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Derivatives, Legislative and Regulatory Weekly Update (May 3, 2024)

May 3, 2024

Click for PDF ***From the Derivatives Practice Group:*** *This week, the CFTC approved final rules amending the capital and financial reporting requirements of swap dealers and major swap participants, and amending the large trading reporting regulations for futures and options.*

New Developments

- **CFTC Chairman Behnam Designates Ted Kaouk as the CFTC's First Chief Artificial Intelligence Officer**. On May 1, CFTC Chairman Rostin Behnam announced the designation of Dr. Ted Kaouk as the agency's first Chief Artificial Intelligence Officer. Dr. Kaouk currently serves as the CFTC's Chief Data Officer and Director of the Division of Data. The CFTC stated that in this newly expanded role as the CFTC's Chief Data & Artificial Intelligence Officer, Dr. Kaouk will be responsible for leading the development of the CFTC's enterprise data and artificial intelligence strategy to further integrate CFTC's ongoing efforts to advance its data-driven capabilities. [NEW]
- **CFTC Approves Final Rule Amending the Capital and Financial Reporting Requirements of Swap Dealers and Major Swap Participants**. On April 30, the CFTC announced it has approved a final rule that amends the capital and financial reporting requirements of Swap Dealers (SDs) and Major Swap Participants (MSPs). According to the CFTC, the amendments make changes consistent with CFTC Staff Letter No. 21-15 regarding the tangible net worth capital approach for calculating capital under CFTC Regulation 23.101, as well as CFTC Staff Letter No. 21-18, as further extended by CFTC Staff Letter No. 23-11, regarding the alternate financial reporting requirements for SDs subject to the capital requirements of a prudential regulator. The amendments also revise certain Part 23 regulations regarding the financial reporting requirements of SDs, including the required timing of certain notifications, the process for approval of subordinated debt for capital, and the information requested on financial reporting forms to conform to the rules. The CFTC stated that the amendments are intended to make it easier for SDs and MSPs to comply with the CFTC's financial reporting obligations and demonstrate compliance with minimum capital requirements. To allow for sufficient time to effectuate the reporting and notification amendments, the final rule has a compliance date of September 30, 2024, and will apply to all financial reports with an "as of" reporting date of September 30, 2024, or later. [NEW]
- **CFTC Approves Final Rules on Large Trader Reporting for Futures and Options**. On April 30, the CFTC announced approval of final rules to amend its large trading reporting regulations for futures and options. These regulations require futures commission merchants, clearing members, foreign brokers, and certain reporting markets (reporting firms) to report to the Commission position information for the largest futures and options traders. The final rules replace the data elements currently enumerated in the CFTC's regulations with an appendix specifying applicable data elements. The final rules also provide for the publication of a separate Part 17 Guidebook specifying the form and manner for reporting. In addition, the final rules remove the outdated 80-character data submission

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standard in the CFTC's regulations. According to the CFTC, that standard will be replaced by a FIXML standard, as set out in the Part 17 Guidebook. [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.
- **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 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 Developments Outside the U.S.

- **ESMA Publishes the Annual Transparency Calculations for Non-Equity Instruments, Bond Liquidity Data and Quarterly SI Calculations**. On April 30, ESMA published the results of the annual transparency calculations for non-equity instruments, new quarterly liquidity assessment of bonds and the quarterly systematic internaliser calculations under MiFID II and MiFIR. As indicated in ESMA's public statement on March 27, the quarterly liquidity assessment of bonds as well as the data for the quarterly systematic internalizers will continue to be published by ESMA. [NEW]
- **ESAs Issue Spring 2024 Joint Committee Update**. On April 30, the three European Supervisory Authorities (EBA, EIOPA and ESMA - the ESAs) issued their Spring 2024 Joint Committee update on risks and vulnerabilities in the EU financial system. The risk update shows that risks remain elevated in a context of slowing growth, an uncertain interest rate environment and ongoing geopolitical tensions. According to the update, in recent months, financial markets have performed strongly in anticipation of potential interest rate cuts in 2024 in both the EU and the US, despite the significant uncertainty surrounding these. The ESAs stated that this strong performance entails elevated risks of market corrections linked to unexpected events. [NEW]
- **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

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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 Industry-Led Developments

- **ISDA Launches Outreach Initiative on Proposed Notices Hub**. On April 25, ISDA announced 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]
- **ISDA, SIFMA, and CCMA Publish T+1 Settlement Cycle Booklet**. On April 30, ISDA, the Securities Industry and Financial Markets Association (SIFMA) and the Canadian Capital Markets Association (CCMA) published a T+1 settlement cycle booklet to address queries from market participants on the settlement cycle changes taking place in North America on May 27-28, 2024, and the possible impact to relevant securities and over-the-counter (OTC) derivatives transactions. This booklet may be updated from time to time. [NEW]
- **ISDA Publishes Sub-Annex A Maintenance Guidelines for the 2005 ISDA Commodity Definitions**. On April 30, ISDA published maintenance guidelines for Sub-Annex A of the 2005 ISDA Commodity Definitions. Sub-Annex A contains definitions for various Commodity Reference Prices. [NEW]
- **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 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.
- **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

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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.

- **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, 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

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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.

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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