

# Derivatives Alert

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## CFTC Eliminates End-User Trade Option Reporting Requirements and Addresses Applicability of Position Limits

The Commodity Futures Trading Commission (CFTC or Commission) adopted a final rule effective March 21, 2016,<sup>1</sup> that eliminates the reporting and recordkeeping requirements under the CFTC's existing trade option exemption for counterparties that are neither swap dealers (SDs) nor major swap participants (MSPs) (these non-SD/MSP counterparties are referred to herein as "commercial end-users").<sup>2</sup>

In 2012, the Commission determined that certain options on physical commodities were swaps, but it exempted qualifying trade option transactions from most swap requirements in the Commodity Exchange Act and CFTC regulations.<sup>3</sup> However, trade options remained subject to the CFTC's Part 45 recordkeeping and reporting rules, subject to an exception from the reporting requirements where neither counterparty to a trade option had been required to report any other kind of swap under Part 45 during the prior 12-month period.<sup>4</sup> Instead, the counterparties were permitted to file annually with the CFTC Form TO. In 2013, CFTC staff issued a no-action letter that effectively extended the option of filing Form TO in lieu of complying with Part 45 reporting requirements for commercial end-user counterparties, regardless of whether a counterparty had been required to report a nontrade option swap under Part 45 during the prior 12-month period.<sup>5</sup>

The final rule expands upon the relief provided in the CFTC's 2013 no-action letter by eliminating altogether the requirement for commercial end-users to report trade options, whether on Form TO or pursuant to Part 45.<sup>6</sup> Commercial end-users also are no longer required to comply with Part 45 recordkeeping requirements in connection with trade

<sup>1</sup> See [Trade Options](#), 81 Fed. Reg. 14966 (March 21, 2016).

<sup>2</sup> Trade options are physically settled over-the-counter options on most deliverable commodities (e.g., agricultural, energy or metals) where the buyer is a producer, processor, commercial user or merchant of the commodity underlying the option. See 17 CFR § 32.3(a). The CFTC describes trade options as "generally a commodity option purchased by a commercial party that, upon exercise, results in the sale of a physical commodity for immediate (spot) or deferred (forward) shipment or delivery." See "[CFTC Form TO \(Unreported Trade Options\)](#)," CFTC.gov.

<sup>3</sup> See [Commodity Options](#), 77 Fed. Reg. 25320 (April 27, 2012).

<sup>4</sup> See 17 CFR § 32.3(b).

<sup>5</sup> See [CFTC Letter No. 13-08](#) (April 5, 2013). The no-action letter also narrowed the scope of Part 45 recordkeeping requirements for commercial end-users if certain criteria was satisfied. For more information on this no-action letter, see April 8, 2013, client alert, "[CFTC No-Action Letter Relieves End-Users of Part 45 Reporting for Trade Options](#)."

<sup>6</sup> The CFTC did not adopt a proposed requirement that would have required a commercial end-user to notify the CFTC if its annual trade options activities were valued at more than \$1 billion. See final rule, 81 Fed. Reg. at 14969-70.

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option activities, except that a commercial end-user engaging in trade options with an SD or MSP must continue to obtain and provide a legal entity identifier to the SD or MSP.<sup>7</sup> The final rule also continues to subject all trade option counterparties, including commercial end-users, to CFTC swaps large trader reporting obligations and the CFTC's anti-fraud provisions.<sup>8</sup>

Notably, in response to questions about whether the CFTC will apply its pending position limits proposal to trade options in the

future, the Commission stated “that federal speculative position limits should not apply to trade options” and that the Commission intends to address the matter in the context of the pending proposal.<sup>9</sup> Similarly, the final rule deletes a provision from the existing trade option exemption that would have subjected trade options to the CFTC's Part 151 position limits rules. The CFTC considered this to be a technical amendment because Part 151 was vacated in 2012 before ever becoming effective.<sup>10</sup>

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<sup>7</sup> See *id.* at 14970-71.

<sup>8</sup> See 17 CFR § 32.3(c)(3). The final rule does not eliminate other requirements applicable only to SDs and MSPs that are counterparties to trade options.

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<sup>9</sup> See final rule, 81 Fed Reg. at 14971.

<sup>10</sup> See *id.* The CFTC also noted that the existing Part 150 position limits for certain agricultural commodities do not apply to trade options. *Id.*