

# Client Update

## Further Extension of No-Action Relief from Certain Reporting Requirements Under the Ownership and Control Final Rule

### NEW YORK

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On April 8, 2016, the Division of Market Oversight (“DMO”) of the Commodity Futures Trading Commission (the “CFTC”) issued a time-limited no-action letter (“Letter 16-32”)<sup>1</sup> and related guidance relating to the Ownership and Control Final Rule (the “OCR Final Rule”), adopted in 2013 to enhance the CFTC’s identification of futures and swaps market participants.<sup>2</sup> Letter 16-32 replaces a prior no-action letter issued by DMO in September 2015 (the “2015 Letter”),<sup>3</sup> further extending the existing no-action relief from certain reporting requirements under Parts 17, 18 and 20 of the CFTC regulations that were added by the OCR Final Rule, and grants additional substantive no-action relief to address certain reporting issues.

On the same day, DMO issued another time-limited no-action letter (“Letter 16-33”) permitting parties with reporting obligations on OCR Forms 102A and 102B to mask certain identifying information, subject to certain conditions and for a limited duration.

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<sup>1</sup> CFTC Letter No. 16-32, dated April 8, 2016, available at: <http://www.cftc.gov/PressRoom/PressReleases/pr7358-16>.

<sup>2</sup> CFTC, “Ownership and Control Reports, Forms 102/102S, 40/40S, and 71; Final Rule,” 78 Fed. Reg. 69178 (Nov. 18, 2013), available at: <https://www.federalregister.gov/articles/2013/11/18/2013-26789/ownership-and-control-reports-forms-102102s-4040s-and-71>.

<sup>3</sup> CFTC Letter No. 15-52, dated September 28, 2015. The 2015 Letter, in turn, extended the same relief from certain reporting initially provided in a 2014 DMO no-action letter (CFTC Letter No. 14-95).

## OWNERSHIP AND CONTROL FINAL RULE

The OCR Final Rule requires submission of trader identification and market participant data on updated Form 102 (“New Form 102”) (comprised of three parts), updated Form 40 (“New Form 40”) and entirely new Form 71 (“New Form 71”). These new and updated forms require the reporting of the following information:

- New Form 102A, a position-based reporting form, requires reporting of both special accounts and the trading accounts of which they are comprised;
- New Form 102B, an entirely new form introduced by the OCR Final Rule, requires reporting of trading accounts that exceed a threshold volume during a single trading day (“volume threshold accounts”), regardless of whether the positions remain open at the end of the day;
- New Form 102S, which has been updated to facilitate electronic submission, requires position-based reporting of consolidated accounts in the swaps market;
- New Form 40/40S is sent by the CFTC to reporting traders via special calls to collect identifying information regarding traders; and
- New Form 71 is sent by the CFTC via special calls to collect additional information on omnibus volume threshold accounts identified on New Form 102B.

## LETTER 16-32

There are two components to the relief provided in Letter 16-32.

The first component extends no-action relief under the 2015 Letter for parties required to report on certain OCR forms under the OCR Final Rule (“Reporting Parties”). Specifically, the relief from the requirement to submit New Forms 102A, 102B (with respect to designated contract market (“DCM”) volume threshold accounts) and 102S will now extend to September 28, 2016, and the relief for New Forms 40/40S and 71 will now extend to November 17, 2016, in each case subject to certain conditions.

The second component provides new substantive no-action relief with respect to certain OCR reporting issues relating to New Forms 102A, 102B and 102S, subject to certain conditions. With respect to New Form 102B reporting requirements relating to trading on swap execution facilities (“SEFs”), DMO notes that it will use the additional five-month relief period to consider whether

to recommend that the CFTC pursue changes to the OCR Final Rule as it pertains to SEFs.

### **Extension of Existing No-Action Relief**

The relief is described in detail below and is subject to the condition that during the relief period Reporting Parties continue to report via the Legacy OCR forms<sup>4</sup> in accordance with the reporting requirements in place prior to the implementation of the OCR Final Rule.

#### *New Form 102A*

DMO will not recommend that the CFTC commence an enforcement action against a Reporting Party (in this case, a futures commission merchant (“FCM”), clearing member or foreign broker) for failure to report via New Form 102A, as required by Part 17 of the CFTC regulations, until 11:59 p.m. on September 28, 2016,<sup>5</sup> subject to the requirement that the Reporting Party continues to report via Legacy Form 102 until such date, in compliance with the reporting practice that was in place prior to the implementation of the OCR Final Rule, as set forth below, and in accordance with the instructions in Appendix A of Letter 16-32.<sup>6</sup>

- Within three business days of date on which the special account is first reported to the CFTC (the “Special Account Reporting Date”), the Reporting Party must submit Legacy Form 102 with the information in paragraphs (a) through (f) of Appendix A;
- On call by the CFTC or its designee, the Reporting Party must identify the special account type specified by items 1(a)-(c) of such form, and the name and location of the person to be identified in item 1(d), and submit such data on the Special Account Reporting Date;
- The Reporting Party must file an updated Legacy Form 102 within three business days after any change in the information required under paragraph (b) of Appendix A that causes a previously filed Legacy Form 102 for a special account to become inaccurate; and

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<sup>4</sup> Forms 102 and 40 (including 102S and 40S filings) as they existed prior to the OCR Final Rule are referred to in Letter 16-32 and in this client memorandum as “Legacy” forms and filings—i.e., Legacy Form 102, Legacy 102S Filing, Legacy Form 40 and Legacy 40S Filing.

<sup>5</sup> All times referred to in this client memorandum are in Eastern Time.

<sup>6</sup> A copy of the Legacy Form 102 is available on the CFTC website, at: <http://www.cftc.gov/Forms/ssLINK/cftcform102>.

- Unless determined otherwise by the CFTC, reporting markets that list exclusively self-cleared contracts must submit an updated Legacy Form 102.

#### *New Form 102B*

Subject to the conditions described above for New Form 102A submissions (including the requirement to continue reporting via Legacy Form 102) and the conditions described below for New Form 102S submissions (including the requirement to continue reporting via Legacy 102S Filing), DMO will not recommend that the CFTC commence an enforcement action against a Reporting Party for failure to report DCM volume threshold accounts via New Form 102B, as required by Part 17, until 11:59 p.m. on September 28, 2016.

#### *New Form 102S*

DMO will not recommend that the CFTC commence an enforcement action against a Reporting Party (in this case, a “reporting entity” as defined in CFTC regulation 20.1)<sup>7</sup> for failure to report via New Form 102S, as required by Part 20, until 11:59 p.m. on September 28, 2016, subject to the requirement that the Reporting Party continues to report via Legacy 102S Filing until such date, in compliance with the Legacy 102S reporting practice that was in place prior to the implementation of the OCR Final Rule, as set forth below.

- Within three days of a counterparty consolidated account becoming reportable, or when instructed by the CFTC, a reporting entity must submit a 102S filing with the counterparty’s name and contact information and a brief description of its paired swaps and swaptions; and
- While a reporting entity may submit a Legacy 102S Filing only once for each counterparty (even if such persons at various times have multiple reportable positions), it must update a Legacy 102S Filing if the information provided is no longer accurate.

Reporting Parties submitting New Form 102S during the testing period must provide, in addition to the data required on New Form 102S, the name and contact information of the reportable counterparty. The CFTC’s Office of Data and Technology (“ODT”) staff will provide additional information on the CFTC’s

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<sup>7</sup> CFTC regulation 20.1 defines “reporting entity” as (1) a clearing member or (2) a swap dealer in one or more paired swaps or swaptions (as defined in section 1a of the Commodity Exchange Act and the CFTC regulations).

“Ownership and Control Reporting” homepage (“OCR homepage”)<sup>8</sup> regarding the time and manner for reporting such information during the testing period.

#### *New Forms 40/40S*

Subject to the conditions below, DMO will not recommend that the CFTC commence an enforcement action against a Reporting Party that is required to report on New Form 40 (or 40S) (a “Reporting Trader”) for failure to do so, as required by Part 18 (or CFTC regulation 20.5(b)), until 11:59 p.m. on November 17, 2016.

This relief is subject to the requirement that the Reporting Trader continues to report via Legacy Form 40 (or the legacy 40S filing) until such date, in compliance with the Legacy Form 40 reporting practice that was in place prior to the implementation of the OCR Final, and in accordance with the instructions in Appendix B to Letter 16-32.

#### *New Form 71*

Letter 16-32 provides that DMO will not recommend that the CFTC commence an enforcement action against a Reporting Party for failure to report via New Form 71, as required by Part 17, until 11:59 p.m. on November 17, 2016.

#### *Testing of Electronic Reporting Methods*

In order to rely on any of the foregoing no-action relief, during the period prior to the expiration of the relief, Reporting Parties are expected to cooperate with ODT staff as requested to test and implement any information technology standards or systems associated with the OCR Final Rule. During this testing period, Reporting Parties must provide (1) Production Grade test data and any other form filings requested by ODT staff, in the form and manner described on the OCR homepage, and (2) status reports on their implementation efforts upon request by ODT or DMO. DMO advises Reporting Parties to check the CFTC’s OCR homepage on a regular basis during the relief period to review updated testing requirements.

#### *Cooperation of Customers and Counterparties*

DMO notes that since the cooperation of Reporting Parties’ customers and counterparties is essential to the implementation of the OCR Final Rule, DMO expects such customers and counterparties to promptly provide responsive OCR

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<sup>8</sup> The OCR homepage is available at: <http://www.cftc.gov/Forms/OCR/index.htm>.

data to Reporting Parties upon request. DMO advises Reporting Parties to consider furnishing their customers and counterparties with either a copy of Letter 16-32 or a previously issued DMO advisory regarding OCR reporting,<sup>9</sup> to help ensure their customers and counterparties comply with their requests in a timely manner.

### **New Substantive No-Action Relief**

In addition to extending existing no-action relief, Letter 16-32 also grants additional time-limited no-action relief to address certain reporting issues.

#### *No-Action Relief Expiring September 28, 2017*

Subject to the testing and other conditions described below, from 12:00 a.m. on September 29, 2016 (the day after the relief described above for New Forms 102A, 102B and 102S is scheduled to expire) until 11:59 p.m. on September 28, 2017, DMO will not recommend that the CFTC commence an enforcement action against a Reporting Party for failure to report:

- the name and address of the trading account controller in Question 10(iii) of Form 102A; or
- the name and address of the DCM volume threshold account controller in Question 6 of Form 102B,

in each case, if the Reporting Party, in lieu of reporting such data, reports to the CFTC that a client will not provide this information or that the Reporting Party does not believe the information provided by the client meets the requirements of the OCR Final Rule (as described in the Technical Guidance Document available on the CFTC's OCR homepage).<sup>10</sup>

In order to rely on this relief, a Reporting Party must provide to DMO, upon request, a list of clients (including their phone numbers and address) that have not provided such information to such Reporting Parties.

#### *No-Action Relief Expiring August 29, 2018*

Subject to the testing condition described below, from 12:00 a.m. on September 29, 2016 (or, in the case of SEF volume threshold accounts, from the date of

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<sup>9</sup> See CFTC Staff Advisory No. 15-14 (Mar. 23, 2015), available at: <http://www.cftc.gov/PressRoom/PressReleases/pr7139-15>.

<sup>10</sup> The Technical Guidance Document provides information technology standards for the automated reporting of OCR information.

Letter 16-32) until 11:59 p.m. on August 29, 2018, DMO will not recommend that the CFTC commence an enforcement action against a Reporting Party for:

- Failure to report the various contact fields related to the trading account controller in Question 10(iii) of Form 102A (including phone number, job title, relationship to owner, email address, NFA ID and the employer's name, NFA ID and legal entity identifier ("LEI"));
- Failure to report the various contact fields related to the DCM volume threshold account controller in Question 6 of Form 102B (including phone number, job title, relationship to owner, email address, NFA ID and the employer's name, NFA ID and LEI);
- Modifying the information previously reported for the names of trading account owners in Question 10(ii) and trading account controllers in Question 10(iii) of Form 102A, up to 9 a.m. on the third business day after the Special Account Reporting Date, provided such information is initially reported by 9 a.m. on the business day after the Special Account Reporting Date;
- Modifying the information previously reported for the names of DCM volume threshold account owners and controllers in Questions 5 and 6 (respectively) of Form 102B, up to 9 a.m. on the third business day after such account becomes reportable, provided such information is initially reported by 9 a.m. on the business day after such account becomes reportable;
- Failure to report on Form 102B based on a reportable trading volume level of 50 contracts, provided the Reporting Party instead reports on Form 102B based on a reportable trading volume level of 250 or more contracts per day from September 29, 2016 until September 28, 2017, and a trading volume of 100 or more contracts a day thereafter until August 29, 2018.
- Failure to report SEF volume threshold accounts via New Form 102B;<sup>11</sup> or
- Failure to report on New Form 102S: (1) the name of the omnibus account originators and related address and contact fields in Question 3(ii) and (2) all consolidated account owner and controller fields in Questions 3(iii) and (iv), provided the Reporting Party identifies the consolidated account counterparty and reports all required 102S information via the new automated methods introduced by the OCR Final Rule.

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<sup>11</sup> DMO has granted this relief due to certain practical limitations regarding the reportable trading volume level under Part 15 for SEF volume threshold accounts. As noted above, DMO staff will use this relief period to consider whether to recommend that the CFTC pursue changes to the OCR Final Rule as it pertains to SEFs.

### *Testing Condition for New Substantive Relief*

During the no-action relief periods described above, Reporting Parties are expected to cooperate with ODT staff as requested to test and implement any information technology standards or systems associated with the OCR Final Rule, including by providing “Production Grade” test data and any other form filings requested by ODT staff, in the form and manner described on the CFTC’s OCR homepage. In addition, Reporting Parties are expected to provide status reports on their implementation efforts upon request by ODT or DMO and to check the OCR homepage on a regular basis to review testing requirements.

### **No-Action Letter 16-33**

Letter 16-33 temporarily permits Reporting Parties to mask certain identifying information on New Forms 102A and 102B that may be subject to foreign privacy statutes or regulations, subject to certain conditions.

Specifically, Letter 16-33 provides that from the date of such letter until either (1) such time as the Reporting Party no longer holds a reasonable belief that a regulatory or statutory prohibition precludes it from reporting the relevant information or (2) March 1, 2017, DMO will not recommend that the CFTC commence an enforcement action against a Reporting Party for failure to report Form 102A Identifying Information or Form 102B Identifying Information (as defined in Appendix A), provided the Reporting Party has:

- Formed a reasonable belief<sup>12</sup> that statutory or regulatory prohibitions in a foreign jurisdiction preclude the Reporting Party from reporting such information;
- Submitted a written request to the relevant foreign regulator or governing authority that (1) describes the Reporting Party’s reporting obligations with respect to such information at issue, (2) requests that the foreign regulator or governing authority specifically identify any statutes or regulations that would prohibit the Reporting Party from reporting such information and (3) requests that the foreign regulator or governing authority specifically address the applicability of such statutes or regulations under the following circumstances, or any other circumstances relevant to the Reporting Party:
  - The Reporting Party is located and registered in a foreign jurisdiction;

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<sup>12</sup> No legal opinion or any other particular basis is required for a Reporting Party to form such a reasonable belief.



- The Reporting Party is located in a foreign jurisdiction as a branch, including as a branch of a U.S. person; or
- The person or entity to which the Form 102A or Form 102B Identifying Information relates is located in the foreign jurisdiction; and
- Obtained a formal response to such request from the relevant foreign regulator or governing authority specifically addressing the foregoing items. A Reporting Party may mask Form 102A or Form 102B Identifying Information only to the extent that the foreign regulator or governing authority has specifically indicated that reporting such information in connection with a Form 102A or Form 102B submission would violate the foreign jurisdiction's law.

In order to rely on this no-action relief, a Reporting Party must:

- Submit to [PrivacyLawReporting@cftc.gov](mailto:PrivacyLawReporting@cftc.gov) (with the acronym "OCR" in the email subject line) copies of the request submitted to the foreign regulator or authority and responses received;
- Submit a Form 102A or Form 102B, as applicable, including the country of the reportable owner or controller and an indication of the Form 102A or Form 102B Identifying Information masked pursuant to the relief (as further described in the Technical Guidance Document);
- Report that information has been masked due to privacy law for each field of Form 102A or Form 102B Identifying Information not reported pursuant to the no-action relief, in accordance with the instructions provided in the Technical Guidance Document; and
- Within 30 days of the expiration of the relief, make a corrective Form 102A or Form 102B submission (in a form and manner acceptable to ODT) for all Form 102A or Form 102B Identifying Information that was previously submitted in a masked form pursuant to the relief. A Reporting Party must contact ODT prior to making such corrective submission.

### 2016 OCR GUIDANCE

In addition to the no-action relief described above, DMO issued guidance (the "2016 OCR Guidance") to clarify the meaning of the terms "owner" and "controller" as used in Forms 102A and 102B in the OCR Final Rules. The 2016 OCR Guidance responds directly to questions presented by Reporting Parties regarding those terms.

*Question 6 of Form 102A—“Special Account Owner”*

- The 2016 OCR Guidance clarifies that the special account “owners” reportable in Question 6 of Form 102A are the direct owners of special accounts (i.e., the direct owner(s) of the reportable position referenced in Question 2 of Form 102A). Indirect owners need not be reported as special account owners in Question 6, and Reporting Parties are not required to perform an ownership look-through past the direct owners (to the corporate owner of an account, investors in a fund or other investment vehicle, stockholders of a corporation or other indirect owners).<sup>13</sup>
- Special account owner(s) identified in Question 6 of Form 102A will typically be the same as the trading account owner(s) identified in Question 10(ii) of Form 102A.

*Question 7 of Form 102A—“Special Account Controller”*

When a Reporting Party reports a special account on the basis of control of a reportable position (or ownership and control of a reportable position), and the special account controller to be reported in Question 7 is a legal entity that is a joint account, the Reporting Party may combine the names comprising the joint account in order to report a single special account controller, provided the combined name is reasonably descriptive and detailed.

*Question 10(ii) of Form 102A—“Trading Account Owner”*

- Where a trading account owner is a joint account, the Reporting Party may report the legal name of the joint account, rather than the individuals holding the joint account, as the trading account owner—e.g., “Peter and Mary Smith JTWROS” would be acceptable, in lieu of “Peter Smith” and “Mary Smith.”
- If the trading account owner has no employees, the Reporting Party may provide a natural person contact of an entity that is connected with the administration of the trading account owner. DMO will not deem such a contact person (or his/her employer) to be the trading account owner solely due to the fact that the person is identified as a contact.
- If a Reporting Party uses a trading manager or a trustee, it may provide a natural person contact of the trading manager or trustee in Question 10(ii) if the individual is authorized by the Reporting Person to provide information

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<sup>13</sup> Legacy Form 102 included a question (#2d) asking for all persons or entities with a 10% percent or more “financial interest” in a special account. Because there is no longer a look-through past direct owners, this 10% test is not used on the new 102 forms.

to the CFTC and is sufficiently knowledgeable about the Reporting Party's trading activity.

- If a government sets up a wholly-owned investment vehicle to conduct trading, DMO would typically consider the investment vehicle to be the owner of the trading account (as opposed to the government).

*Question 10(iii) of Form 102A—"Trading Account Controller"*

"Trading account controller," defined in Part 15 as a natural person who by power of attorney or otherwise "actually directs" the trading of a trading account, would include, for example:

- a natural person who makes specific decisions to place, cancel or modify orders for a trading account; and
- a person or entity exercising discretion over the trading of a trading account, either directly or indirectly. Where one person provides instructions to another person regarding trading decisions, both persons should be reported as trading account controllers.

Persons whose authority within an organization would permit them to direct the trading of an account if they so choose (e.g., a CEO or CCO) or would make them responsible for the financial performance of an account are not account controllers unless they actually direct such account.

Where trading for an account is conducted by an automated trading system ("ATS") and control over the ATS is divided among different individuals over the course of a trading day, all such individuals are trading account controllers (assuming they meet the "controller" definition). [All individuals who qualify as trading account controllers should be reported in Question 10(iii).]

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Please do not hesitate to contact us with any questions.