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CFTC No-Action Letter Relieves End-Users of Part 45 Reporting for Trade Options

On April 5, 2013, the Commodity Futures Trading Commission's (CFTC) Division of Market Oversight (DMO) provided end-users no-action relief (the No-Action Letter) from certain "trade option" reporting and recordkeeping obligations.¹ As a result of the Dodd-Frank Act, certain commodity options may now be subject to regulation as swaps.² However, under a CFTC interim final rule, a subset of these commodity options, called "trade options," may be exempt from most swap regulations.³ Accordingly, transactions qualifying for the trade option exemption (Trade Option Exemption) face less regulation than other swaps.⁴ One of the regulatory burdens that still would have applied to many trade option counterparties is the CFTC's Part 45 swap data reporting requirements.

DMO's No-Action Letter provides reporting and recordkeeping relief to market participants that are not swap dealers (SDs) or major swap participants (MSPs). (For purposes of this Alert, we call these market participants "end-users.") Specifically, the No-Action Letter provides relief from the Part 45 reporting requirements for end-user counterparties to transactions that meet the following conditions:

- The transaction qualifies for all other elements of the Trade Option Exemption (subject to any other applicable no-action relief);
- The end-user counterparty reports the transaction on Form TO⁵ pursuant to Rule 32.3(b)(2); and
- The end-user notifies DMO (at Toreportingrelief@cftc.gov) "no later than 30 days after entering into trade options having an aggregate notional value in excess of \$1 billion during any calendar year."⁶

¹ See CFTC Letter No. 13-08.

² See Further Definition of "Swap," "Security-Based Swap" and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, 77 Fed. Reg. 48,207 (Aug. 13, 2012).

³ See 17 C.F.R. § 32.3(a). Among other requirements, to qualify as a trade option, the offeree of the transaction must be a "producer, processor, or commercial user of, or a merchant handling the commodity that is the subject of the commodity option transaction, or the products or by-products thereof, and such offeree is offered or entering into the commodity option transaction solely for the purposes related to its business as such." Additionally, the "commodity option transaction must be intended to be physically settled, so that, if exercised, the option would result in the sale of an exempt or agricultural commodity for immediate or deferred shipment or delivery."

⁴ See 17 C.F.R. § 32.3(b) – (c).

⁵ Form TO is an annual report for trade options that are exercised in the prior calendar year. Under CFTC rules, counterparties to trade options may report certain trade options on Form TO in lieu of Part 45. However, as written, the rules foreclose the possibility of using Form TO if even one counterparty to the trade option must report pursuant to Part 45 for its nontrade option swap activity. The No-Action Letter essentially eliminates that limitation with respect to the trade option reporting obligations of non-SDs/MSPs.

⁶ The No-Action Letter explains that "[f]or purposes of this condition, the aggregate notional value of trade options entered into should be calculated by multiplying (1) the maximum volume of the commodities that could be bought or sold pursuant to the trade options entered into by (2) the fair market value ("FMV") of each such maximum volume. If the FMV is not a fixed number in the trade option agreement and, instead, is to be determined pursuant to a reference price source that is not determinable at the time of the trade option's execution, the foregoing calculation should be based on the value of the reference price source at the time of execution."

The No-Action Letter also clarifies the application of the Part 45 recordkeeping requirements for end-users trade options. In particular, if a transaction meets certain requirements, the No-Action Letter provides limited relief from some recordkeeping obligations. To rely on the limited recordkeeping relief, the transactions must meet the following conditions:

- The transaction qualifies for all other elements of the Trade Option Exemption (subject to any other applicable no-action relief);
- If the end-user's counterparty to the trade option is an SD or MSP, the end-user must obtain a legal entity identifier (LEI) and provide it to the SD or MSP counterparty; and
- The end-user notifies DMO (at TOreportingrelief@cftc.gov) "no later than 30 days after entering into trade options having an aggregate notional value in excess of \$1 billion during any calendar year."⁷

7 *Id.*