

This Week in Derivatives

October 11, 2024

From the Derivatives Practice Group: The CFTC announced that it has taken a no-action position with respect to KalshiEX LLC and related parties regarding swap-data reporting and recordkeeping regulations.

New Developments

- **CFTC Staff Issues Supplemental Letter Regarding No-Action Position Related to Reporting and Recordkeeping Requirements for Fully Collateralized Binary Options.** On October 4, the CFTC's Division of Market Oversight and the Division of Clearing and Risk announced they have taken a [no-action position](#) regarding swap data reporting and recordkeeping regulations in response to a request from KalshiEX LLC, a designated contract market, and Kalshi Klear LLC, a derivatives clearing organization, to modify CFTC Letter No. 21-11 to cover transactions cleared through Kalshi Klear LLC. According to the announcement, the divisions will not recommend the CFTC initiate an enforcement action against KalshiEX LLC, Kalshi Klear LLC, or their participants for failure to comply with certain swap-related recordkeeping requirements and for failure to report to swap data repositories data associated with binary option transactions executed on or subject to the rules of KalshiEX LLC and cleared through Kalshi Klear LLC, subject to the terms and conditions in the no-action letter. [NEW]
- **US Appeals Court Clears Kalshi to Restart Elections Betting.** On October 2, the U.S. Court of Appeals for the D.C. Circuit upheld the D.C. District Court's order that permitted KalshiEX LLC to list contracts that allow Americans to bet on election outcomes. The Court said that the CFTC did not show how the agency or the public interest would be harmed by the "event" contracts. The CFTC's motion was denied "without prejudice to

renewal should more concrete evidence of irreparable harm develop during the pendency of appeal.”

- **CFTC’s Division of Clearing and Risk Announces Staff Roundtable Discussion on New and Emerging Issues in Clearing.** On September 27, the CFTC announced that the Division of Clearing and Risk will hold a public roundtable on October 16, to discuss existing, new, and emerging issues in clearing. The roundtable will be held in the Conference Center at CFTC’s headquarters at Three Lafayette Centre, 1155 21st Street N.W., Washington, D.C. The roundtable will include participants from derivatives clearing organizations, futures commission merchants (“FCM”), FCM customers, end-users, custodians, proprietary traders, public interest groups, state regulators, and others. The goal of the roundtable is to gather information and receive expert input from a wide variety of stakeholder groups. Topics to be covered include the custody and delivery of digital assets, digital assets and margin, full collateralization, 24/7 trading, non-intermediated clearing with margin, and conflicts of interest related to vertically integrated entities.
- **CFTC Requests Public Comment on a Rule Certification Filing by KalshiEX LLC.** On September 26, the CFTC requested public comment on a [rule certification filing](#) by KalshiEX LLC, which would amend its rulebook to include rules for a request for quote functionality and amendments to its prohibited transactions rule. The CFTC previously [stayed](#) KalshiEX LLC’s filing because, according to the CFTC, the submission presents novel or complex issues that require additional time to analyze and is potentially inconsistent with the Commodity Exchange Act or the CFTC’s regulations. Comments must be submitted on or before October 28, 2024.
- **CFTC Staff Extends No-Action Position for Certain Reporting Obligations Under the Ownership and Control Reports Final Rule.** On September 25, the CFTC’s Division of Market Oversight (“DMO”) issued a no-action letter that extends the current no-action position for reporting obligations under the [ownership and control reports final rule](#) (“OCR Final Rule”). The OCR Final Rule, approved in 2013, requires the electronic submission of trader identification and market participant data for special accounts and volume threshold accounts through Form 102 and Form 40. DMO said that it is extending its no-action position to address continuing compliance difficulties associated with certain ownership and control reporting obligations identified by reporting parties and market participants. The position extends DMO’s position under CFTC Letter No. [23-14](#), stating that DMO will not recommend the CFTC commence an enforcement action for non-compliance with certain obligations. These obligations include, among others, the timing of ownership and control report form filings; certain information required to be reported regarding trading account controllers and volume threshold account controllers on Form 102; the reporting threshold that triggers the reporting of a volume threshold account on Form 102; the filing of refresh updates for Form 102; and responses to certain questions on Form 40. The no-action position will remain in effect until the later of the applicable effective date or compliance date of a CFTC action, such as a rulemaking or order, addressing such obligations.
- **CFTC Announces Four Orders Granting Whistleblower Awards – Marking the Most in a Single Day.** On September 23, the CFTC announced awards totaling approximately

\$4.5 million for whistleblowers who, collectively, provided information that led to the success of multiple enforcement actions brought by the CFTC and another authority. The four orders granting awards, to a total of seven whistleblowers, are the most the CFTC has issued on a single day.

New Developments Outside the U.S.

- **ESMA Publishes Its First Annual Report on EU Carbon Markets.** On October 7, ESMA published the [2024 EU Carbon Markets report](#), providing details and insights into the functioning of the EU Emissions Trading System market. The report indicates that prices in the EU ETS have declined since the beginning of 2023; emission allowance auctions remain significantly concentrated, with 10 participants buying 90% of auctioned volumes, reflecting a preference by most EU ETS operators to source allowances from financial intermediaries; and the vast majority of emission allowance trading in secondary markets takes place through derivatives, reflecting the annual EU ETS compliance cycle where non-financial sector firms hold long positions (for compliance purposes) while banks and investment firms hold short positions. The report builds on ESMA's [2022 report](#) on the trading of emission allowances, mandated in the context of rising energy prices and a three-fold increase of emission allowances' prices in 2021. [NEW]
- **ESMA Launches New Consultations Under the MiFIR Review.** On October 3, ESMA launched [two consultations](#) on transaction reporting and order book data under the Markets in Financial Instruments Regulation ("MiFIR") Review. ESMA is seeking input on the amendments to the regulatory technical standards ("RTS") for the reporting of transactions and to the RTS for the maintenance of data relating to orders in financial instruments.
- **Joint UK Regulators Issue Press Release on the End of LIBOR.** On October 1, the Bank of England published a [joint press release](#) with the FCA and the Working Group on Sterling Risk-Free Reference Rates on the end of LIBOR. On September 30, the remaining synthetic LIBOR settings were published for the last time and LIBOR came to an end. All 35 LIBOR settings have now permanently ceased. The Working Group has met its objective of finalizing the transition away from LIBOR and will be wound down effective as of October 1. Market participants are encouraged to continue to ensure they use the most robust rates for the relevant currency and should ensure their use of term risk-free reference rates are limited and remain consistent with the relevant guidance on best practice on the scope of use.
- **ESAs Appoint Director to Lead their DORA Joint Oversight.** On October 1, the European Supervisory Authorities appointed Marc Andries to lead their new joint Directorate in charge of oversight activities for critical third-party providers established by the Digital Operational Resilience Act ("DORA"). In his role as DORA Joint Oversight Director, Marc Andries will be responsible for implementing and running an oversight framework for critical third-party service providers at a pan-European scale, contributing to the smooth operations and stability of the EU financial sector.

- **ESMA 2025 Work Programme: Focus on Key Strategic Priorities and Implementation of New Mandates.** On October 1, ESMA published its [2025 Annual Work Programme \(AWP\)](#). A significant portion of ESMA’s work in 2025 will comprise policy work to facilitate the implementation of the large number of mandates received in the previous legislative cycle, and the preparation of new mandates, such as the European Green Bonds and the ESG Rating Providers Regulations.
- **ESMA Announces Next Steps for the Selection of Consolidated Tape Providers.** On September 30, ESMA announced it will launch the selection procedure for Consolidated Tapes Providers (“CTPs”) bonds on January 3, 2025. In June 2025, ESMA will launch the selection procedure for the CTP for shares and Exchange-Traded Funds with the objective to adopt a reasoned decision on the selected applicant by the end of 2025.
- **SFC and HKMA Publish Conclusions on Enhancements to OTC Derivatives Reporting Regime for Hong Kong.** On September 26, the Securities and Futures Commission and the Hong Kong Monetary Authority jointly published [conclusions](#) on proposed enhancements to the over-the-counter (“OTC”) derivatives reporting regime for Hong Kong, indicating that they will mandate (i) the use of unique transaction identifiers, (ii) the use of unique product identifiers and (iii) the reporting of critical data elements beginning on September 29, 2025.

New Industry-Led Developments

- **ISDA Submits Paper to ESMA on MIFIR Post-Trade Transparency.** On October 8, ISDA submitted [a paper](#) to ESMA, in which it outlined its views on the scope of OTC derivatives post-trade transparency in the revised MiFIR. The paper outlines ISDA’s view on the treatment of certain interest rate derivatives, index credit default swaps and securitized derivatives. ISDA indicated that it is anticipating the publication of ESMA’s consultation paper on the revised regulatory technical standards, covering OTC derivatives, later in 2024 or in the first quarter of 2025. [NEW]
- **ISDA, FIA Respond to BoE Consultations on CCP Recovery and Resolution.** On October 4, ISDA and FIA submitted a [joint response](#) to two Bank of England (“BoE”) consultations on central counterparty (“CCP”) recovery and resolution: [the BoE’s power to direct a CCP to address impediments to resolvability](#) ; and [the BoE’s approach to determining commercially reasonable payments for contracts subject to a statutory tear up in CCP resolution](#). In response to the BoE’s consultation on its power to direct a CCP to address impediments to resolvability, the associations said that they welcome the clarity provided on the timescales the BoE would follow when using its power to address impediments to resolvability. However, the response notes that the BoE should more explicitly set out whether and how it would consider informing clearing members ahead of using this power. In response to the BoE’s consultation on its approach to determining commercially reasonable payments for contracts subject to statutory tear up in CCP resolution, the associations expressed caution on the proposed approach, which they indicated could result in placing too much reliance on the CCP’s own rules and

arrangements to generate commercially reasonable prices for contracts subject to tear up. The response highlights that in a situation where the BoE would have to use its power to tear up contracts – i.e., after a failed auction – there might not exist a clear price for those contracts. [NEW]

- **ISDA Responds to UK FCA Consultation on DTO and PTRRS.** On September 30, ISDA responded to Financial Conduct Authority (“FCA”) consultation CP24/14 on the derivatives trading obligation (“DTO”) and post-trade risk reduction services (“PTRRS”). In the response, ISDA highlights its support for including certain overnight index swaps based on the US Secured Overnight Financing Rate within the classes of derivatives subject to the DTO and expanding the list of PTRRS exempted from the DTO and other obligations.
- **ISDA Publishes Results of Survey on AT1 Treatment in DRM Model** On September 27, ISDA published a [survey](#) of its members on the development of the dynamic risk management (“DRM”) model. The survey sought to understand the accounting and regulatory treatment of Alternative Tier 1 (“AT1”) financial instruments and to contribute this information to the development of the International Accounting Standards Board’s DRM model. The survey shows that for balance sheet classification under International Financial Reporting Standards, the majority of respondents classify their AT1s as equity; the majority of respondents include their AT1s for interest rate risk in the banking book (“IRRBB”) as equivalent to financial liabilities; and there is strong desire for the inclusion of AT1s in the current net open position.
- **ISDA Publishes Updated Best Practices for Confirming Reference Obligations or Standard Reference Obligations.** On September 25, ISDA published updated [Best Practices for Single-name Credit Default Swaps regarding Reference Obligations or Standard Reference Obligations](#). The document sets out suggested best practices for confirming the Reference Obligation or Standard Reference Obligations for single-name Credit Default Swaps and is an update to the [Best Practice Statement](#) that was published by ISDA on November 18, 2014.
- **Joint Trade Association Issues Statement on EMIR 3.0 Effective Implementation Dates.** On September 23, ISDA, the Alternative Investment Management Association, the European Banking Federation, the European Fund and Asset Management Association and FIA sent a [letter](#) urging the European Commission and European supervisory authorities to clarify that market participants are not required to implement the European Market Infrastructure Regulation (“EMIR 3.0”) Level 1 provisions prior to the date of application of the associated Level 2 regulatory technical standards (“RTS”). In the letter, the associations state that they are seeking clarification to avoid firms being required to implement the requirements of EMIR 3.0 twice—first, to comply with the Level 1 provisions once EMIR 3.0 enters into force and then when the associated Level 2 RTS becomes applicable.

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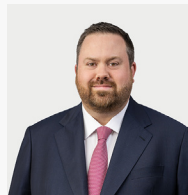
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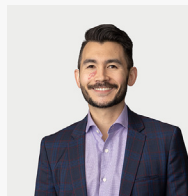
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