

Derivatives, Legislative and Regulatory Weekly Update (March 29, 2024)

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From the Derivatives Practice Group: Several CFTC advisory committees are scheduled to meet in the upcoming weeks, and ESMA was busy issuing reports and consultations on MiCA. **New Developments**

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- **CFTC's Energy and Environmental Markets Advisory Committee to Meet.** The CFTC's Energy and Environmental Markets Advisory (EEMAC) will hold a public meeting from 9:00 a.m. to 12:00 p.m. (CDT) on Wednesday, April 10 at the University of Missouri – Kansas City in Kansas City, Missouri. At this meeting, the EEMAC will continue its discussion on the federal prudential financial regulators' proposed rules implementing Basel III and the implications for and impact on the derivatives market. There will also be presentations and discussions on the state of crude oil markets and the future of power markets. Finally, the two EEMAC subcommittees will offer updates on their continued work related to traditional energy infrastructure and metals markets. [NEW]
- **CFTC's Agricultural Advisory Committee to Meet.** The CFTC's Agricultural Advisory Committee (AAC) will hold a public meeting on April 11 from 9:30 a.m. to 11:00 a.m. (CDT) at the Sheraton Overland Park Hotel in Overland Park, Kansas. At this meeting, the AAC will discuss topics related to the agricultural economy and recent developments in the agricultural derivatives markets. [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]
- **CFTC's Market Risk Advisory Committee to Meet.** The CFTC's Market Risk Advisory Committee (MRAC) will meet on April 9 at 9:30 am ET. The MRAC will consider current topics and developments in the areas of central counterparty risk and governance, market structure, climate-related risk, and emerging technologies affecting derivatives and related financial markets.

New Developments Outside the U.S.

- **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. [NEW]

- **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. [NEW]
- **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. [NEW]
- **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. [NEW]
- **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]
- **ESMA Publishes Feedback on Shortening Settlement Cycle.** On March 21, the ESMA [published feedback](#) received to its Call for Evidence on shortening the settlement cycle in the EU. According to ESMA's report on the feedback, respondents focused on four areas: (1) many operational impacts, beyond adaptations of post-trade processes, were identified as the result of a reduction of the securities settlement cycle in the EU; (2) respondents identified a wide range of both potential costs and benefits of a shortened cycle, with some responses supporting a thorough impact assessment; (3) respondents provided suggestions around how and when a shorter settlement cycle could be achieved, with a strong demand for a clear signal from the regulatory front at the start of the work and clear

coordination between regulators and the industry; and (4) stakeholders made clear the need for a proactive approach to adapt their own processes to the transition to T+1 in other jurisdictions. Additionally, according to ESMA, some responses warned about potential infringements due to the misalignment of the EU and North America settlement cycles.

- **HKMA Issues New SPM Modules on Market Risk and CVA Risk Capital Charges.** On March 15, the HKMA released a [circular](#) informing the industry that it has issued new Supervisory Policy Manual (SPM) modules [MR-1: Market Risk Capital Charge](#) and [MR-2: CVA Risk Capital Charge](#) as statutory guidance, which will come into effect on a day to be appointed by the HKMA (intended to be January 1, 2025). The HKMA said that the revised market risk and credit valuation adjustment (CVA) risk capital frameworks will be set out in Part 8 and Part 8A of the Banking (Capital) Rules, respectively. The SPM MR-1: Market Risk Capital Charge covers the standardized approach for market risk, the internal models approach, the simplified standardized approach and requirements related to the boundary between the trading book and banking book, while the SPM MR-2: CVA Risk Capital Charge covers the reduced basic CVA approach, the full basic CVA approach and the standardized CVA approach. According to the HKMA, both new SPM modules are designed not just to provide additional technical details in addition to the rules but to integrally cover all of the related requirements. They set out the minimum standards that all locally incorporated authorized institutions are expected to adopt for the calculation of their market risk and CVA risk capital charges.
- **ASIC Finalizes Minor and Technical Changes to OTC Derivatives Reporting Rules.** On March 13, the Australian Securities and Investments Commission (ASIC) finalized the minor and technical changes to the [ASIC Derivative Transaction Rules \(Reporting\) 2024](#) under [ASIC Derivative Transaction Rules \(Reporting\) 2024 Amendment Instrument 2024/1](#) to implement the proposed changes to the 2024 rules set out in Consultation Paper 361a ASIC Derivative Transaction Rules (Reporting) 2024: Follow-on consultation on changes to data elements and other minor amendments ([CP 361a](#)). The changes include (1) seven additional data elements; (2) provide clarifications and administrative updates to the data elements; (3) make consequential changes to Chapter 2: Reporting Requirements; and (4) make other administrative updates including re-referencing the location of definitions in the Corporations Act 2001 that have been moved by the [Treasury Laws Amendment \(2023 Law Improvement Package No. 1\) Act 2023](#). According to ISDA, feedback to CP 361a was broadly supportive. In response to industry requests, the final changes also (1) provide for an additional circumstance where the name of Counterparty 2 is not reported and (2) change how the amount of one kind of collateral is reported.

New Industry-Led Developments

- **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. [NEW]
- **ISDA Responds to CFTC on Clearing Member Funds Protection.** On March 18, ISDA responded to the CFTC's consultation on proposed rules for the protection of clearing member funds held by derivatives clearing organizations (DCOs), including the assets of futures commission merchants (FCMs). According to ISDA,

it proposed that the CFTC should finalize the enhanced protection for clearing member assets in connection with an intermediated DCO only, which includes multiple FCMS, unaffiliated with the DCO, as its members. Regarding a DCO providing direct clearing without multiple FCMS unaffiliated with the DCO, ISDA suggested the CFTC should wait to propose enhanced protection for clearing members' assets, once a full assessment of the risks and complications associated with a DCO providing direct clearing has been completed. At which point, in ISDA's opinion, it would be appropriate for the CFTC to propose a comprehensive framework to address these risks holistically. Otherwise, ISDA said, the current notice of proposed rulemaking would create a sense of safety for the disintermediated model, which is superficial due to the rule not creating a comprehensive safety regime for disintermediated central counterparties (CCPs), with many risks arising from such models being left unaddressed.

- **ISDA Responds to FASB on Induced Conversion of Convertible Debt.** On March 18, ISDA [submitted a response](#) to the Financial Accounting Standards Board's (FASB) exposure draft on File Reference No. 2023-ED600, Debt—Debt with Conversion and Other Options (Subtopic 470-20): Induced Conversions of Convertible Debt Instruments. ISDA indicated that it supports FASB's proposals in the exposure draft and believes it achieves the objective of improving the application and relevance of the induced conversion guidance to cash convertible debt instruments.

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 materials does not establish an attorney-client relationship with the recipient and should not be relied upon as an alternative for advice from qualified counsel. Please note that facts and circumstances may vary, and prior results do not guarantee a similar outcome.

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