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Derivatives, Legislative and Regulatory Weekly Update (April 26, 2024)

Client Alert | April 26, 2024

From the Derivatives Practice Group: *This week, the CFTC approved final rules to amend its Swap Execution Facility regulations, and extended the deadline for public comment period on a proposed rule that makes certain modifications to rules for Swap Execution Facilities and Designated Contract Markets in Part 37 and 38.*

New Developments

- **"AI Day" To Be Held at May 2 CFTC Technology Advisory Committee Meeting.** On April 24, Commissioner Christy Goldsmith Romero, sponsor of the Technology Advisory Committee (TAC), announced "AI Day" is to be held at the CFTC's Washington, D.C. headquarters on May 2, 2024, during a TAC meeting. AI Day will take place from 1:00 p.m. to 4:00 p.m. (EDT). AI Day is a continuation of the TAC's study of AI, and the concept of Responsible AI in financial markets. The TAC Subcommittee on Emerging and Evolving Technologies will present on the work and findings of the Subcommittee in its study of AI for financial markets. [NEW]
- **CFTC Approves Final Rules on Swap Confirmation Requirements for SEFs.** On April 23, the CFTC approved final rules to amend its swap execution facility (SEF) regulations related to uncleared swap confirmations to address issues which have been addressed in CFTC staff no-action letters, including the most recent CFTC No Action Letter No. 17-17, as well as associated conforming and technical changes. In particular, the final rules amend CFTC Regulation 37.6(b) to enable SEFs to incorporate terms of underlying, previously negotiated agreements between the counterparties by reference in an uncleared swap confirmation without being required to obtain such underlying, previously negotiated agreements. Further, the final rules amend CFTC Regulation 37.6(b) to require such confirmation to take place "as soon as technologically practicable" after the execution of the swap transaction on the SEF for both cleared and uncleared swap transactions. The final rules also amend CFTC Regulation 37.6(b) to make clear the SEF-provided confirmation under CFTC Regulation 37.6(b) shall legally supersede any conflicting terms in a previous agreement, rather than the entire agreement. The final rules make conforming amendments to CFTC Regulation 23.501(a)(4)(i) to correspond with the amendments to CFTC Regulation 37.6(b). Finally, the final rules make certain non-substantive amendments to CFTC Regulation 37.6(a)-(b) to enhance clarity. [NEW]
- **CFTC to Hold a Commission Open Meeting April 29.** On April 22, Chairman Rostin Behnam announced the Commission will hold an open meeting on Monday, April 29 at 9:30 a.m. (EDT) at the CFTC's Washington, D.C. headquarters. The Commission will consider Final Rule "Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants" and Final Rule "Adopting Amendments to the Large Trader Reporting Rules for Futures and Options." [NEW]
- **CFTC Extends Public Comment Period for Proposed Rule for Designated Contract Markets and Swap Execution Facilities Regarding Governance and Conflicts of Interest.** On April 22, the CFTC announced it is extending the deadline for public comment period on a proposed rule that makes certain

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modifications to rules for Swap Execution Facilities and Designated Contract Markets in Part 37 and 38 that would establish governance requirements regarding market regulation functions, as well as related conflicts of interest standards. The deadline is being extended to May 13, 2024. [NEW]

- **Chairman Behnam Announces CFTC's First DEIA Strategic Plan.** On April 18, CFTC Chairman Rostin Behnam announced the agency's first Strategic Plan to Advance Diversity, Equity, Inclusion, and Accessibility (DEIA Plan). Chairman Behnam said that the two-year DEIA Plan represents a critical step forward in aligning the CFTC with a collective DEIA vision that not only provides genuine support for team members, but also ensures the CFTC is a source of future leaders. The CFTC designed the DEIA Plan to align with its 2022-2026 Strategic Plan and to focus on the following six goals: Inclusive Workplaces, Partnerships and Recruitment, Paid Internships, Professional Development and Advancement, Data, and Equity in Procurement and Customer Education and Outreach. Each goal includes objectives and strategies/actions to achieve the goal, and identifies the agency division(s)/office(s) that will lead and contribute to the implementation of the goal. The CFTC said that an internal DEIA Executive Council will support and guide the implementation of the DEIA Plan.
- **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 Developments Outside the U.S.

- **Telbor Committee to Permanently Cease Publication of Telbor.** On April 16, the Telbor Committee of the Bank of Israel decided that the publication of all tenor of Telbor will permanently cease following a final publication on June 30, 2025. The announcement constitutes an "Index Cessation Event" under the 2021 ISDA Interest Rate Derivatives Definitions and the November 2022 Benchmark Module of the ISDA 2021 Fallbacks Protocol. In February 2022, the Telbor Committee decided that the SHIR (Shekel overnight Interest Rate) rate would eventually replace the Telbor interest rate in shekel interest rate derivative transactions. The Bank of Israel said that the decision to switch to the SHIR rate is in accordance with the decisions reached in major economies worldwide, according to which IBOR type interest rates will be replaced by risk-free overnight interest rates. ISDA published cessation guidance for parties affected by the announcement.
- **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 Industry-Led Developments

- **ISDA and SIFMA Submit Addendum to Proposed FFIEC Reporting Revisions.** On April 23, ISDA and the Securities Industry and Financial Markets Association (SIFMA) submitted an addendum to the joint response to the Board of Governors

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of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency on the proposed reporting revisions of the call report, FFIEC 101 and FFIEC 102, which are designed to reflect the implementation of the Basel III endgame proposal. The addendum contains additional findings in the FFIEC 102 report, including end-of-week Fundamental Review of the Trading Book standardized approach average calculations and reported market risk risk-weighted assets in sub-parts D and E. [NEW]

- **ISDA Launches Outreach Initiative on Proposed Notices Hub.** On April 25 ISDA announced a major industry outreach initiative to establish support among dealers and buy-side firms for a new online platform that would allow the instantaneous delivery and receipt of critical termination-related notices, reducing the risk exposure and potential losses from a delay. Under the ISDA Master Agreement, termination-related notices must be delivered by certain prescribed methods, using company address details listed in the agreement. However, delays can occur if a company has moved and the documentation hasn't been updated with the new details or if delivery to a physical location is not possible due to geopolitical shocks. The proposed ISDA Notices Hub would act as a secure central platform for firms to deliver notices, with automatic alerts sent to the receiving entity. Multiple designated people at each firm would be able to access the hub from anywhere in the world, regardless of the situation at its physical location. The platform would also allow market participants to update their physical address details via a single entry, providing a golden source of those details. [NEW]
- **Four Directors Join ISDA Board.** On April 18, ISDA announced that four directors have joined its Board, three directors were re-appointed, and 10 others have been re-elected at ISDA's Annual General Meeting in Tokyo. The new directors are: Erik Tim Mueller, Chief Executive Officer, Eurex Clearing AG; Jared Noering, Managing Director, Head of Fixed Income Trading, NatWest Markets; Brad Tully, Managing Director and Global Head of Corporate Derivatives and Private Side Sales for J.P. Morgan; and Jan Mark van Mill, Managing Director of Multi Asset, APG Asset Management.
- **ISDA Future Leaders in Derivatives Publishes Generative Artificial Intelligence Whitepaper.** On April 17, ISDA published a whitepaper from ISDA Future Leaders in Derivatives (IFLD), its professional development program for emerging leaders in the derivatives market. The whitepaper, GenAI in the Derivatives Market: a Future Perspective, was developed by the third cohort of IFLD participants, who began working together in October 2023. According to ISDA, the 38 individuals in the group represent buy- and sell-side institutions, law firms, and service providers from around the world. After being selected for the IFLD program, they were asked to engage with stakeholders, develop positions, and produce a whitepaper on the potential use of generative artificial intelligence (genAI) in the over-the-counter derivatives market. The participants were also given access to ISDA's training materials, resources, and staff expertise to support the project and their own professional development. ISDA said that, drawing on industry expertise and academic research, the whitepaper identifies a range of potential use cases for genAI in the derivatives market, including document creation, market insight, and risk profiling. ISDA also indicated that it explores regulatory issues in key jurisdictions and addresses the challenges and risks associated with the use of genAI. The paper concludes with a set of recommendations for stakeholders, including investing in talent development, fostering collaboration and knowledge sharing with technology providers, prioritizing ethical AI principles and engaging with policymakers to promote an appropriate regulatory framework.
- **ISDA Publishes Research Paper on Interest Rate Derivatives, Benchmark Rates and Development Financial Markets in EMDEs.** On April 17, ISDA published a research paper in which it outlines the role of interest rate derivatives (IRDs) in supporting the development of financial markets in emerging markets and developing economies (EMDEs). It also examines the significance of reliable,

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robust interest rate (IR) benchmarks. ISDA indicated that the paper draws valuable lessons from the transition from LIBOR to overnight risk-free rates in advanced economies and applies those insights to the context of EMDEs. Through case studies, ISDA attempts to show how various EMDE jurisdictions have successfully adopted and implemented more robust and transparent IR benchmarks.

- **ISDA Extends Digital Regulatory Reporting Initiative to New Jurisdictions.** On April 17, ISDA announced that it is extending its Digital Regulatory Reporting (DRR) initiative to several additional jurisdictions in an effort to enable firms to implement changes to regulatory reporting requirements. The DRR is being extended to cover rule amendments being implemented under the UK European Market Infrastructure Regulation and by the Australian Securities and Investments Commission and the Monetary Authority of Singapore. Those rule changes are due to be implemented in the UK on September 30, 2024, and October 21, 2024 in Australia and Singapore. The DRR code for all three sets of rules is currently available for market participants to review and test. ISDA said that the DRR will be further extended to cover rule changes in Canada and Hong Kong, both due in 2025, and the DRR for the CFTC rules will also be updated to include further anticipated updates, currently under consultation at the commission. Firms can either use the DRR as the basis for implementation or to validate an independent interpretation of the rules.
- **ISDA Publishes Margin Survey.** On April 16, ISDA published its latest margin survey, which shows that $1.4 trillion of initial margin (IM) and variation margin (VM) was collected by 32 leading derivatives market participants for their non-cleared derivatives exposures at the end of 2023, unchanged from the previous year. The survey also reports the amount of IM posted by all market participants to major central counterparties.
- **ISDA Establishes Suggested Operational Practices for EMIR Refit.** On April 16, through a series of discussions held within the ISDA Data and Reporting EMEA Working Group, market participants established and agreed to Suggested Operational Practices (SOP) for over-the-counter derivative reporting in preparation for the commencement of the EMIR Refit regulatory reporting rules on April 29. ISDA said that the SOP matrix was established based on the EMIR Refit validation table, (as published by ESMA), which contains the Regulatory Technical Standards (RTS), the Implementation Technical Standards (ITS) and validation rules. Additional tabs have been added to supplement to SOPs, including product-level SOPs for several of the underlier fields, and listing names of floating rate options. There are also tabs to reflect updates made to the matrix ('Updates') and a tab to track questions raised by the ISDA Data and Reporting EMEA Working Group ('WG Questions'). ISDA indicated that the document will continue to be reviewed and updated as and when required. While the intention of these SOPs is to provide an agreed and standardized market guide for firms to utilize, no firm is legally bound or compelled in any way to follow any determinations made within these EMIR SOPs.
- **ISDA and IIF Respond to BCBS-CPMI-IOSCO Consultation on Margin Transparency.** On April 12, ISDA and the Institute of International Finance (IIF) submitted a response to the Basel Committee on Banking Supervision (BCBS), Committee on Payments and Market Infrastructures (CPMI) and International Organization of Securities Commissions (IOSCO) consultation on transparency and responsiveness of initial margin in centrally cleared markets. In their response, the associations expressed support for enhancing transparency on cleared margin for all market participants, which they expect will help with liquidity preparedness and increase resilience of the system, noting it should start with central counterparties (CCPs) making fundamental disclosures about their margin models. In this regard, both associations highlight their support in the response to recommendations one through eight. Regarding recommendation nine, the associations indicated that they are supportive of clients having necessary transparency on clearing member (CM) margin requirements. Regarding

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recommendation 10, the associations said in the response that they are generally supportive of the principle that CCPs should have visibility into the risk profile of their clearing participants but warned that, in their opinion, the information required under recommendation 10 may raise legal, confidentiality, or competition concerns. Finally, the associations noted that they believe further work should be done on the fundamentals of CCP margin models, for example on the appropriateness of margin periods of risk and the calibration of anti-procyclicality tools, to ensure that margins do not fall too low during low volatility periods.

- **IOSCO Publishes Updated Workplan.** On April 12, IOSCO published its updated 2024 Workplan, which directly supports its overall two-year Work Program published on April 5, 2023. The 2024 Workplan announced new workstreams, reflecting increased focus on AI, tokenization and credit default swaps, and additional work on transition plans and green finance. The 2024 Workplan set out priorities under five themes: Protecting Investors, Address New Risks in Sustainability and Fintech, Strengthening Financial Resilience, Supporting Market Effectiveness and Promoting Regulatory Cooperation and Effectiveness
- **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.
- **ISDA Submits Addendum to US Basel III NPR Comment Letter.** On April 8, ISDA submitted an addendum to the joint US Basel III 'endgame' notice of proposed rulemaking response along with the Securities Industry and Financial Markets Association. The addendum contains a more developed proposal for the index bucketing approach for equity investment in funds and an update to the Fundamental Review of the Trading Book Standardized Approach Quantitative Impact Study numbers.

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 on information available at the time of publication and are not intended as, do not constitute, and should not be relied upon as, legal advice or a legal opinion on any specific facts or circumstances. Gibson Dunn (and its affiliates, attorneys, and employees) shall not have any liability in connection with any use of these materials. The sharing of these

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