

info@spiegelmc

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CLIENT ALERT: CFTC STAFF PROVIDES NO-ACTION RELIEF FROM MARCH 1, 2016 DEADLINE FOR FORM TO REPORTING FOR OTHERWISE UNREPORTED TRADE OPTIONS

The Commodity Futures Trading Commission (“CFTC”) staff released on February 18, 2016 a notice of no-action relief¹ for end users (entities that buy and sell power as part of their underlying business) that would otherwise have to file a Form TO on March 1, 2016 for otherwise unreported options.

Background

CFTC Regulation 32.3(b)(2)² requires that each counterparty to an otherwise unreported trade option submit a Form TO annually, on March 1, reporting those trade options. In shorthand terms, a trade option is a contract with optionality in the price or delivery term that is entered into between commercial parties in the course of their normal businesses who intend the transaction to go to physical delivery.³ If either or both of the parties to such a transaction are a swap dealer or a major swap participant, that party is required to report the option under a more rigorous standard.⁴ If neither party so qualifies, the trade option is “otherwise unreported.” In general, these otherwise unreported trade options tend to be transactions between end users in the electricity business.

On May 7, 2015, the CFTC issued a Notice of Proposed Rulemaking (“NOPR”) that proposed, among other things, to do away with the obligation for Form TO reporting for these otherwise unreported transactions among commercial end users.⁵ The Commission has not yet issued a final rule on that part of the NOPR. However, entities who were uncertain whether or not they should prepare and

¹ CFTC Div. of Mkt. 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, CFTC Letter 16-10 (Feb. 18, 2016), <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/16-10.pdf>.

² 17 C.F.R. § 32.3(b)(2).

³ 17 C.F.R. § 32.3(a).

⁴ 17 C.F.R. § 32.3(b)(1).

⁵ Trade Options, 80 Fed. Reg. 26,200 (proposed May 7, 2015) (to be codified at 17 C.F.R. pt. 32).

submit Form TOs for the March 1 deadline, now a little over a week away, had been inquiring at the Commission as to what they should do. It appears that these inquiries have elicited a response.

The No-Action Letter

The No-Action Letter states that CFTC staff will not recommend that the Commission undertake enforcement action against an entity that is not a swap dealer or major swap participant for failing to report its otherwise unreported trade options by means of a Form TO by the March 1 deadline. The letter is valid until April 1, 2016. The letter does not mean that the Commission has reached a decision on what to do about the Form TO reporting obligation in the NOPR, but it might indicate that the Commission is inclined to reach such a conclusion, and that it hopes to do so before April 1, 2016. Obviously, affected entities should keep an eye on this space for further developments. If the Commission does not eliminate the obligation for some reason, it is likely that a later deadline for this year would be announced. For the time being, however, utilities that may have been scrambling to complete their Form TOs can relax.

We note that the information contained in this memorandum is highly simplified for general reading and is not intended as legal advice for any specific situation. Please do not hesitate to contact one of the attorneys listed below if you would like advice or additional information.

FOR ADDITIONAL INFORMATION, PLEASE CONTACT THE FOLLOWING SPIEGEL ATTORNEYS:

Lisa Dowden	202.879.2046	lisa.dowden@spiegelmc.com
Rebecca Baldwin	202.879.4088	rebecca.baldwin@spiegelmc.com

www.spiegelmc.com