

Derivatives, Legislative and Regulatory Weekly Update (April 12, 2024)

Client Alert | April 12, 2024

From the Derivatives Practice Group: The CFTC has appointed a new Inspector General, Christopher Skinner. The Office of the Inspector General is an independent organizational unit of the CFTC, with the mission to detect waste, fraud, and abuse and to promote integrity, economy, efficiency, and effectiveness in the CFTC's programs and operations.

New Developments

- **CFTC Appoints Christopher Skinner as Inspector General.** On April 10, the Commodity Futures Trading Commission announced that Christopher L. Skinner has been appointed CFTC's Inspector General (IG). The CFTC stated that Mr. Skinner brings 15 years of IG experience, including leading and managing Offices of Inspector's General (OIG), and conducting investigations, inspections, and audits. Mr. Skinner comes to the CFTC from the Federal Election Commission (FEC) where he served as IG since 2019. [NEW]
- **SEC Adopts Reforms Relating to Investment Advisers Operating Exclusively Through the Internet.** On March 27, the SEC adopted amendments to the rule permitting certain internet investment advisers to register with the Commission (the "internet adviser exemption"). The amendments will require an investment adviser relying on the internet adviser exemption to have at all times an operational interactive website through which the adviser provides digital investment advisory services on an ongoing basis to more than one client. The amendments will also eliminate the current rule's de minimis exception by requiring an internet investment adviser to provide advice to all of its clients exclusively through an operational interactive website and to make certain corresponding changes to Form ADV.

New Developments Outside the U.S.

- **New Report Sheds Light on Quality and Use of Regulatory Data Across EU.** On April 11, ESMA published the fourth edition of its [Report on the Quality and Use of Data](#) aiming to provide transparency on how the data collected under different regulations is used systematically by authorities in the EU, and clarifying the actions taken to ensure data quality. The report provides details on how National Competent Authorities, the European Central Bank, the European Systemic Risk Board and ESMA use the data that is collected through the year from different legislation requirements, including datasets from European Market Infrastructure Regulation, Securities Financing Transactions Regulation, Markets in Financial Instruments Directive, Securitization Regulation, Alternative Investment Fund Managers Directive and Money Market Funds Regulation. [NEW]
- **UK's Accelerated Settlement Taskforce Publishes Report on the Path to T+1.** On March 28, the UK's Accelerated Settlement Taskforce published its [report on the path to a T+1 settlement cycle](#). The report finds there is a clear consensus on the need for the UK to move to a T+1 settlement cycle and this shift will require substantial investment in greater automation and standardization. In addition, the report emphasizes a need for ongoing engagement with stakeholders during the

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transition period and the opportunity to learn from the U.S. move to T+1 in May 2024. The report recommends the immediate creation of a technical group to identify the challenges of transition and formulate solutions and suggests a two-step transition to T+1 before the end of 2027, with the exact date to be determined by the technical group.

- **ESMA Clarifies Application of Certain MIFIR Provisions, Including Volume Cap.** On March 27, the European Securities and Markets Authority (ESMA) published a [statement](#), including practical guidance supporting the transition and the consistent application of the revised Markets in Financial Instruments Regulation (MiFIR). The statement covers guidance on equity transparency and non-equity transparency; the systematic internaliser (SIs) regime; designated publishing entities (DPEs); and reporting. Regarding the volume cap, following the publication by the European Commission, ESMA confirmed that DVC data will continue to be published, with the next publication scheduled for early April.
- **ESMA Provides Market Participants with Guidance on the Clearing Obligation for Trading with 3rd Country Pension Schemes.** On March 27, ESMA issued a [public statement](#) on deprioritizing supervisory actions linked to the clearing obligation for third-country pension scheme arrangements (TC PSA), pending the finalization of the review of EMIR. ESMA expects National Competent Authorities (NCAs) not to prioritize supervisory actions in relation to the clearing obligation for derivative transactions conducted with TC PSAs exempted from the clearing obligation under their third-country's national law. Additionally, ESMA recommends that NCAs apply their risk-based supervisory powers in their day-to-day enforcement of applicable legislation in this area in a proportionate manner. The Council and the European Parliament reached a provisional agreement on February 7. The political agreement on the EMIR 3 text provides for an exemption regime from the EMIR clearing obligation when the TC PSA is exempted from the clearing obligation under that third country's national law.
- **ESMA Finalizes First Rules on Crypto-Asset Service Providers.** On March 25, ESMA published the [first Final Report](#) under the Markets in Crypto-Assets Regulation (MiCA). ESMA stated that the report, which aims to foster clarity and predictability, promote fair competition between crypto-asset service providers (CASPs) and a safer environment for investors across the Union, includes proposals on: (1) information required for the authorization of CASPs; (2) the information required where financial entities notify their intent to provide crypto-asset services; (3) information required for the assessment of intended acquisition of a qualifying holding in a CASP, and (4) how CASPs should address complaints.
- **ESMA Launches the Third Consultation Under MiCA.** On March 25, ESMA published its [third consultation package](#) under the MiCA. In the consultation package, ESMA is seeking input on four sets of proposed rules and guidelines, covering: (1) detection and reporting of suspected market abuse in crypto-assets; (2) policies and procedures, including the rights of clients, for crypto-asset transfer services; (3) suitability requirements for certain crypto-asset services and format of the periodic statement for portfolio management; and (4) ICT operational resilience for certain entities under MiCA.
- **SGX Issues Consultation on Revised Limit on Clearing Members' Liability for Multiple Defaults.** On March 22, Singapore Exchange (SGX) issued a [consultation paper](#) proposing to refine the existing cap on a clearing member's liability to meet default losses arising from multiple events of default. The cap is imposed on clearing members of Singapore Exchange Derivatives Clearing Limited (SGX-DC) and The Central Depository (Pte) Limited (CDP). The proposal purports to limit a non-defaulting clearing member's liability to meet multiple default losses arising within a 30-day period to three times the aggregate of its funded and unfunded clearing fund contributions (prescribed contribution) as determined at the start of the 30-day period. The revised limit is intended to be independent of the clearing member's resignation. SGX has also proposed

changes to the SGX-DC clearing rules set out in [Appendix B](#) of the consultation. SGX is seeking views and comments on: (1) capping the limit for multiple defaults at three times a clearing member's clearing fund contribution amount for all defaults occurring within a 30-day period; (2) the methodology for calculating the amount of a non-defaulting clearing member's clearing fund contributions available to meet losses suffered by the SGX central counterparty arising from or in connection with an event of default (as set out in SGX-DC Clearing Rule 7A.06.9.2); and (3) the rule amendments to effect the proposed change. The consultation closes on April 24, 2024.

- **SFC and HKMA Further Consult on Enhancements to Hong Kong's OTC Derivatives Reporting Regime.** On March 22, 2024, the Securities and Futures Commission (SFC) and the Hong Kong Monetary Authority (HKMA) launched a [joint-further consultation](#) on enhancements to the over-the-counter (OTC) derivatives reporting regime in Hong Kong. This further consultation follows an earlier joint-consultation in April 2019, in which the SFC and HKMA proposed a requirement to identify transactions submitted to the Hong Kong Trade Repository (HKTR) for the reporting obligation by a Unique Transaction Identifier. The current joint-further consultation consults on the implementation of the Unique Transaction Identifier, together with the mandatory use of Unique Product Identifier and Critical Data Elements for submission of transactions to the HKTR. The Interested parties are encouraged to submit responses to the SFC or HKMA on the consultation by May 17, 2024.

New Industry-Led Developments

- **ISDA, AIMA, GFXD Publish Paper on Transition to UPI.** On April 9, ISDA, the Alternative Investment Management Association (AIMA) and the Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association published a [paper](#) on the transition to unique product identifiers (UPI) as the basis for over-the-counter (OTC) derivatives identification across the Markets in Financial Instruments Regulation (MiFIR) regimes. The paper has been sent to the European Commission, which is working on legislation to address appropriate identification of OTC derivatives under MiFIR. [NEW]
- **IOSCO Seeks Feedback on the Evolution of Market Structures and Proposed Good Practices.** On April 4, the International Organization of Securities Commissions (IOSCO) published a consultation report on [Evolution in the Operation, Governance and Business Models of Exchanges: Regulatory Implications and Good Practices](#). The consultation report analyzes the structural and organizational changes within exchanges, focusing on business models and ownership structures. It highlights a shift towards more competitive, cross-border, and diversified operations as exchanges integrate into larger corporate groups. The consultation report discusses regulatory considerations, particularly in the organization of individual exchanges and exchange groups and the supervision of multinational exchange groups. It addresses potential conflicts of interest arising from matrix structures and the challenges of overseeing individual exchanges within exchange groups. Additionally, it outlines a set of six proposed good practices for regulators to consider in the supervision of exchanges, particularly when they provide multiple services and/or are part of an exchange group. The good practices are also complemented by a non-exclusive list of supervisory tools used by IOSCO jurisdictions to address the issues under discussion, in the form of "toolkits". While the Consultation Report focuses on equities listing trading venues, the findings are also relevant to other trading venues, including non-listing trading venues and derivatives trading venues. IOSCO is seeking input from market participants on the major trends and risks observed, and the proposed good practices on or before July 3, 2024.
- **ISDA Submits Response to CFTC Proposed Operational Resilience Rules.** On April 1, ISDA submitted [comments](#) on the CFTC's notice of proposed rulemaking

on requirements to establish an Operational Resilience Framework for Futures Commission Merchants, Swap Dealers and Major Swap Participants, which was published in the Federal Register on January 24, 2024. ISDA recommended that the CFTC adjust portions of the proposed rules relating to governance, third-party relationships, incident notification and implementation period.

- **ISDA Submits Response to IOSCO Consultation on Post-Trade Risk Reduction.** On March 29, ISDA submitted a [response](#) to IOSCO consultation on post-trade risk reduction (PTRR) services. According to ISDA, PTRR services are intended to optimize bilateral and cleared derivatives portfolios to minimize the build-up of notional amounts and trade count, counterparty risk, and basis risk respectively, which in turn reduces systemic risk. ISDA stated that it is broadly supportive of IOSCO's proposed sound practices.
- **ISDA Submits Joint Response to PRA on Approach to Policy.** On March 28, ISDA and the Association for Financial Markets in Europe (AFME) submitted a joint [response](#) to the Prudential Regulation Authority (PRA) consultation on its approach to policy. The associations highlighted the importance of considering UK market specificities in meeting the secondary competitiveness and growth objective, and in the implementation of international standards. The associations expressed support for the continuation of structured policy development in dialogue with the industry, while also advocating for the enhancement of the PRA's stakeholder engagement by re-establishing standing groups and horizon risk scanning groups, and greater industry cooperation during the initiation phase of the policy cycle. ISDA highlighted certain other points in the response, including recommendations on clustering regulatory principles and suggested improvements to the cost-benefit analysis and data collection processes to achieve greater transparency.
- **ISDA Submits Joint Response to BCBS Crypto Standard Amendments Consultation.** On March 28, ISDA, with the Global Financial Markets Association, the Futures Industry Association, the Institute of International Finance and the Financial Services Forum, submitted a joint response to the Basel Committee on Banking Supervision (BCBS) consultation on proposed crypto asset standard amendments. ISDA and the other trade associations stated that they welcome the BCBS's continued focus on designing and improving the prudential framework for crypto assets. The key topics in the consultation response include public permissionless blockchains, classification condition 2 and settlement finality and Group 1b eligibility.

The following Gibson Dunn attorneys assisted in preparing this update: Jeffrey Steiner, Adam Lapidus, Marc Aaron Takagaki, Hayden McGovern, and Karin Thrasher. Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Derivatives practice group, or the following practice leaders and authors: Jeffrey L. Steiner, Washington, D.C. (202.887.3632, jsteiner@gibsondunn.com) Michael D. Bopp, Washington, D.C. (202.955.8256, mbopp@gibsondunn.com) Michelle M. Kirschner, London (+44 (0)20 7071.4212, mkirschner@gibsondunn.com) Darius Mehraban, New York (212.351.2428, dmehraban@gibsondunn.com) Jason J. Cabral, New York (212.351.6267, jcabral@gibsondunn.com) Adam Lapidus – New York (+1 212.351.3869, alapidus@gibsondunn.com) Stephanie L. Brooker, Washington, D.C. (202.887.3502, sbrooker@gibsondunn.com) Roscoe Jones Jr., Washington, D.C. (202.887.3530, rjones@gibsondunn.com) William R. Hallatt, Hong Kong (+852 2214 3836, whallatt@gibsondunn.com) David P. Burns, Washington, D.C. (202.887.3786, dburns@gibsondunn.com) Marc Aaron Takagaki, New York (212.351.4028, mtakagaki@gibsondunn.com) Hayden K. McGovern, Dallas (214.698.3142, hmcgovern@gibsondunn.com) Karin Thrasher, Washington, D.C. (202.887.3712, kthrasher@gibsondunn.com) © 2024 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. Attorney Advertising: These materials were prepared for general informational purposes only based

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