

Updated: CFTC FORM 40/40S Reporting Requirements

Note: This version includes an additional section on cross-border considerations.

Significant amendments to the CFTC's large trader reporting program will apply as of August 15, 2014.

The U.S. Commodity Futures Trading Commission (CFTC) has seemingly increased the number of Form 40/40S requests it has sent to market participants in recent months in anticipation of the CFTC's revised position limits¹ and aggregation rules² as well as the implementation of its new enforcement authorities under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).³ In light of this apparent increase and certain amendments to the CFTC's large trader reporting rules (e.g., a continuing obligation to update Form 40/40S information) that will apply as of August 15, 2014,⁴ this Client Alert offers a summary of the circumstances that may result in the receipt of a Form 40/40S request as well as the reporting and recordkeeping requirements that currently apply (and will apply) to market participants that receive a Form 40/40S request from the CFTC. Because this Client Alert offers only a brief summary of these complex rules, however, please contact any of the authors for further clarification and guidance regarding responding to a Form 40/40S request from the CFTC.

Background

The CFTC operates a comprehensive system of collecting information on market participants as part of its market surveillance and large trader reporting program. Under the CFTC's large trader reporting program, clearing members, futures commission merchants (FCMs), foreign brokers and swap dealers (collectively, Reporting Entities) are required to make periodic reports to the CFTC.⁵ Specifically, with respect to exchange-traded futures and commodity options, clearing members, FCMs and foreign brokers must file a report to the CFTC for each account in which a "reportable position" is held, which is known as a "special account."⁶ These reports are filed with the CFTC on a Form 102 and must be made for the day that the reportable position in futures and/or commodity options is opened.⁷ In general, Form 102 requires Reporting Entities to identify basic information regarding its customer, including the customer's name, address and account numbers.⁸ Once an account contains a "reportable position," the CFTC may then contact the trader directly and require that the trader file a more detailed identification report on CFTC Form 40, which requires further information regarding the reporting trader.⁹

Pursuant to the Dodd-Frank Act, the CFTC extended its large trader reporting requirements to cover, in addition to exchange-traded futures and commodity options, swaps and swaptions on certain physical commodities.¹⁰ The CFTC's large trader reporting rules for swaps apply to any swaps or swaptions that are linked, or priced at a differential, to either the price of certain enumerated covered futures contracts or the price of the physical commodity at the delivery location of the covered futures contract, which are defined as "Paired Swaps" or "Paired Swaptions."¹¹ As with the large trader reporting program for exchange-traded futures and commodity options, when a Reporting Entity (which, in the case of Paired Swaps or Paired Swaptions, includes clearing members or swap dealers in Paired Swaps or Paired

Swaptions) has an account or counterparty with a “reportable position,” the Reporting Entity must submit a report to the CFTC on Form 102S, which consists of the name, address, and contact information of the counterparty and a brief description of the counterparty’s Paired Swap or Paired Swaption activity.¹² The CFTC may then contact the trader (or a counterparty to a trade) with the reportable position directly and request that the trader file a CFTC Form 40S with more detailed information about the trader’s activities as well as ownership and control information.¹³ For example, a swap dealer may file a CFTC Form 102S for its counterparties that are not Reporting Entities and the CFTC will then issue a form 40S request to the counterparties to obtain additional information about their positions.

Together, CFTC Forms 102/102S and 40/40S allow the CFTC to identify the name and address of the account, the person(s) owning and/or controlling the trading, the person to contact regarding trading, the nature of the account (*e.g.*, whether it is an omnibus account for another broker or an individual account), whether the reported account is related — by financial interest or control — to another account, and the principal occupation or business of the account owner.¹⁴ The forms also show whether the account is being used for hedging cash market exposure.

According to the CFTC, it uses this information to determine if the reported account is a new trader or is an additional account of an existing trader.¹⁵ If the account is an additional one of an existing trader, the account is then aggregated with that of other related accounts currently being reported.¹⁶ By properly identifying and aggregating accounts, CFTC surveillance staff can thoroughly assess a trader’s potential market impact as well as a trader’s compliance with speculative position limits rules.¹⁷

As detailed below, on November 18, 2013, the CFTC published in the Federal Register final rules on Ownership and Control Reports (Final OCR Rules), which are intended to provide the CFTC with enhanced visibility of participants in the futures and swaps markets.¹⁸ Among other things, the Final OCR Rules update existing Forms 102/102S and 40/40S as well as introduce new mandatory forms to report large trader activity in swaps and futures based on volume thresholds.

Reporting Thresholds for Form 40/40S

As noted above, market participants may be required to complete a Form 40/40S when they have an account that contains a “reportable position.”

For exchange-traded futures and commodity options, a “reportable position” is defined in CFTC Regulation 15.00(p)(1) as any open contract position that at the close of the market on any business day equals or exceeds the quantity set forth in CFTC Regulation 15.03 in either: (i) any one futures contract or commodity on any reporting market, excluding futures contracts against which notices of delivery have been stopped by a trader or issued by the clearing organization of a reporting market; or (ii) long or short put or call options that exercise into the same future of any commodity, or other long or short put or call commodity options that have identical expirations and exercise into the same commodity, on any one reporting market. CFTC Regulation 15.03 then specifies the reporting thresholds for various types of commodities. For example, CFTC Regulation 15.03 sets a reporting threshold of 200 contracts for natural gas (*e.g.*, natural gas futures contracts traded on NYMEX representing 10,000 mmBtus per contract), 350 contracts for crude oil (sweet) (*e.g.*, NYMEX crude oil futures representing 1,000 barrels of oil per contract), and 150 contracts for unleaded gasoline (*e.g.*, NYMEX RBOB futures contracts representing 42,000 gallons per contract).

As to Paired Swaps or Paired Swaptions, CFTC Regulation 20.1 defines a reportable position as a position in any one futures equivalent month, comprised of 50 or more futures equivalent Paired Swaps or Paired Swaptions based on the same commodity underlying a futures contract listed in CFTC Regulation

20.2, grouped separately by swaps and swaptions, then grouped by gross long contracts on a futures equivalent basis or gross short contracts on a futures equivalent basis. Note that these reporting requirements for Paired Swaps and Paired Swaptions apply to market participants in addition to, and not in lieu of, the reporting requirements under Parts 43 (real time reporting) and 45 (regulatory reporting). As an example, if a swap dealer (“A”) entered into a spark spread call option with an end-user (“B”) that is keyed, in part, on the NYMEX natural gas futures contract, A would be required to report that transaction immediately to a swap data repository (SDR) pursuant to the CFTC’s real time and regulatory reporting rules and may also be required to submit a Form 102S to the CFTC if the position is comprised of 50 or more futures equivalent contracts. The CFTC may then separately issue a Form 40S request to B.

Responding to a CFTC Form 40/40S Request

Upon receipt of a special call from the CFTC, the CFTC’s regulations require that those who have a reportable position must file a Form 40/40S request response with the CFTC by the deadline and in accordance with the instructions set forth in the special call.¹⁹ Failure to provide the required Form 40/40S filing in a timely fashion constitutes a violation of the Commodity Exchange Act (CEA) and CFTC Regulations. Additionally, market participants who fail to comply with a special call from the CFTC may have their trading privileges suspended or denied and may be assessed a fine of US\$ 140,000.²⁰ Section 6(c) of the CEA also provides that it shall be unlawful for any person to make false or misleading statements of material fact to the CFTC in any report filed with the CFTC, and the CFTC has brought enforcement actions against individuals for lying to the CFTC in violation of this provision.

Cross-Border Considerations

The CFTC’s final cross-border guidance regarding the application of the CFTC’s swap regulatory regime to cross-border activities (Final Cross-Border Guidance)²¹ identifies the CFTC’s large trader reporting rules as “entity-level” (as opposed to “transaction-level”) requirements with which CFTC-registered swap dealers are required to comply. Although certain “entity-level” requirements are eligible for substituted compliance, to the extent that the CFTC makes a comparability determination in respect of a non-US swap dealer’s local jurisdiction, the CFTC specifically identified large trader reporting as ineligible for substituted compliance.

According to the Final Cross-Border Guidance, the CFTC’s large trader reporting program is essential to the CFTC’s ability to conduct effective surveillance of markets in physical commodity futures contracts and economically equivalent swaps.²² Given this important regulatory function and that the large trader reporting rules only apply to Paired Swaps and Paired Swaptions that are specifically linked to US-listed futures contracts, the CFTC’s policy is to apply these requirements to non-US persons whose trading falls within its scope to the same extent as US persons. Therefore, a non-US swap dealer is required to submit a Form 102S to the CFTC for any of its counterparties — including those counterparties that are non-US persons — that have reportable positions, and the CFTC may send a Form 40S request to such counterparties for further information regarding the traders’ positions.

Recordkeeping Requirements

Under CFTC Regulation 18.05(a), traders (*i.e.*, not just Reporting Entities) holding or controlling a reportable position in exchange-traded futures or commodity option contracts must maintain books and records relating to: (i) all positions and transactions in the commodity, whether held on reporting markets, over the counter or on foreign boards of trade; and (ii) all positions in the cash commodity (*e.g.*, forward or spot transactions to which the futures contract relates), its products or byproducts, and all commercial activities that the trader hedges in the reportable futures or option contracts. Similarly, the large trader reporting rules for swaps and swaptions require that market participants holding reportable positions keep

books and records: (i) showing all records of transactions resulting in such positions; and (ii) showing transactions in the cash commodity underlying such positions or its products and byproducts, and all commercial activities that are hedged or which have risks that are mitigated by such positions.²³ Note that these recordkeeping requirements apply in addition to, and not in lieu of, the regular CFTC recordkeeping requirements applicable to swaps.

New Ownership and Control Reporting Rules

As noted above, the Final OCR Rules were adopted to provide the CFTC with enhanced visibility of futures and swaps market participants and their positions by updating the existing large trader reporting forms and introducing new mandatory forms to report large trader activity. The chart below summarizes the amendments to the existing forms and new forms that were adopted under the Final OCR Rules.

FORM	WHAT?	CONCERNING	WHO?	WHEN?	UPDATES	DELIVERY METHOD
102A	An updated version of current Form 102. Form 102A collects information with respect to position-based accounts in the futures markets, including new ownership and control information fields and trade capture report account numbers.	Futures and options.	FCMs, clearing members, foreign, brokers and certain reporting markets — <i>i.e.</i> designated contract markets (DCMs) and swap execution facilities (SEFs) that list self-cleared contracts.	9 a.m. on the business day following the date on which the special account becomes reportable. Certain fields designated as 'Follow-On Information' may be submitted by 9 a.m. on the third business day following the date on which the special account becomes reportable.	Any changes to information previously submitted must be sent to the CFTC and refresh updates are required on an annual basis.	Electronically to the CFTC via an FTP feed or CFTC web-based portal.
102B	A new form that requires transaction-based reporting of trading accounts that have intra-day trading volume that exceeds a specified level on a single trading day, regardless of whether the accounts maintain reportable positions at the end of the day.	Futures, options, swaps, and any product traded on a DCM or SEF.	Clearing members and certain reporting markets — <i>i.e.</i> DCMs and SEFs that list self-cleared contracts.	9 a.m. on the business day following the date on which the volume threshold account becomes reportable. Certain fields designated as 'Follow-On Information' may be submitted by 9 a.m. on the third business day following the date on which the volume threshold account becomes reportable.	Any changes to information previously submitted must be sent to the CFTC and refresh updates are required on an annual basis.	Electronically to the CFTC via an FTP feed or CFTC web-based portal.
71	A new form, to be used in conjunction with Form 102B, that the CFTC will send in its discretion upon a special call, to request information on volume threshold accounts that are omnibus accounts, to identify the ultimate owner and controller of such accounts.	Futures, options, swaps, and any product traded on a DCM or SEF.	Originator of an omnibus volume threshold account identified in Form 102B.	The date specified by the CFTC in the special call notice.	Reporting parties have a continuing obligation, per direction in the special call notice, to update and maintain the accuracy of the information.	Electronically to the CFTC via an FTP feed or CFTC web-based portal.

FORM	WHAT?	CONCERNING	WHO?	WHEN?	UPDATES	DELIVERY METHOD
<u>102S</u>	An updated version of form 102 required under the CFTC's large trader reporting program for Paired Swaps. Requires more detail regarding ownership and control information.	Paired Swaps and Paired Swaptions.	Swap dealers and clearing members.	Within three days following the day a consolidated account first becomes reportable.	Reporting parties must submit any changes to information previously submitted on Form 102S to the CFTC by 9 a.m. on the following business day. Refresh updates are required on an annual basis.	Electronically to the CFTC via an FTP feed or CFTC web-based portal.
<u>40</u>	An updated version of Current Form 40 for exchange-traded futures and option contracts. Requires additional information regarding the large trader's business and ownership and control.	Futures and options.	Traders with a reportable positions in exchange-traded futures or option contracts.	The date specified by the CFTC in the special call notice to the reporting trader.	Reporting parties have a continuing obligation, per direction in the special call notice, to update and maintain the accuracy of the information.	Electronically to the CFTC via an FTP feed or CFTC web-based portal.
<u>40S</u>	An updated version of Current Form 40S for Paired Swaps or Paired Swaptions. Requires additional information regarding the large trader's business and ownership and control.	Paired Swaps and Paired Swaptions.	Traders with a reportable position in Paired Swaps or Paired Swaptions.	The date specified by the CFTC in the special call notice to the reporting trader.	Reporting parties have a continuing obligation, per direction in the special call notice, to update and maintain the accuracy of the information.	Electronically to the CFTC via an FTP feed or CFTC web-based portal.

The Final OCR Rules include separate “effective” and “compliance dates.” The effective date of the Final OCR Rules was February 18, 2014, but the compliance date was delayed by an additional 180 days. Therefore, the compliance date of the Final OCR Rules will be August 15, 2014.

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Endnotes

- ¹ See Position Limits for Derivatives, Proposed Rule, 78 Fed. Reg. 75680 (Dec. 12, 2013).
- ² See Aggregation of Positions; Proposed Rule, 78 Fed. Reg. 68946 (Nov. 15, 2013). For a more detailed summary of the position limits re-proposed rule and the aggregation proposal, see our previous *Client Alert* on position limits and aggregation, available [here](#).
- ³ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).
- ⁴ See Ownership and Control Reports, Forms 102/102S, 40/40S, and 71; Final Rule, 78 Fed. Reg. 69178 (Nov. 18, 2013).
- ⁵ See 17 C.F.R. §§ 17.00(a); 20.4(b); see also Large Trader Reporting for Physical Commodity Swaps, Final Rule, 76 Fed. Reg. 43851 (July 22, 2011).
- ⁶ See 17 C.F.R. §§ 15.00(r); 17.00.
- ⁷ See 17 C.F.R. § 17.00(a).
- ⁸ See CFTC Form 102, available at: <http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform102.pdf>.
- ⁹ See 17 C.F.R. § 18.04(a); see also CFTC Form 40, available at: <http://www.cftc.gov/ucm/groups/public/@forms/documents/file/cftcform40.pdf>.
- ¹⁰ See Large Trader Reporting for Physical Commodity Swaps, *supra*, note 5 at 43862- 43865 (codified at 17 C.F.R. §§ 20.1-20.11).
- ¹¹ See *id.* at 43862- 43863 (codified at 17 C.F.R. §§ 20.1; 20.2).
- ¹² See *id.* at 43684 (codified at 17 C.F.R. § 20.5).
- ¹³ See *id.* A form 40S filing currently consists of a the submission of a CFTC Form 40 with any references to futures or option contracts being treated as references to Paired Swaps or Paired Swaptions.
- ¹⁴ See *generally*, Large Trader Reporting Program, <http://www.cftc.gov/IndustryOversight/MarketSurveillance/LargeTraderReportingProgram/index.htm>.
- ¹⁵ See *id.*
- ¹⁶ See *id.*
- ¹⁷ See *id.*
- ¹⁸ See Ownership and Control Reports, Forms 102/102S, 40/40S, and 71; Final Rule, 78 Fed. Reg. 69178 (Nov. 18, 2013).
- ¹⁹ See 17 C.F.R. § 18.04; see also Large Trader Reporting for Physical Commodity Swaps, *supra*, note 5 at 43864 (codified at 17 C.F.R. § 20.5).

²⁰ See Commodity Exchange Act, § 6(d).

²¹ See Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swaps Regulations, 78 Fed. Reg. 4529 (July 26, 2013).

²² See *id.* at 45338.

²³ See Large Trader Reporting for Physical Commodity Swaps, *supra*, note 5 at 43864 (codified at 17 C.F.R. § 20.6).