

CFTC Extends Trade Option Reporting Deadline to April 1, 2016

The CFTC provides the market additional time to submit Form TO while considering further amendments to trade option reporting rules.

On February 18, 2016, the US Commodity Futures Trading Commission's (the CFTC) Division of Market Oversight (DMO) issued a no-action letter providing time-limited relief for end-users from the Form TO filing requirement under CFTC regulations (CFTC No-Action Letter 16-10).¹ Though CFTC rules require counterparties to file a Form TO with the CFTC annually on March 1, reporting otherwise unreported trade options for the previous calendar year, the CFTC in 2015 proposed eliminating the Form TO filing requirement (the Proposed Trade Option Rules).² While the CFTC is considering finalization of the Proposed Trade Option Rules, DMO will not recommend that the CFTC take enforcement action against a market participant that is neither a swap dealer (SD) nor a major swap participant (MSP) for failing to report its otherwise unreported trade options entered into during 2015 on Form TO.

The relief in CFTC No-Action Letter 16-10 will expire on **April 1, 2016**, effectively providing a one-month extension to the March 1 requirement.

Trade Options

Trade options are commodity options that, if exercised, would result in the sale of a non-financial commodity for immediate (*i.e.*, spot) or deferred (*i.e.*, forward) shipment or delivery. An instrument must meet the following conditions to qualify as a trade option:

- The offeror of such commodity option is either (i) an eligible contract participant (ECP)³ or (ii) a producer, processor or commercial user of, or merchant handling the commodity that is the subject of, the commodity option, or the products or by-products thereof (referred to as a commercial party), and is offering or entering into such commodity option for purposes related to its business as such.
- The offeree of such commodity option: (i) is a producer, processor or commercial user of, or a merchant handling the commodity that is the subject of, the commodity option, or the products or by-products thereof; and (ii) is offered or entering into the commodity option solely for purposes related to its business as such.
- Such commodity option is intended to be physically settled so that, if exercised, the option would result in the sale of an exempt commodity (*e.g.*, energy commodities)⁴ for immediate or deferred shipment or delivery.⁵

Like physically delivered nonfinancial forward contracts, trade options are exempt from most of the CFTC's regulatory requirements, but remain subject to reporting and recordkeeping requirements and certain other requirements (e.g., position limits).

Trade Options Reporting Requirement

Currently, trade options must be reported pursuant to the CFTC's regulatory reporting rules for swaps if either:

- One of the counterparties is a registered SD/MSP
- Neither of the parties to the trade option are SDs/MSPs, but at least one of the parties has been required to report non-trade option swaps during the previous 12 months

If neither party has been required to report non-trade option swaps during the previous 12 months, then each counterparty must: (i) file a Form TO with the CFTC, reporting each trade option entered into during the previous 12-month period; and (ii) notify the CFTC no later than 30 days after entering into trade options having an aggregate notional value in excess of US\$1 billion during any calendar year (\$1 Billion Notice).⁶ In a separate no-action letter (CFTC No-Action Letter 13-08), the CFTC provided relief to those end-users transacting in trade options, but were nevertheless not in compliance with Part 45 reporting requirements, if such end-users also satisfied the conditions of (i) and (ii) above.⁷

Proposed Trade Options Rule

On April 30, 2015, the CFTC published the Proposed Trade Options Rule, which would revise the existing trade option rules to reduce the reporting and recordkeeping requirements for entities that are not SDs or MSPs by, *inter alia*, eliminating the Form TO annual notice reporting requirement for otherwise unreported trade options.⁸ The Proposed Trade Options Rule has not yet been finalized.

CFTC No-Action Letter 16-10

Recognizing that the Proposed Trade Options Rule has not yet been finalized, the CFTC's DMO published CFTC No-Action Letter 16-10 on February 18, 2016, providing temporary relief from the Form TO annual notice reporting requirement (which would have been due by March 1, 2016) for otherwise unreported trade options entered into during 2015. Accordingly, non-SDs/MSPs have until April 1, 2016, to file Form TO with the CFTC, reporting these otherwise unreported 2015 trade options. This extension also applies to those relying on CFTC No-Action Letter 13-08.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

[Yvette D. Valdez](#)

yvette.valdez@lw.com
+1.212.906.1797
New York

[Brett M. Ackerman](#)

brett.ackerman@lw.com
+1.202.637.2109
Washington, D.C.

J. Ashley Weeks

ashley.weeks@lw.com
+1.212.906.4630
New York

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Endnotes

¹ *Time-Limited No-Action Relief for End Users from the Form TO Filing Requirement under § 32.3(b)(2) of the Commission's Regulations*, CFTC No-Action Letter 16-10 (Feb. 18, 2016), available at <http://www.cftc.gov/LawRegulation/CFTCStaffLetters/16-10> (CFTC No-Action Letter 16-10).

² Trade Options, 80 Fed. Reg. 26200 (proposed May 7, 2015) (proposing amendment of 17 C.F.R. pt. 32), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-05-07/pdf/2015-11020.pdf> (Proposed Trade Options Rule).

³ For a definition of "eligible contract participant", see 7 U.S.C. § 1a(18); 17 C.F.R. § 1.3(m).

⁴ For a definition of "exempt commodity," see 7 U.S.C. § 1a(20).

⁵ See 17 C.F.R. § 32.3(a).

⁶ See 17 C.F.R. § 32.3(b).

⁷ *Staff No-Action Relief from the Reporting Requirements of § 32.3(b)(1) of the Commission's Regulations, and Certain Recordkeeping Requirements of § 32.3(b), for End Users Eligible for the Trade Option Exemption*, CFTC No-Action Letter No. 13-08 (April 5, 2013), available at <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/13-08.pdf>.

⁸ See Proposed Trade Options Rule.