GIBSON DUNN

This Week in Derivatives

July 12, 2024

From the Derivatives Practice Group: This week, President Biden announced his intent to nominate Julie Brinn Siegel to be a Commissioner of the CFTC. Siegel is the Senior Coordinator for Management at the Office of Management and Budget.

New Developments

- **President Biden Announced Intent to Nominate Julie Brinn Siegel as a Commissioner of the CFTC.** On July 11, President Biden announced his intent to nominate Julie Brinn Siegel to be a Commissioner of the CFTC. Siegel currently serves as the federal government's deputy chief operating officer as Senior Coordinator for Management at the Office of Management and Budget (OMB). Prior to that, Siegel served as Secretary of the Treasury Janet Yellen's Deputy Chief of Staff and served as Senior Counsel and Policy Advisor to U.S. Senator Elizabeth Warren (D-MA). Last month, President Biden nominated CFTC Commissioner Johnson to be Assistant Secretary for Financial Institutions at the Department of Treasury and nominated CFTC Commissioner Christy Goldsmith Romero to be Chair and Member of the Federal Deposit Insurance Corporation (FDIC) which, if confirmed by the Senate, would leave open two Democratic Commissioner seats at the CFTC. Siegel, if nominated and confirmed by the Senate, would take the seat of Commissioner Goldsmith Romero. [NEW]

- **First Interagency Fraud Disruption Conference Focuses on Combatting Crypto Schemes Commonly Known as "Pig Butchering."** On July 11, the CFTC and the DOJ's Computer Crime and Intellectual Property Section's National Cryptocurrency Enforcement Team ("NCET") convened the first Fraud Disruption Conference to work on efforts to combat a type of fraud commonly known as "pig butchering". It is estimated that Americans are scammed out of billions per year, making this a top law enforcement priority. The working group addressed strategies to prevent victimization; using technology to disrupt the fraud; and collaboration on enforcement efforts. Several agencies also collaborated on an anti-victimization messaging campaign to warn Americans to remain vigilant against emerging fraud threats. [NEW]

- **Supreme Court Overrules Chevron, Sharply Limiting Judicial Deference To Agencies' Statutory Interpretation.** On June 28, the Supreme Court overruled Chevron v. Natural Resources Defense Council, a landmark decision that had required courts to defer to agencies', including the CFTC's, reasonable interpretations of ambiguous statutory terms. For a more detailed analysis of the ruling please refer to Gibson Dunn's client alert, available here.

- **CFTC Announces Supervisory Stress Test Results.** On July 1, the CFTC issued Supervisory Stress Test of Derivatives Clearing Organizations: Reverse Stress Test Analysis and Results, a report detailing the results of its fourth Supervisory Stress Test ("SST") of derivatives clearing organization ("DCO") resources. Among other findings, the 2024 report concluded the DCOs studied hold sufficient financial resources to withstand many extreme and often implausible price shocks. The purpose of the analysis was twofold: (1) to identify hypothetical combinations of extreme market shocks, concurrent with varying numbers of clearing member ("CM") defaults, that would exhaust prefunded resources (DCO committed capital, and default fund), and unfunded resources available to the DCOs (this represents the reverse stress test component), and (2) to analyze the impacts of DCO use of mutualized resources on non-defaulted CMs.

- **CFTC Staff Issues a No-Action Letter Regarding Certain Reporting Requirements for Swaps Transitioning from CDOR to CORRA.** On June 27, the CFTC Division of Market Oversight ("DMO") and Division of Data ("DOD") issued a staff no-action letter regarding certain Part 43 and Part 45 swap reporting obligations for swaps transitioning under the ISDA LIBOR fallback provisions from referencing the Canadian Dollar Offered Rate ("CDOR"), to referencing the risk-free Canadian Overnight Repo Rate Average ("CORRA") following the cessation of CDOR after June 28, 2024. The letter states DMO and DOD will not recommend the CFTC take enforcement action against an entity for failure to timely report under Part 45 the change in a swap's floating rate. This letter covers those floating rate changes that are made under the ISDA LIBOR fallback provisions from CDOR to CORRA, but only in the event the entity uses its best efforts to report the change by the applicable deadline in Part 45 and in no case reports the required information later than five business days from, but excluding, July 2, 2024. The letter also states DMO and DOD will not recommend the CFTC take enforcement action against an entity for failure to report under Part 43 the change in the floating rate for a swap modified after execution to incorporate the ISDA LIBOR fallback provisions to transition from referencing CDOR to referencing CORRA.

- **CFTC Extends Public Comment Period for Proposed Amendments to Event Contracts Rules.** On June 27, the CFTC announced it is extending the deadline for public comment on a proposal to amend its event contract rules. The extended comment period will close on August 8, 2024. The CFTC is providing an extension to allow interested persons additional time to analyze the proposal and prepare their comments. The proposal would amend CFTC Regulation 40.11 to further specify types of event contracts that fall within the scope of Commodity Exchange Act ("CEA") Section 5c(c)(5)(C) and are contrary to the public interest, such that they may not be listed for trading or accepted for clearing on or through a CFTC-registered entity.

New Developments Outside the U.S.

- **ESAs Consult on Guidelines under the Markets in Crypto-Assets Regulation.** On July 12, the European Supervisory Authorities ("ESAs") published a consultation paper on Guidelines under Markets in Crypto-assets Regulation ("MiCA"), establishing templates for explanations and legal opinions regarding the classification of crypto-assets along with a standardized test to foster a common approach to classification. [NEW]

- **ESAs Report on the Use of Behavioral Insights in Supervisory and Policy Work.** On July 11, the ESAs published a joint report following their workshop on the use of behavioral insights by supervisory authorities in their day-to-day oversight and policy work. The report provides a high-level overview of the main topics discussed during the workshop held in February 2024 for national supervisors and other competent authorities, where participants explored the added value of behavioral insights in their work by exchanging their experiences and discussing the challenges they face. [NEW]

- **ESMA Publishes the 2024 ESEF Reporting Manual.** On July 11, ESMA published the update of its Reporting Manual on the European Single Electronic Format ("ESEF") supporting a harmonized approach for the preparation of annual financial reports. ESMA has also updated the Annex II of the Regulatory Technical Standards ("RTS") on ESEF. [NEW]

- **ESMA Publishes Statement on Use of Collateral by NFCs Acting as Clearing Members.** On July 10, ESMA issued a public statement on deprioritizing supervisory actions linked to the eligibility of uncollateralized public guarantees, public bank guarantees, and commercial bank guarantees for Non-Financial Counterparties ("NFCs") acting as clearing members, pending the entry into force of EMIR 3.

- **ESMA Launches New Consultations.** On July 10, ESMA published a new package of public consultations with the objective of increasing transparency and system resilience in financial markets, reducing reporting burden and promoting convergence in the supervisory approach. [NEW]

- **ESMA Consults on Rules to Recalibrate and Further Clarify the Framework.** On July 9, ESMA launched new consultations on different aspects of the Central Securities Depositories Regulation ("CSDR") Refit. The proposed rules relate to the information to be provided by European CSDs to their national competent authorities ("NCA"s) for the review and evaluation, the information to be notified to ESMA by third-country CSDs, and the scope of settlement discipline. [NEW]

- **ESMA Consults on Liquidity Management Tools for Funds.** On July 8, ESMA announced it is seeking input on draft guidelines and technical standards under the revised Alternative Investment Fund Managers Directive ("AIFMD") and the Undertakings for Collective Investment in Transferable Securities ("UCITS") Directive. Both Directives aim to mitigate potential financial stability risks and promote harmonization of liquidity risk management in the investment funds sector. [NEW]

- **ESMA Consults on Reporting Requirements and Governance Expectations for Some Supervised Entities.** On July 8, ESMA launched two consultations on proposed guidance for some of its supervised entities. The consultations are aimed at the following entities supervised by ESMA: Benchmark Administrators, Credit Rating Agencies, and Market Transparency Infrastructures. The Consultation Paper sets out the information ESMA expects to receive and a timeline for supervised entities to provide the required information. The objective of the Draft Guidelines is to ensure consistency in cross-sectoral reporting. [NEW]

- **ESMA Puts Forward Measures to Support Corporate Sustainability Reporting.** On July 5, ESMA published a Final Report on the Guidelines on Enforcement of Sustainability Information ("GLESI") and a Public Statement on the first application of the European Sustainability Reporting Standards ("ESRS"). ESMA reports that these documents will support the consistent application and supervision of sustainability reporting requirements.

- **ESMA Releases New MiCA Rules To Increase Transparency for Retail Investors.** On July 4, ESMA published the second Final Report under the Markets in Crypto-Assets Regulation (MiCA) covering eight draft technical standards that aim to provide more transparency for retail investors, clarity for providers on the technical aspects of disclosure and record-keeping requirements, and data standards to facilitate supervision by National Competent Authorities ("NCAs"). The report covers public disclosures, as well as descriptions on how issuers should disclose price-sensitive information to the public to prevent market abuses, such as insider dealing.

- **ESMA Reappoints Three Members to its Management Board.** On July 4, ESMA announced that it has reappointed three current members to its Management Board. The appointments took place at the Board of Supervisors meeting on July 3. The Management Board, chaired by Verena Ross, Chair of ESMA, is responsible for ensuring that the Authority carries out its mission and performs the tasks assigned to it under its founding Regulation.

- **EBA and ESMA Publish Guidelines on Suitability of Management Body Members and Shareholders for Entities Under MiCA.** On June 27, EBA and ESMA published joint guidelines on the suitability of members of the management body, and on the assessment of shareholders and members with qualifying holdings for issuers of asset reference tokens ("ARTs") and crypto-asset service providers ("CASPs"), under the MiCA. The first set of guidelines covers the presence of suitable management bodies within issuers of ARTs and CASPs. The second set of guidelines concerns the assessment of the suitability of shareholders or members with direct or indirect qualifying holdings in a supervised entity.

New Industry-Led Developments

- **Trade Associations Submit Letter on EMIR IM Model Validation.** On July 8, ISDA, the Alternative Investment Management Association ("AIMA"), the European Fund and Asset Management Association ("EFAMA") and the Securities Industry and Financial Markets Association's asset management group ("SIFMA AMG") submitted a letter to the ESAs and the European Commission on initial margin ("IM") model approval requirements set out in the European Market Infrastructure Regulation ("EMIR 3.0"). The letter highlights challenges posed by the three-month period granted to the European Banking Authority and NCAs to validate changes to an IM model and describes how the ISDA Standard Initial Margin Model ("ISDA SIMM") schedule can be amended to address these issues. [NEW]

- **ISDA Proceeds with Development of an Industry Notices Hub.** On July 1, ISDA announced it will proceed with the development of an industry-wide notices hub, following strong support from buy- and sell-side institutions globally. The new online platform will allow instantaneous delivery and receipt of critical termination-related notices and help to ensure address details for physical delivery are up to date, reducing the risk of uncertainty and potential losses for senders and recipients of these notices.

- **ISDA Publishes Framework to Prepare for Close Out of Derivatives Contracts.** On June 27, ISDA published the ISDA Close-out Framework that market participants can use to help prepare for potential terminations of collateralized derivatives contracts. ISDA stated that the launch of the ISDA Close-out Framework is in response to the March 2023 failure of Signature Bank and SVB in the US, which, according to ISDA, highlighted the complexities of potentially terminating over-the-counter derivatives trading relationships following various post-crisis regulatory reforms. Specifically, the reforms require that in-scope entities post margin for non-cleared derivatives transactions, while various jurisdictions have introduced mandatory stays on termination rights and remedies as part of bank resolution regimes. ISDA stated that the ISDA Close-out Framework is intended to be used as a preparatory resource to help firms coordinate internal business functions and stakeholders and internal and external legal, operational, risk management, infrastructure and other relevant service providers to ensure they are adequately prepared for any potential future stress events.

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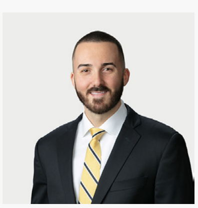

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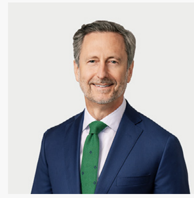

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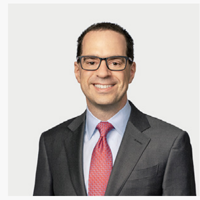

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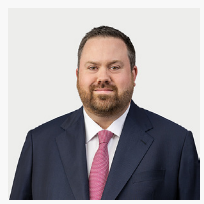

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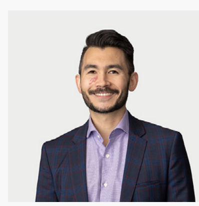

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