GIBSON DUNN

This Week in Derivatives

March 1, 2024

From the Derivatives Practice Group: In a busy week for derivatives reporting, the CFTC extended the public comment period for its proposed reporting and ISDA touted its Digital Regulatory Reporting (DRR) initiative as the best approach to handling various jurisdictions' revised reporting requirements set to go live this year

New Developments

- **CFTC Extends Public Comment Period for Proposed Rule on Real-Time Public Reporting Requirements and Swap Data Recordkeeping and Reporting Requirements**. On February 26, the CFTC announced that it is extending the deadline for the public comment period on a proposed rule that makes certain modifications to the CFTC's swap data reporting rules in Parts 43 and 45 related to the reporting of swaps in the other commodity asset class and the data element appendices to Parts 43 and 45 of the CFTC's regulations. The deadline is being extended to April 11, 2024. The proposed rule was published in the Federal Register on December 28, 2023, with a 60-day comment period scheduled to close on February 26, 2024. [NEW]

- **CFTC Staff Issues No-Action Letter Regarding Pre-Trade Mid-Market Mark for Certain Interest Rate Swaps Referencing SOF**R. On February 22, the CFTC's Market Participants Division (MPD) issued a no-action letter applicable to all registered swap entities in relation to the requirement in Regulation 23.431 that swap dealers and major swap participants (swap entities) disclose to certain counterparties the Pre-Trade Mid-Market Mark (PTMMM) of a swap. The no-action letter states that MPD will not recommend the CFTC take an enforcement action against a registered swap entity for its failure to disclose the PTMMM to a counterparty in certain interest rate swaps referencing the Secured Overnight Financing Rate that are identified in the no-action letter, provided that: (1) real-time tradeable bid and offer prices for the swap are available electronically, in the marketplace, to the counterparty; and (2) the counterparty to the swap agrees in advance, in writing, that the registered swap entity need not disclose a PTMMM for the swap. According to the CFTC, the no-action letter provides a similar no-action position as that in CFTC Staff Letter No. 12-58 for certain interest rate swaps referencing the London Interbank Offered Rate. CFTC Commissioner Christy Goldsmith Romero objected to the no-action letter, arguing that it inappropriately shifts the burden of understanding swap dealer's conflicts and incentives back onto counterparties, upending the Dodd-Frank Act's intent.

- **CFTC Approves Three Proposed Rules and Other Commission Business**. On February 20, the CFTC approved three proposed rules through its seriatim process: (1) Regulations to Address Margin Adequacy and to Account for the Treatment of Separate Accounts by Futures Commission Merchants; (2) Foreign Boards of Trade; and (3) Requirements for Designated Contract Markets and Swap Execution Facilities Regarding Governance and the Mitigation of Conflicts of Interest Impacting Market Regulation Functions. All three proposals have a comment deadline of April 22, 2024. Additionally, the CFTC issued an order of exemption from registration as a derivatives clearing organization (DCO) to Taiwan Futures Exchange Corporation and approved an amended order of registration for ICE NGX Canada, Inc., adding environmental contracts to the scope of contracts it is eligible to clear as a DCO.

- **CFTC Extends Comment Period on Proposed Rules for Operational Resilience Frameworks**. On February 20, the CFTC extended the comment period on its proposed rules implementing requirements for operational resilience frameworks for futures commission merchants, swap dealers and major swap participants. The new deadline is April 1, 2024.

- **CFTC GMAC to Meet March 6**. The CFTC's Global Markets Advisory Committee (GMAC) will meet on Wednesday, March 6 at 10am ET. The GMAC will hear presentations from its Global Market Structure Subcommittee, Technical Issues Subcommittee and Digital Asset Markets Subcommittee, and consider their recommendations. The CFTC stated that the GMAC recently advanced eight recommendations to the Commission following its November meeting. According to the CFTC, the upcoming GMAC meeting will build upon the GMAC's progress toward developing solutions to the most significant challenges in global markets, as set forth in its 2023-2025 work program.

New Developments Outside the U.S.

- **HKMA Sets Out Expectations on Tokenized Product Offerings**. On February 20, the Hong Kong Monetary Authority (HKMA) published a circular covering the sale and distribution of tokenized products. According to the HKMA, the prevailing supervisory requirements and consumer/investor protection measures for the sale and distribution of a product are also applicable to its tokenized form as it has terms, features and risks similar to those of the underlying product. The HKMA clarified that authorized institutions should conduct adequate due diligence and fully understand the tokenized products before offering them to customers and on a continuous basis at appropriate intervals. Authorized institutions are also expected to act in the best interest of their customers and make adequate disclosure of the relevant material information about a tokenized product, including its key terms, features and risks. Finally, the HKMA indicated that authorized institutions should put in place proper policies, procedures, systems and controls to identify and mitigate the risks arising from tokenized product-related activities.

- **HKMA Sets Standards for Digital Asset Custodial Services**. On February 20, the HKMA issued guidance for authorized institutions interested in offering custody services for digital assets. The HKMA expects authorized institutions to undertake a comprehensive risk assessment followed by the implementation of appropriate policies to manage identified risks. The entire process should be overseen by the board and senior management. The HKMA also requires authorized institutions to conduct independent systems audits, store a substantial portion of client digital assets in cold storage, ensure that private keys are secured within Hong Kong and provide all records to HKMA whenever requested. Authorized institutions should notify the HKMA and confirm that they meet the expected standards in the guidance within 6 months from the date of the guidance (i.e. February 20, 2024).

- **ASIC Publishes Third Consultation Paper on OTC Derivatives Reporting**. On February 15, the Australian Securities and Investments Commission (ASIC) published Consultation Paper (CP) 375: Proposed changes to the ASIC Derivatives Transaction Rules (Reporting): Third consultation. CP 375 proposes the following changes to ASIC Derivative Transaction Rules (Reporting) 2024: simplify the exclusion of exchange-traded derivatives; simplify the scope of foreign entity reporting; remove the alternative reporting provisions; clarify the exclusion of FX securities conversion transactions; and add additional allowable values for two data elements. Additionally, CP 375 proposes minor changes to ASIC Derivative Transaction Rules (Clearing) 2015: simplify and align the exclusion of exchange-traded derivatives with the 2024 reporting rules and make minor updates to re-reference certain definitions to their changed location in the Corporations Act 2001. The proposed changes would commence on October 21, 2024, except for the changes to the scope of foreign entity reporting and the removal of alternative reporting provisions, which would commence on April 1, 2025. ASIC indicated that it does not expect most reporting entities to face any material additional compliance burden upon implementation of the proposed changes. However, a small number of international reporting entities and some small-scale exempt reporting entities may be impacted, according to ASIC. The consultation period will run until March 28, 2024.

- **Council of the EU Ratifies EMIR 3 Agreement at Ambassador Level**. On February 14, the European Market Infrastructure Regulation 3 (EMIR 3) package (regulation and directive), as negotiated in the trilogues, was approved at ambassador level. The texts are available here. According to ISDA, the final text maintains the Council of the EU's less punitive approach of an operational active account with representativeness. It also introduces a requirement for financial counterparties and non-financial counterparties above certain de minimis thresholds to hold an active account at an EU CCP and to clear a number of representative trades in that account. The directive amending the Capital

Requirement Regulation is intended to provide more specific tools and powers under Pillar 2 in the context of excessive concentration to CCPs.

- **CPMI, IOSCO Publish Paper on Streamlining VM in Centrally Cleared Markets**. On February 14, the Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) published a discussion paper on streamlining variation margin (VM) in centrally cleared markets. The discussion paper follows the review of margining practices, published in 2022 by the Basel Committee on Banking Supervision, the CPMI and IOSCO. The discussion paper sets out eight effective practices, covering intraday VM call scheduling and frequency, treatment of excess collateral, the pass-through of VM by CCPs and transparency between CCPs, clearing members and their clients. The deadline for comment is April 14.

- **ESMA Withdraws Euronext Authorization as a Data Reporting Service Provider Under MIFIR Upon the Entity's Request**. On February 13, ESMA withdrew the authorization of Euronext Paris SA (Euronext) as a Data Reporting Service Provider (DRSP) under the Markets in Financial Instruments Regulation (MiFIR). Euronext was authorized as both an Approved Reporting Mechanism and an Approved Publication Arrangement under MiFIR since January 3, 2018. MiFIR provides that ESMA shall withdraw the authorization of a DRSP where the DRSP expressly renounces its authorization. ESMA's withdrawal decision follows the notification by Euronext of its intention to renounce its authorization under the conditions set out in Article 27e(a) of MIFIR.

- **ESMA Publishes Latest Edition of its Newsletter**. On February 13, ESMA published its latest edition of the Spotlight on Markets Newsletter. The newsletter focused on the last ESMA consultation package related to the Markets in Crypto Assets Regulation (MiCA). ESMA invited stakeholders to send their feedback on reverse solicitation and classification of crypto assets as financial instruments by April 29, 2024. The newsletter also launched a call for candidates for ESMA's Securities Markets Stakeholder Group and called interested parties who can give a strong voice to consumers, industry, users of financial services, employees in the financial sector, SMEs as well as academics to apply by March 18.

New Industry-Led Developments

- **ISDA Updates Updated OTC Derivatives Compliance Calendar**. On February 29, ISDA announced that it has updated its global calendar of compliance deadlines and regulatory dates for the over-the-counter (OTC) derivatives space. [NEW]

- **ISDA Extends Digital Regulatory Reporting InitiativeDRR: The Answer to Reporting Rule Rush**. On February 26, ISDA reported that it has worked to extend its Digital Regulatory Reporting (DRR) initiative to cover the rush of reporting rules, which starts with Japan on April 1, followed by the EU on April 29, the UK on September 30 and Australia and Singapore on October 21. ISDA stated that iIn each case, regulators are revising their rules to incorporate globally agreed data standards in an effort to improve the cross-border consistency of what is reported and the format in which it is submitted – a process that started in December 2022 with the rollout of the first phase of the US Commodity Futures Trading Committee's revised swap data reporting rules. [NEW]

- **ISDA Publishes Clearing Model Comparison**. On February 1, ISDA published a comparison of US Treasury clearing models at the Fixed Income Clearing Corporation, as well as models for clearing repos at other central counterparties globally and models for clearing derivatives. ISDA explained that Tthis comparison is intended to help market participants understand existing and potential new clearing models for UST cash and repo transactions as they implement the US SEC's recent rules requiring clearing of such transactions. [NEW]

- **ISDA Responds to FCA on Commodity Derivatives**. On February 15, ISDA and the Association for Financial Markets in Europe (AFME) submitted a joint response to the UK Financial Conduct Authority (FCA) consultation on the reform of the UK commodity derivatives regulatory framework. The consultation sought to remove unnecessary burdens on firms and strengthen the supervision of the UK's commodity derivatives markets. The associations indicated that they strong support the FCA's proposal to apply a narrower position limits regime that it views as more proportionate to the risks associated with certain commodity derivatives contracts. However, the associations expressed concern over the proposed approaches for setting position limits and adding additional reporting obligations. They noted that the complex and burdensome frameworks proposed can, in their view, discourage participation in UK trading venues by non-UK participants and may have a negative impact on the competitiveness of UK markets. The response also recommends a longer implementation period of at least 24 months, based on the association's perception of the scale of the operational and technical changes required.

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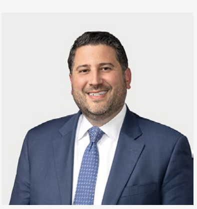

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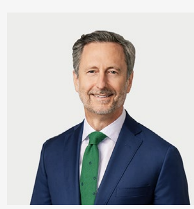

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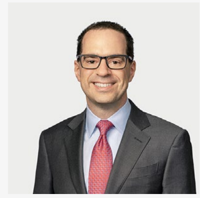

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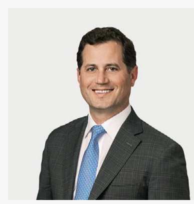

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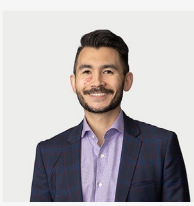

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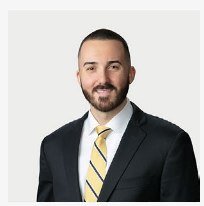

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