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In this issue:

CLIENT ALERT: CFTC FINAL RULE ELIMINATES TRADE OPTIONS REPORTING ON FORM TO

On March 16, 2016, the Commodity Futures Trading Commission (“CFTC”) issued a final rule¹ that provides meaningful relief for those of you who engage in trade options (or suspected trade options) in the course of business. The final rule eliminates the requirement that entities that are not Swap Dealers or Major Swap Participants² file an annual Form TO disclosing otherwise-unreported trade options. The rule also provides relief from certain other recordkeeping and reporting requirements related to trade options. The final rule is effective today, March 21.

The Final Rule

The final rule adopts the CFTC’s May 7, 2015 proposals³ to:

- **Eliminate the Form TO Filing Requirement (81 Fed. Reg. at 14,969)**
 - The final rule eliminates any necessity for a Non-Swap Dealer/Major Swap Participant (“Non-SD/MSP”) to file a Form TO.⁴ Previously, some commercial users were required to file a Form TO by March 1 of each year to report previously unreported trade options or suspected trade options to the CFTC.⁵ Even some who ultimately determined they were not required to file the Form TO were obliged to undertake a time-consuming annual review of transactions to assess potential reporting obligations. This relief alone is significant.
- **Eliminate Part 45 Reporting for Non-SD/MSPs (81 Fed. Reg. at 14,969)**
 - The CFTC amended its rules such that a Non-SD/MSP “will under no circumstances be subject to part 45 reporting requirements with respect to its trade option activities.” The previous rule required that a Non-SD/MSP counterparty to a trade option that has become

¹ Trade Options, 81 Fed. Reg. 14,966 (Mar. 21, 2016) (to be codified at 17 C.F.R. pt. 32), <https://www.gpo.gov/fdsys/pkg/FR-2016-03-21/pdf/2016-06260.pdf>; see also *CFTC Approves Final Rule to Amend the Trade Option Exemption by Eliminating Certain Reporting Requirements for End-Users*, CFTC (Mar. 16, 2016), www.cftc.gov/PressRoom/PressReleases/pr7343-16.

² Most Spiegel clients are neither Swap Dealers (“SDs”) nor Major Swap Participants (“MSPs”).

³ Trade Options, 80 Fed. Reg. 26,200 (proposed May 7, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-05-07/pdf/2015-11020.pdf>.

⁴ SD/MSPs must report trade options as swaps, and thus are not affected by the elimination of Form TO.

⁵ As noted in our alert dated February 18, 2016, this year CFTC staff issued a no-action letter postponing the deadline for filing Form TO. That no-action letter is now vacated, since Form TO is no longer required.

obligated to report a non-trade option swap within the past calendar year comply with part 45 reporting requirements.

- **Modify the Recordkeeping Requirements for Non-SD/MSPs (81 Fed. Reg. at 14,970-71)**
 - The final rule goes farther than the proposal, deleting the requirement that trade option counterparties who are not SD/MSPs comply with the recordkeeping requirements of part 45 (as otherwise applicable to any swap), with the exception that they must obtain a Legal Entity Identifier (“LEI”) which they provide to their counterparty, if that counterparty is an SD/MSP. The CFTC notes that it “expects that Non-SD/MSPs maintain records concerning their trade option activities in the ordinary course of business.”

In addition to the relief noted above, the preamble to the final rule contains encouraging language stating that the CFTC does not believe that federal speculative position limits should apply to trade options. 81 Fed. Reg. at 14,971. The CFTC has been struggling with whether or how to promulgate a rule on commodity position limits. While most of our clients do not trade enough to be covered by position limit rules, the inclusion of trade options would make the scope of such a rule much wider. While this is not a guarantee, the CFTC indicated that if and when it issues a proposed rule on position limits, it expects to propose that trade options be excluded. The CFTC also rejected certain proposed notice provisions that would have been an alternative means of reporting trade options, finding that the relief provided by the final rule “would be more meaningful” if non-SD/MSPs are not required to classify, value, and track their trade options in order to comply with a \$1 billion notice requirement. 81 Fed. Reg. at 14,970. In light of the burdens the requirement would impose, and the “relatively limited use of such data” to the CFTC, the final rule does not adopt a \$1 billion notice provision. *Id.*

The bottom line is that so long as your transactions containing optionality qualify as trade options,⁶ your obligations (so long as you are not an SD/MSP) are limited to providing an LEI number when you transact with counterparties that are SD/MSPs and keeping records of transactions as you would in the normal course of business.

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:

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⁶ I.e., the offeror is an Eligible Contract Participant or a producer, processor or commercial user of or merchant handling the commodity for purposes solely related to its business as such; 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 the option is intended to be physically settled and, if exercised, would result in the sale of an exempt or agricultural commodity for immediate shipment or deferred shipment or delivery. 7 U.S.C. § 1a and 17 C.F.R. § 32.3(a).