

Derivatives, Legislative and Regulatory Weekly Update (March 8, 2024)

Client Alert | March 8, 2024

From the Derivatives Practice Group: We continue to see a lot of activity around virtual assets in Hong Kong, with Hong Kong's Securities and Futures Commission weighing in most recently.

New Developments

- **CFTC's Global Markets Advisory Committee Advances Three Recommendations.** On March 7, the CFTC's Global Markets Advisory Committee (GMAC), sponsored by Commissioner Caroline D. Pham, advanced three new recommendations intended to (1) [promote U.S. Treasury markets resiliency and efficiency](#), (2) [provide resources on the upcoming transition to T+1 securities settlement](#), and (3) [publish a first-ever digital asset taxonomy to support U.S. regulatory clarity and international alignment](#). [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]
- **CFTC Staff Issues Advisory Regarding FBOT Regulatory Filings.** On March 1, the CFTC's Division of Market Oversight announced that it issued an [advisory](#) notifying all foreign boards of trade (FBOTs) registered under Part 48 of the CFTC's regulations that, beginning April 1, 2024, certain regulatory filings (covered filings) should be submitted through the CFTC's online filings portal, which has been updated for FBOT use. The portal has been available to registered FBOTs for the submission of public filings since March 1. Covered filings will be accepted via email until March 31. Beginning April 1, FBOTs should submit all Covered Filings exclusively through the portal. [NEW]
- **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 SOFR.** 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

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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.

New Developments Outside the U.S.

- **SFC Issues Guidance on Disciplinary Process Under Virtual Assets Regime.** On February 28, Hong Kong's Securities and Futures Commission (SFC) published a [guide](#) outlining the disciplinary process under the new licensing regime for virtual asset trading platforms (AMLO VATP Regime). Under the new regime, introduced via an amendment to the [Anti-Money Laundering and Counter-Terrorist Financing Ordinance](#) (Cap. 615), the SFC has the power to discipline its licensees, comprising firms, their responsible officers and those involved in their management, if it finds that such licensee's conduct suggests that it is, or was at any time, guilty of misconduct or not fit and proper. The disciplinary process under the AMLO VATP Regime is based largely on the disciplinary process applicable to persons licensed by or registered with the SFC (including those involved in their management) under the [Securities and Futures Ordinance](#) (Cap. 571). The SFC indicated that when determining whether to take disciplinary action and the level of sanction, the SFC will consider, among other things, the nature and seriousness of the conduct, the amount of profits accrued or loss avoided, and circumstances specific to the firm or individual. [NEW]
- **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).

New Industry-Led Developments

- **ISDA Publishes Whitepaper Charting the Next Phase of India's OTC Derivatives Market.** On March 4, ISDA published a new [whitepaper](#) that explores the growth of India's financial markets and makes a series of market and policy recommendations to encourage the further development of a safe and efficient over-the-counter (OTC) derivatives market. The whitepaper proposes several initiatives that industry participants and regulators could take that ISDA believes will create deeper and more liquid domestic derivatives markets and enhance risk management practices. The recommendations are centered on five key pillars: (1) Broaden product development, innovation and diversification; (2) Foster adoption of similar market and risk principles across regulatory regimes; (3) Enhance market access and diversification of participants in the OTC derivatives market; (4) Ensure growth in a safe and efficient manner; and (5) Encourage greater alignment with international principles and practices. [NEW]
- **ISDA Extends Digital Regulatory Reporting Initiative DRR: 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 in 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](#).

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 (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,

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