



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of  
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CFTC Letter 16-10  
No-Action  
February 18, 2016  
Division of Market Oversight

### **Time-Limited No-Action Relief for End Users from the Form TO Filing Requirement under § 32.3(b)(2) of the Commission's Regulations**

Commission regulation § 32.3 provides that commodity options that qualify as trade options are generally exempt from the swap requirements of the CEA and the Commission's regulations, subject to certain specified conditions. To qualify for the trade option exemption, a commodity option transaction must meet the following requirements: (1) the offeror is either an eligible contract participant ("ECP")<sup>1</sup> or a producer, processor, commercial user of, or merchant handling the commodity that is the subject of the commodity option transaction, or the products or byproducts thereof (a "commercial party") that offers or enters into the commodity option transaction solely for purposes related to its business as such; (2) the offeree is, and the offeror reasonably believes the offeree to be, a commercial party that is offered or enters into the transaction solely for purposes related to its business as such; and (3) the option is intended to be physically settled so that, if exercised, the option would result in the sale of an exempt or agricultural commodity<sup>2</sup> for immediate or deferred shipment or delivery.<sup>3</sup>

Pursuant to Commission regulation § 32.3(b)(1), the determination as to whether a trade option must be reported pursuant to the swaps reporting requirements of part 45 of the Commission's regulations is based on the status of the parties to the trade option and whether or not they have previously reported swaps to an appropriate swap data repository ("SDR") pursuant to part 45. If a trade option involves at least one counterparty (whether as buyer or seller) that has (1) become obligated to comply with the reporting requirements of part 45, (2) as a reporting party, (3) during the twelve month period preceding the date on which the trade option is entered into, (4) in connection with any non-trade option swap trading activity, then such trade option must also be reported pursuant to the reporting requirements of part 45. If only one counterparty to a trade option has previously complied with the part 45 reporting provisions, as described above, then that counterparty shall be the part 45 reporting counterparty for the

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<sup>1</sup> See 7 U.S.C. § 1a(18) (defining "eligible contract participant"); 17 C.F.R. § 1.3(m) (further defining "eligible contract participant").

<sup>2</sup> See 7 U.S.C. § 1a(20) (defining "exempt commodity" to mean a commodity that is not an agricultural commodity or an "excluded commodity," as defined in 7 U.S.C. § 1a(19)); 17 C.F.R. 1.3(zz)(defining "agricultural commodity"). Examples of exempt commodities include energy commodities and metals.

<sup>3</sup> See 17 C.F.R. § 32.3(a).

trade option. If both counterparties have previously complied with the part 45 reporting provisions, as described above, then the part 45 rules for determining the reporting counterparty will apply.<sup>4</sup>

To the extent that neither counterparty to a trade option has previously submitted reports to an SDR as a result of its swap trading activities as described above, then such trade option is not required to be reported pursuant to part 45. Instead, Commission regulation § 32.3(b)(2) requires that each counterparty to an otherwise unreported trade option (*i.e.*, a trade option that is not required to be reported to an SDR by either counterparty pursuant to § 32.3(b)(1) and part 45) complete and submit to the Commission an annual Form TO filing providing notice that the counterparty has entered into one or more unreported trade options during the prior calendar year.<sup>5</sup> Form TO requires an unreported trade option counterparty to: (1) provide its name and contact information; (2) identify the categories of commodities (agricultural, metals, energy, or other) underlying one or more unreported trade options which it entered into during the prior calendar year; and (3) for each commodity category, identify the approximate aggregate value of the underlying physical commodities that it either delivered or received in connection with the exercise of unreported trade options during the prior calendar year. Counterparties to otherwise unreported trade options must submit a Form TO filing by March 1 following the end of any calendar year during which they entered into one or more unreported trade options.

On May 7, 2015, the Commission published in the Federal Register a notice of proposed rulemaking to amend Commission regulation § 32.3,<sup>6</sup> including a proposed amendment that a Non-SD/MSP would no longer be required to report otherwise unreported trade options on Form TO.<sup>7</sup> The Commission further proposed to delete Form TO from appendix A to part 32.

While the Commission is considering the finalization of the proposed Trade Options Rule, DMO will not recommend that the Commission take enforcement action against a Non-SD/MSP for failing to report its otherwise unreported trade options entered into during 2015 on

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<sup>4</sup> On April 3, 2013, the Commission's Division of Market Oversight ("DMO") issued CFTC No-Action Letter No. 13-08 ("No-Action Letter 13-08") granting relief from certain conditions in the trade option exemption. *See* CFTC No-Action Letter No. 13-08 (Apr. 5, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrflettergeneral/documents/letter/13-08.pdf>. No-Action Letter 13-08 provides that DMO would not recommend that the Commission commence an enforcement action against a market participant that is neither a swap dealer nor a major swap participant (a "Non-SD/MSP") for failing to comply with the part 45 reporting requirements, as required by § 32.3(b)(1), provided that such Non-SD/MSP meets certain conditions. Those conditions include reporting such exempt commodity option transactions via Form TO and notifying DMO no later than 30 days after entering into trade options having an aggregate notional value in excess of \$1 billion during any calendar year. No-Action Letter 13-08 at 3-4. No-Action Letter 13-08 also grants relief from certain swap recordkeeping requirements in part 45 for a Non-SD/MSP that complies with the recordkeeping requirements set forth in § 45.2, provided that if the counterparty to the trade option at issue is an SD or an MSP, the Non-SD/MSP obtains a legal entity identifier ("LEI") pursuant to § 45.6. *Id.* at 4-5. The relief provided by No-Action Letter 13-08 is open-ended and remains applicable to trade option counterparties that are Non-SD/MSPs.

<sup>5</sup> *See* 17 C.F.R. § 32.3(b)(2). Form TO is set out in appendix A to part 32 of the Commission's regulations.

<sup>6</sup> Trade Options, Notice of Proposed Rulemaking, 80 FR 26200 (May 7, 2015), available at <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2015-11020a.pdf>.

<sup>7</sup> *See* 80 FR at 26203.

Form TO by April 1, 2016. Additionally, the relief provided by No-Action Letter 13-08 will continue to apply to a trade option counterparty that is a Non-SD/MSP, as long as the Non-SD/MSP reports its otherwise unreported trade options for 2015 on Form TO by April 1, 2016.

This letter, and the no-action position taken herein, represents the views of DMO only, and does not necessarily represent the positions or views of the Commission or of any other division or office of the Commission. The no-action position announced herein does not excuse Non-SD/MSPs from compliance with any other applicable requirements of the Act or the Commission's regulations thereunder. As with all no-action letters, DMO retains the authority to condition further, modify, suspend, terminate or otherwise restrict the terms of the no-action relief provided herein, in its discretion.

If you have any questions concerning this correspondence, please contact David Pepper, Special Counsel, Division of Market Oversight, at (202) 418-5565 or [dpepper@cftc.gov](mailto:dpepper@cftc.gov), or David Van Wagner, Chief Counsel, Division of Market Oversight, at (202) 418-5481 or [dvanwagner@cftc.gov](mailto:dvanwagner@cftc.gov).

Sincerely,

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