potentially decrease their price.¹⁶⁵

Hwang's use of leverage increased his aggregate position size to an estimated \$100 billion despite the fact that Archegos had only \$20 billion worth of capital.¹⁶⁶ Interestingly, Hwang's use of total return swaps helped him avoid one of the only regulatory requirements that family offices face. Money managers with \$100 million or more invested in publicly traded securities are generally required to file a form 13F with the SEC that identifies the securities they own.¹⁶⁷ Form 13F reporting is a requirement imposed by the Securities Exchange Act (thus it is a requirement independent of the Advisers Act structure) and applies to all money managers exceeding the \$100 million assets under management threshold, even family

¹⁶² *Id.* (“If the underlying assets falter, the hedge fund must pay the bank an amount based on the negative returns plus the regular fees it has agreed to pay.”).

¹⁶³ Barry B. Cosgrave et al., *COVID-19: Crisis Management for End-Users of Swaps and Repos: Key Issues in Responding to Margin Calls and Early Termination Notices*, NAT'L L. REV. (Apr. 21, 2020), <https://www.natlawreview.com/article/covid-19-crisis-management-end-users-swaps-and-repos-key-issues-responding-to-margin> [https://perma.cc/NZ3K-UBFC] (“Once the secured party has determined that swap collateral or repo'd assets have decreased in value below the contractually agreed margin level, it may opt to issue a demand for additional collateral.”).

¹⁶⁴ *Id.* (describing margin calls in the swaps context).

¹⁶⁵ Webb et al., *supra* note 15 (“If the underlying assets falter, the hedge fund must pay the bank an amount based on the negative returns plus the regular fees it has agreed to pay.”).

¹⁶⁶ Robert Burgess, *The Number of the Week is \$100 Billion*, BLOOMBERG (Apr. 3, 2021, 5:30 PM), <https://www.bloomberg.com/opinion/articles/2021-04-03/the-number-of-the-week-is-100-billion> (“Estimates of the firm's total positions reached \$100 billion.”).

¹⁶⁷ Matthew Goldstein, *Archegos Left a Sparse Paper Trail for a \$10 Billion Firm*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/04/12/business/archegos-capital-management-SEC.html> (“Money managers with \$100 million or more in stocks are generally required to declare what securities they are invested in every quarter.”).

offices.¹⁶⁸ However, money managers are only required to report positions they actually own, which until very recently did not include positions they have exposure to via total return swaps because banks were the actual owners of the underlying securities.¹⁶⁹ In its eight-year history, Archegos never filed a form 13F, adding to the secrecy Hwang enjoyed until things went awry.¹⁷⁰

Hwang's appetite for total return swaps made him a favored client of Wall Street's largest banks. Estimates suggest that he paid more than \$100 million in fees a year to banks acting as his prime broker by executing swap agreements for him.¹⁷¹ Those fees were evidently sufficient to erase any qualms raised by the banks' risk-management teams about doing business with an investor only a few years removed from an SEC proceeding. Credit Suisse in particular enjoyed doing business with Hwang as it had been lending to him for years while he was running Tiger Asia and Archegos, while other banks remained wary of Hwang.¹⁷² By March 2021, Credit Suisse's exposure to investments made by Archegos had exceeded \$20 billion.¹⁷³ This represented almost half of its balance

¹⁶⁸ Daniel G. Berick et al., *Section 13(f)'s Disclosure Rules a Trap for Family Offices?*, LEXOLOGY (Aug. 2, 2021), <https://www.lexology.com/library/detail.aspx?g=985b69bc-8e55-464f-aadc-f9060c2626db> [<https://perma.cc/5Y28-WXX7>] (“Unlike the Advisers Act, Section 13(f) does not exempt family offices: with the result that a family office, even if it is exempt from registration under the Advisers Act, may nevertheless . . . be required to comply with the Form 13F filing requirements.”).

¹⁶⁹ Letter from Americans for Financial Reform, *supra* note 137 (“Total Return Swaps are a derivative that tracks the performance of a stock, but unlike stocks, they are not currently required to be disclosed on the Form 13F.”).

¹⁷⁰ Goldstein, *supra* note 166 (“Bill Hwang, did not publicly file such a document — called a 13F — in its eight-year history.”).

¹⁷¹ Schatzker, *supra* note 3 (“People familiar with the situation say [Archegos] was paying prime brokers tens of millions of dollars a year in fees, possibly more than \$100 million in total.”).

¹⁷² *Id.* (“Credit Suisse . . . had been doing business with Archegos for years, unperturbed by Hwang's brush with regulators.”).

¹⁷³ Emily Glazer et al., *Inside Credit Suisse's \$5.5 Billion Breakdown*, WALL ST. J. (Jun. 7, 2021), <https://www.wsj.com/articles/inside-credit-suisse-5-5-billion-breakdown-archegos-11623072713> (“Credit Suisse amassed more than \$20 billion of exposure to investments related to Archegos, equivalent to half the bank's equity cushion against potential losses.”).

sheet's equity cushion against potential losses.¹⁷⁴ It was joined by Nomura, Morgan Stanley, Goldman Sachs, and other well know prime brokers who had lent to Hwang.¹⁷⁵

The first domino to fall was a nine percent decline in the share price of ViacomCBS on March 23, 2021, after the company announced a stock split, followed by a twenty-three percent dip the following day.¹⁷⁶ The dramatic fall in price imperiled his swap contracts from the banks' perspectives because they were the entities actually owning the securities.¹⁷⁷ Because the value of Archegos' portfolio was tied to the value of the securities underlying its swap contracts, the risk that he would not be able to pay the banks what they were entitled under the agreements increased as the share prices fell.¹⁷⁸ The banks knew this and urged Hwang to sell his positions before the losses became too much, but he refused to take losses.¹⁷⁹ Two of his prime brokers, Morgan Stanley and Goldman Sachs, issued a margin call requesting that he post cash to assuage their concerns.¹⁸⁰ When Hwang failed to post the requested capital, these banks turned to their other recourse by taking possession of the

¹⁷⁴ *Id.* (Credit Suisse amassed more than \$20 billion of exposure to investments related to Archegos, equivalent to half the bank's equity cushion against potential losses . . .").

¹⁷⁵ Hugh Son, *How Goldman and Morgan Stanley Avoided Losses After Fund Meltdown Burned Nomura, Credit Suisse*, CNBC (Mar. 29, 2021), <https://www.cnbc.com/2021/03/29/goldman-morgan-stanley-avoided-losses-after-fund-meltdown-hit-nomura.html> [<https://perma.cc/Y8AS-3S3Y>] (listing banks with exposure to Archegos).

¹⁷⁶ Schatzker, *supra* note 3 ("[ViacomCBS] tanked 9% on Tuesday and 23% on Wednesday.").

¹⁷⁷ Robert Armstrong, *Archegos Debacle Reveals Hidden Risk of Banks' Lucrative Swaps Business*, FIN. TIMES (Apr. 1, 2021), <https://www.ft.com/content/fb364689-9b04-47cb-aba9-5eb15d1cea85> (describing how banks acting as the return player for a swap contract risk default on the swap contract if the counterparty is not sufficiently capitalized).

¹⁷⁸ *Id.* (describing how swap holders must pay their banks when the underlying security falls).

¹⁷⁹ Schatzker, *supra* note 3 ("A few bankers pleaded with [Hwang] to sell shares; he would take losses and survive, they reasoned, avoiding a default. Hwang refused . . .").

¹⁸⁰ Bloomberg Quicktake, *supra* note 138 (describing the requests for additional capital as Hwang's bets were failing).

securities and selling them to avoid further losses.¹⁸¹ They abruptly unloaded the shares of multiple companies in Hwang's portfolio, driving their prices down, further cratering the value of Archegos' portfolio.¹⁸² Credit Suisse and Nomura, on the other hand, failed to act quickly and were left holding the proverbial bag.¹⁸³ The mass selling of Hwang's positions depressed the value of all his holdings.¹⁸⁴ When it came time to pay the banks who were slow to act on what they were due, Archegos simply did not have the capital to do so.¹⁸⁵ After the dust settled, Credit Suisse was faced with losses of \$5.5 billion¹⁸⁶ and Nomura with losses of \$2.9 billion.¹⁸⁷

Archegos' implosion revealed holes in the risk-management programs of the nation's largest banks in a manner strikingly similar to the way the mortgage crisis did in 2008, which also centered around excessive and irresponsible lending by the nation's banking

¹⁸¹ *Id.* (describing how his bank counterparties began selling securities held on Hwang's behalf).

¹⁸² Son, *supra* note 174 (describing the fire sale of Archegos-held securities as big banks tried to avoid losses).

¹⁸³ *Id.* (describing Credit Suisse's and Nomura's decision to not sell Archegos-held securities).

¹⁸⁴ Elizabeth Dilts Marshall & Matt Schuffham, *TIMELINE – Diary of a meltdown: how the Archegos Capital fire sale went down*, REUTERS (Apr. 2, 2021),

<https://www.reuters.com/article/usa-markets-blocktrades-timeline/timeline-diary-of-a-meltdown-how-the-archegos-capital-fire-sale-went-down-idUSL1N2LS332> [<https://perma.cc/EVE2-PMH4>] (“Goldman Sachs came to an agreement with Archegos to sell a block of \$3 billion to \$4 billion worth of the securities that backed Hwang's positions . . . Goldman sold more than \$10.5 billion of shares in ViacomCBS, Baidu Inc and Tencent Music Entertainment Group, among others . . . Morgan Stanley offloaded \$8 billion worth of shares . . . Archegos' banks sold millions of stocks the companies had bet on, dragging down the media sector and others.”).

¹⁸⁵ *Id.* (“[B]y the time [Credit Suisse and Nomura] decided to start selling, the stocks had fallen too far to avert major losses.”).

¹⁸⁶ Glazer et al., *supra* note 172 (“Credit Suisse took a \$5.5 billion loss on Archegos, the largest related to that firm's collapse on Wall Street.”).

¹⁸⁷ Takashi Nakamichi & Takako Taniguchi, *Nomura Sticks to Global Goals After \$2.9 Billion Archegos Hit*, BLOOMBERG (Apr. 27, 2011, 2:11 AM), <https://www.bloomberg.com/news/articles/2011-04-27/nomura-takes-2-3-billion-hit-on-archegos-exits-most-positions> (“Nomura Holdings Inc. is pushing ahead with its global ambitions, unswayed by a \$2.9 billion hit from the implosion of Archegos Capital Management.”).

system.¹⁸⁸ Banks are supposed to utilize credit and reputational risk committees to vet clients and transactions and impose limits on how much could be lost from a single counterparty.¹⁸⁹ Greed undeniably influenced bank figures who were hungry for Archegos' fees as even Goldman Sachs, whose risk-management department had steadfastly refused to do business with Hwang for years, finally capitulated to those in its ranks who were lobbying to lift its ban in 2020.¹⁹⁰ Although Archegos' failure did not precipitate a market-wide meltdown, its effects are far reaching. In addition to the billions of dollars in bank losses, the share prices of ViacomCBS and Discovery – just two of the stocks Archegos was heavily invested in – remained battered for months, trading in ranges markedly below their price in March 2021.¹⁹¹

IV. Is Regulatory Reform on the Horizon?

A. Current Attitudes on Regulatory Reform

A number of politicians and commentators were quick to ask questions about and propose regulatory reform for the family office industry. On April 7, 2021, Senator Sherrod Brown, the chairman of

¹⁸⁸ Jack Ewing, *'It's Déjà Vu': Credit Suisse Faces a Big Loss From Familiar Troubles*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/business/credit-suisse-losses-archegos.html> (“[T]he eye-popping losses showed that increased scrutiny of lenders during the last decade has not stopped some of the same kinds of behavior that caused the collapse of Lehman Brothers in 2008, setting off a financial crisis and severe economic downturns in the United States”)

¹⁸⁹ Glazer et al., *supra* note 172 (describing the functions of risk management departments).

¹⁹⁰ Kinder & Lewis, *supra* note 7 (“Goldman Sachs took the longest to remove [Hwang] from its blacklist.”)

¹⁹¹ See Brian Langis, *Warner Bros. Discovery: A Streaming Giant In The Making*, SEEKING ALPHA (Sep. 28, 2021), <https://seekingalpha.com/article/4457558-warner-bros-discovery-a-streaming-giant-in-the-making> [<https://perma.cc/272E-AHYC>]; David Moadel, *Why ViacomCBS Deserves Apathetic Investors' Attention*, NASDAQ (Sep. 21, 2021), <https://www.nasdaq.com/articles/why-viacomcbs-deserves-apatetic-investors-attention-2021-09-21> [<https://perma.cc/D8XL-2JUE>] (noting the battered share prices of VIAC and DISCA late in the third quarter of 2021).

the Senate's Banking Committee requested information from some of the prime brokers that worked with Archegos to elicit information about what services they provide to family offices and how they review them.¹⁹² On May 3, 2021, congresswoman Maxine Waters, the chairwoman of the House Financial Services Committee (FSC), submitted draft legislation to that committee calling for an amendment to the Advisers Act limiting the Family Office Rule's applicability to family offices managing less than \$750 million in assets.¹⁹³ Dan Berkowitz, a commissioner of the Commodity Futures Trading Commission (CFTC) opined that regulation of family offices needs to be enhanced, noting that they can cause havoc in financial markets.¹⁹⁴ The SEC listed amendments to the Family Office Rule as one of its priorities for 2021.¹⁹⁵ Even the chief executive officer of Morgan Stanley suggested that reform may be a good thing by noting that "[b]etter information is always good in rooting out where potential problems can be" after observing that "the transparency and lack of disclosure relating to [family offices] is just different from the hedge fund institutions."¹⁹⁶

The most significant harbinger of regulatory reform to the family office industry to date is H.R. 4620, introduced by congresswoman Alexandria Ocasio-Cortez on July 22, 2021. The bill proposes to amend the Family Office Rule by limiting its

¹⁹² Henry Bregstein et al., *Family Offices Receive Increased Regulatory Scrutiny*, THE NAT'L L. REV. (Jun. 9, 2021), <https://www.natlawreview.com/article/family-offices-receive-increased-regulatory-scrutiny> [<https://perma.cc/U3WW-7NGJ>] (describing current sentiments regarding family office regulatory reform).

¹⁹³ Memorandum from the Majority Staff of the Comm. on Fin. Servs. to Members of the Comm. on Fin. Servs. (May 3, 2021), <https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-20210506-sd002.pdf> [<https://perma.cc/7GD2-B5KJ>] ("[T]his discussion draft would limit the use of the family office exemption to offices with \$750 million or less in assets under management.").

¹⁹⁴ Laurence Fletcher et al., *Archegos and the \$10TRN World of Family Offices*, FIN. REV. (Apr. 6, 2021, 12:15 PM), <https://www.afr.com/wealth/investing/archegos-and-the-10trn-world-of-family-offices-20210406-p57gtp> [<https://perma.cc/6XSE-7PAF>] ("Dan Berkowitz at the US Commodity Futures Trading Commission said oversight of family offices 'must be strengthened', noting that they 'can wreak havoc on our financial markets.'").

¹⁹⁵ Regulatory Flexibility Agenda, 80 Fed. Reg. 17,040, 17,045 (Mar. 31, 2021) (listing the SEC's regulatory agenda).

¹⁹⁶ Light & Supples, *supra* note 48.

applicability to any “covered family office,” a term that the bill defines as “a family office with less than \$750,000,000 in assets under management.”¹⁹⁷ The bill instructs the SEC to adopt this definition of “covered family office” by rule and further instructs it to exclude from the definition any person subject to a final SEC order for fraud, manipulation or deceit, and grants it the power to exclude from the definition any family office it determines is “highly leveraged or engaged in high-risk activities.”¹⁹⁸ Family offices with assets under management exceeding \$750 million would be able to avoid SEC registration as an investment adviser under a separate provision, but they would have to report information to the SEC as an exempt reporting adviser (ERA).¹⁹⁹ ERAs are a class of investment adviser created by Dodd-Frank that has historically included venture capital and other certain private funds.²⁰⁰ ERAs do not register as investment advisers but are required to file with the SEC certain parts of Form ADV, giving the SEC some insight into their operation.²⁰¹

A memorandum by the FSC explained the rationale for H.R. 4620 by noting that the billions of dollars of losses at some of the world’s largest banks caused by Archegos demonstrate “that family offices can be deeply interconnected with the rest of the financial markets and their activities could affect the stability of financial markets.”²⁰² Not everyone shares this opinion on the impact of family offices on systemic risk. Hester Peirce and Brian Quintenz, commissioners for the SEC and the CFTC respectively, opined that the “impact on the financial system of the Archegos-fueled losses

¹⁹⁷ H.R. 4620, 117th Cong. § 1 (2021) (amending the Family Office Rule).

¹⁹⁸ *Id.* (adding a leverage and fraud component to the Family Office Rule).

¹⁹⁹ Memorandum from the Majority Staff of the Comm. on Fin. Servs. to Members of the Comm. on Fin. Servs. (July 23, 2021), <https://financialservices.house.gov/uploadedfiles/hmkp-117-ba00-20210728-sd008.pdf> [<https://perma.cc/XP3L-NYVA>] (“Family offices with more than \$750 million assets under management (AUM) would have to register with the SEC as ‘exempt reporting advisers’”).

²⁰⁰ *Id.* (“Exempt reporting advisers, a category of registrants that was created by the Dodd-Frank Act . . .”).

²⁰¹ *Id.* (“ERAs are required to file limited sections of Form ADV with the SEC.”).

²⁰² *Id.* (“The recent meltdown of the Archegos Capital Management family office . . . demonstrated that family offices can be deeply interconnected with the rest of the financial markets and their activities could affect the stability of financial markets.”).

was zero” and that “even the most directly affected firms easily weathered the event.”²⁰³ Other reform opponents argue against regulation of family offices on the basis that requiring family offices to register with the SEC amounts to an invasion of privacy. In particular, Republican members of the FSC expressed their feeling that H.R. 4620 is “a partisan bill that would do nothing to protect consumers” and that it is an attempt by Democrats to “control how American investors manage their own family investments.”²⁰⁴

B. Discussion

Although the call for enhanced oversight of family offices is at a fever pitch, it is not clear that any substantive reform will result. H.R. 4620 is viewed as a partisan bill, and it is unlikely to become law given the current composition of the Senate.²⁰⁵ The SEC has the power under section 409 of Dodd-Frank to alter the applicability of the Family Office Rule by narrowing or restricting the definition of “family office.”²⁰⁶ The SEC is currently considering whether to make such a change.²⁰⁷ The current iteration of the Family Office Rule—unchanged since it was adopted in 2011—does not involve

²⁰³ Hester Peirce & Brian Quintenz, *Family Offices Don't Need New Regulations*, BLOOMBERG (June 24, 2021, 6:00 AM), <https://www.bloomberg.com/opinion/articles/2021-06-24/archegos-collapse-doesn-t-necessitate-new-family-office-rules>. (“Yet the systemic impact on the financial system of the Archegos-fueled losses was zero . . . Indeed, even the most directly affected firms easily weathered the event.”).

²⁰⁴ U.S. House Comm. on Fin. Servs. Republicans, TWITTER (June 24, 2021, 4:10 PM), <https://twitter.com/FinancialCmte/status/1420476903559938054> [<https://perma.cc/B44H-4UXW>].

²⁰⁵ Michael Drobac et al., *What Family Offices Need to Know About HR 4620, a Bill Requiring More Family Offices to Register With the SEC*, JDSUPRA <https://twitter.com/FinancialCmte/status/1420476903559938054>

<https://www.jdsupra.com/legalnews/what-family-offices-should-know-about-1640074/> [<https://perma.cc/QBM4-AA4G>] (“[T]he prospects for eventual Senate passage of HR 4620 are currently very slim.”).

²⁰⁶ Regulatory Flexibility Agenda, 80 Fed. Reg. 17,040, 17,045 (Mar. 31, 2021). (stating that the Commission may propose targeted amendments to the Family Office Rule so that family offices are excluded from the Act’s definition of investment advisor and not subject to provisions of the act).

²⁰⁷ *Id.* (“The Division is considering recommending that the Commission propose targeted amendments to the family office rule. . .”).

any assets under management or leverage component, as the proposed rule in H.R. 4620 does.²⁰⁸ The SEC could attempt to add such elements, but may be hamstrung to effect such significant change given that Dodd-Frank instructed it to define “family office” in a manner “consistent with the previous exemptive policy of the Commission,” which was historically quite liberal.²⁰⁹ While amending the definition of “family office” is certainly within the SEC’s authority, altering the definition so radically as to exclude a large number of entities from the definition of “family office” may result in challenges to the SEC’s rulemaking.

While none of the current proposed reform is certain to occur, the debate should focus on the extent to which family offices add systemic risk to the financial system. This was the same consideration that resulted in many private fund advisers having to register with the SEC after Dodd-Frank.²¹⁰ Although Archegos did not precipitate a Lehman Brothers-like meltdown of a systematically important financial institution, the argument that “even the most directly affected firms easily weathered the event” paints an unduly sanguine picture.²¹¹ Credit Suisse, a bank that is considered a systematically important financial institution,²¹² faced the largest losses.²¹³ An independent investigation commissioned by Credit Suisse’s board of directors concluded that the bank’s dealing with

²⁰⁸ H.R. 4620, 117th Cong. § 1 (2021) (imposing \$750 million threshold to definition of “covered family office”).

²⁰⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 409, 124 Stat. 1376, 1575 (2010). (finding that the rules issued by the commission under the Investment Advisers Act of 1940 shall provide an exemption that is in line with the previous policy).

²¹⁰ Kaal, *supra* note 90, at 166–67 (“Partly in reaction to the systemic risk concerns posed by the private fund industry, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act...”).

²¹¹ Pierce & Quintenz, *supra* note 202 (finding that even the most directly affected firms managed and survived the Archegos event).

²¹² FINANCIAL STABILITY BOARD, 2020 LIST OF GLOBAL SYSTEMICALLY IMPORTANT BANKS (G-SIBs) 1, 3 (2020), <https://www.fsb.org/wp-content/uploads/P111120.pdf> [<https://perma.cc/4TLG-2JLC>] (identifying Credit Suisse as a G-SIB).

²¹³ Margot Patrick, *Credit Suisse Failed to Act on Archegos Risks, Report Says*, WALL ST. J. (July, 29, 2021), <https://www.wsj.com/articles/credit-suisse-report-pins-archegos-disaster-on-fundamental-failure-of-management-and-controls-11627537722> (“Credit Suisse fared the worst among Archegos’s lending banks, with more than \$5.5 billion in losses.”).

Archehos exposed it to “potentially catastrophic” risk.²¹⁴ The report excoriates Credit Suisse for its “fundamental failure of management” and its “lackadaisical attitude towards risk and risk discipline,” laying the majority of the blame on the prime brokerage department.²¹⁵ Credit Suisse has undergone a significant overhaul of its risk management personnel, and may even close its investment banking division.²¹⁶ While other banks like Morgan Stanley and Goldman Sachs avoided significant losses by selling the securities tied to Hwang’s swap agreements at the first sign of trouble, the damage suffered by Credit Suisse alone should raise concern. Each prominent investment bank has a prime brokerage department that finances the activities of family offices and hedge funds, and the systemic risk that results from many highly leveraged private funds owing money to systematically important financial institutions has been noted before.²¹⁷ Given the influx of risk-loving investors into the family office world, it seems possible that a different prime brokerage, housed within a systematically important financial institution, will find itself on the wrong side of a bad bet made by a different family office, with no guarantee that the losses will not be larger and more consequential than the ones caused by Archehos.

²¹⁴ SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF CREDIT SUISSE, CREDIT SUISSE GROUP SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS REPORT ON ARCHEGOS CAPITAL MANAGEMENT 1–2 (2021). (“There were numerous warning signals – including large, persistent limit breaches – indicating that Archeho’s concentrated, volatile, and severely under-margined swap positions posed potentially catastrophic risk to CS.”).

²¹⁵ *Id.* (“The Archehos-related losses sustained by CS are the result of a fundamental failure of management and controls in CS’s Investment Bank, and specifically, in its Prime Services business. . . . The Archehos default exposed several significant deficiencies in CS’s risk culture, revealing a Prime Services business with a lackadaisical attitude towards risk and risk discipline.”).

²¹⁶ Rochelle Toplensky, *Credit Suisse Needs to Make Bold Changes*, WALL ST. J. (July 29, 2021, 11:36 AM), https://www.wsj.com/articles/credit-suisse-needs-to-make-bold-changes-11627572983?mod=article_inline (“The group’s investment bank is likely to be scaled back and could even be closed.”).

²¹⁷ Kaal, *supra* note 90, at 169 (“Others argued that private funds can create market events such as the [Long Term Capital Management] failure, which in turn can lead to global financial crises if many highly leveraged funds with illiquid portfolios are obligors of a small number of major financial institutions.”).

Reform opponents argue that a relatively few former hedge fund investors in the family office space do not warrant a regulatory overhaul.²¹⁸ They seem to cling to the original justification for the Family Office Rule—that the government should not interfere with families managing their own wealth.²¹⁹ Relatedly, opponents argue that family offices are not within the intended ambit of the Advisers Act. They argue that registration as an investment adviser is intended to prevent outside investors through the imposition of fiduciary duties and that no such protection is necessary when investors of a fund are all family members.²²⁰ Regulators, the argument goes, are not supposed to prevent sophisticated investors from pursuing their novel investment ideas.²²¹ In reality, registration as an investment adviser does not restrict an investment adviser’s investment decisions.²²² Moreover, most American families who seek professional management of their money do so, either directly or indirectly, through a registered investment adviser.²²³ The true justification for the Family Office Rule may be less about the scope of the Advisers Act than result of a successful lobbying effort by the

²¹⁸ Drobac et al., *supra* note 204 (“Yet, standing alone, the existence of some family offices with more aggressive investment strategies surely is not a sufficient reason to subject most family offices to the information disclosure, compliance expense and potential disclosure of proprietary trading strategies that comes with federal regulation.”)

²¹⁹ Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37,983 (June 22, 2011) (“[T]he exclusion’s underlying rationale that recognizes that the Advisers Act is not designed to regulate families managing their own wealth.”).

²²⁰ Pierce & Quintenz, *supra* note 202 (“The investment adviser registration and regulatory regimes focus on investor protection, with a specific emphasis on protecting outside investors through disclosures, fiduciary-duty obligations and reporting requirements. Such protections are unnecessary when the investors are all in the family.”).

²²¹ *Id.* (“[I]nvestment adviser regulatory regimes are not designed to prevent investors — particularly sophisticated investors — from the consequences of their poor investment decisions.”).

²²² See FRANCO & HARTMANN, *supra* note 60, at 183–190 (describing the diverse investment strategies that registered private funds are free to pursue).

²²³ See *id.* at 117 (identifying the categories of investment adviser that must register with the SEC that comprise the most common types of investment managers).

family office industry while Dodd-Frank was being crafted.²²⁴ Family offices had a financial incentive to avoid registration requirements as the costs of registration and the associated compliance costs are extensive.²²⁵ The SEC acknowledged in its adopting release of the Family Office Rule that it would result in tremendous costs savings to family offices.²²⁶ Cost savings to the world's wealthiest families hardly seem a compelling reason to let their private investment funds skirt regulatory oversight.

Even acknowledging that the original investment adviser regulatory framework was motivated by concerns that are not present in the family office context—the need for protection for outside investors—reform may still be appropriate. After all, the same rationale presumably justified the original exemption from registration for most private funds pre-Dodd-Frank because private fund advisers could be exempted from registration with the SEC as long as they dealt only with accredited investors, did not market themselves to the public, and constrained the resale of their securities.²²⁷ The exemption for private funds was ultimately superseded by countervailing concerns about systemic risk caused by private funds.²²⁸ While the debate over whether family offices add systemic risk will continue, the proposition that they should not be regulated because they involve a single family's money seems unreasonable. When banks are willing to supply billions of dollars of

²²⁴ Light & Supples, *supra* note 48 (“Family office representatives are . . . preparing for their biggest lobbying effort since they successfully avoided inclusion in tough new regulations following the 2008 financial crisis.”).

²²⁵ See Moehrke, et al., *supra* note 57 (“Registration as an investment adviser subjects a family office to additional regulatory requirements and operational expenses associated with complying with such requirements . . .”).

²²⁶ Family Offices, Investment Advisers Act Release No. IA-3220, 76 Fed. Reg. 37,983 (June 29, 2011) (“[T]he rule will benefit family offices, as defined by the rule, and their clients by eliminating the costs of seeking (and considering) individual exemptive orders.”).

²²⁷ Kaal, *supra* note 90, at 175 (listing the requirements to satisfy the now repealed private adviser exemption).

²²⁸ J.W. Verret, *Revisiting Title IV: Why Mandatory SEC Registration for Hedge-Fund Advisers is Not Necessary*, in THE CASE AGAINST DODD-FRANK: HOW THE “CONSUMER PROTECTION” LAW ENDANGERS AMERICANS 93 (The Heritage Found. 2016) (“Congress, motivated by systemic risk and investor-protection concerns, directed the SEC to reinstitute mandatory registration for most advisers to hedge funds and other private funds.”).

leverage to family office investors, which can be lost just as easily and quickly as their own family money, far more is on the line than a single family's net worth.

The easiest way to reform is for family offices to be subsumed by the existing investment adviser registration regime. Either by classifying family offices as an investment adviser or an ERA would subject them to enhanced reporting requirements. Registering as an investment adviser would cause family offices to file Form ADV and Form PF, mirroring the requirements imposed on hedge fund advisers after Dodd-Frank.²²⁹ Requiring Family offices to file Form ADV, Form PF or both depending on whether they are classified as registered investment advisers or ERAs would give the SEC and FSOC insight into their risky activities. The SEC could then work family offices into their examination routine and potentially identify concerning activity taking place in those firms. Fortunately, other options remain that may be less controversial. Regulators can amend reporting requirements that fall outside the investment adviser regulatory structure. For example, the SEC has already bolstered Form 13F requirements by requiring disclosure of total return swaps.²³⁰ Had this reform been in place prior to March 2021, Archegos' lenders would have been able to see that Archegos was invested in only a handful of stocks—an extremely risky portfolio—and may have declined to enter total swap agreements with Hwang.²³¹ Furthermore, the current SEC chairman has expressed his intention for the SEC to fulfill an uncompleted task required by Dodd-Frank that it establish databases to track the use of swaps and their underlying securities.²³² Such databases would allow

²²⁹ FRANCO & HARTMANN, *supra* note 60, at 120 (describing the reporting requirements that follow from registration as an investment adviser).

²³⁰ Melanie Waddell, *Why Family Offices Are in the SEC's Crosshairs*, THINKADVISOR (2021), <https://www.thinkadvisor.com/2021/04/26/why-family-offices-are-in-secs-crosshairs/> [<https://perma.cc/TK77-5EXV>] (“As part of Dodd-Frank, Congress charged the SEC and CFTC to regulate security-based swaps. That regulation is literally going into effect starting in August [2021].”)

²³¹ Goldstein, *supra* note 155 (describing how Archegos' portfolio was hidden because the firm did not file a form 13f).

²³² Akayla Gardner, *Gensler Says SEC Plans More Swaps Disclosures Post-Archehos*, BLOOMBERG (Sept. 15, 2021), <https://www.bloomberg.com/news/articles/2021-09-15/gensler-says-sec-plans-more-swaps-disclosures-post-archegos> (listing the Chairman's comments on potential swap disclosure reform).

financial regulators to monitor the use of these swaps and potentially identify reckless trades like the ones that sank Archegos.²³³

Alternatively, regulators could seek to limit the use of leverage by family offices and other private funds as they did to systematically important financial institutions in response to the 2008 crisis.²³⁴ This seems particularly appropriate in the family office context as individual investors are not allowed to buy securities with more than 50% of money borrowed on margin, and family offices are, in theory, extensions of an individual and their family members.²³⁵

V. Conclusion

Is the implosion of Archegos a one-off event, wherein one crafty investor manipulated the regulatory framework to obscure his risky trading activity? Or is it a sign that history is repeating itself, systemic risk is coursing through the financial system, and a financial crisis redux was narrowly avoided? The answer is somewhere in the middle. But two things are undeniable: Hwang's trading activity was reckless, and so was the willingness of the world's largest banks to lend to him. The Family Office Rule carved out an exception to the regulatory regime precisely because family offices were characteristically not reckless. Something has changed in the family office industry, and it is time for something to change in the regulation of family offices. Regulators need insight into the activities of family offices to monitor the systemic risk they inflict on the financial system. Archegos' collapse did not plunge the financial system into crisis, but that does not mean the next family office

²³³ *Id.* (“The SEC hasn’t completed a task required by the Dodd-Frank Act that it approve vast databases to track these derivatives, something lawmakers mandated to ensure watchdogs were keeping tabs on complex instruments that contributed to the 2008 financial crisis.”).

²³⁴ Celine Choulet, *Bank Debt Leverage: Ten Years Later*, BNP PARIBAS (Sept. 5, 2018), <https://economic-research.bnpparibas.com/html/en-US/Bank-debt-leverage-years-later-9/5/2018,31229> [https://perma.cc/BP7Y-SMNU] (“Following the 2007-2008 financial crisis, international regulators considerably strengthened the capital adequacy requirements for banks.”).

²³⁵ Schatzker, *supra* note 3 (“U.S. rules prevent individual investors from buying securities with more than 50% of the money borrowed on margin. No such limits apply to hedge funds and family offices.”).

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taking billion-dollar risks could not. As the saying goes, there is always a bigger fish.