GIBSON DUNN

This Week in Derivatives

October 18, 2024

From the Derivatives Practice Group: On October 15, ESMA, the European Commission and the European Central Bank announced the next steps to support the preparations towards a transition to T+1 in a Joint Statement. In the Joint Statement, ESMA expressed that close cooperation between regulators and the financial industry is of the utmost importance to facilitate the transition to T+1.

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.

- **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."

New Developments Outside the U.S.

- **ESMA Responds to the Commission Rejection of Certain MiCA Technical Standards.** On October 16, ESMA responded to the European Commission proposal to amend the Markets in crypto-assets Regulation ("MiCA") Regulatory Technical Standards ("RTS"). In their response, ESMA emphasized the importance of the policy objectives behind the initial proposal. [NEW]

- **ESAs Respond to the European Commission's Rejection of the Technical Standards on Registers of Information under the Digital Operational Resilience Act and Call for Swift Adoption.** On October 15, the European Supervisory Authorities ("ESAs") issued an Opinion on the European Commission's rejection of the draft Implementing Technical Standards ("ITS") on the registers of information under the Digital Operational Resilience Act. The ESAs raise concerns over the impacts and practicalities of the proposed EC changes to the draft ITS on the registers of information in relation to financial entities' contractual arrangements with ICT third-party service providers. [NEW]

- **ESMA, ECB and EC Announce Next Steps for the Transition to T+1 Governance.** On October 15, ESMA, the European Commission and the European Central Bank announced the next steps to support the preparations towards a transition to T+1 in a Joint Statement. ESMA stressed in the Joint Statement that they believe a coordinated approach across Europe is desirable, with efforts to reach consensus on the timing of any move to T+1. [OPEN]

- **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.

- **The European Supervisory Authorities Share Highlights from the 2024 Joint Consumer Protection Day in Budapest.** On October 3, the European Supervisory Authorities and ESMA organized the 11th edition of their annual Consumer Protection Day, in Budapest. The event followed the theme of "Empowering EU consumers: fair access to the future of financial services" and had three panels covering the topics of artificial intelligence in financial services, access to consumer centric products and services, and sustainable finance. Speakers and panelists included leaders from consumer organizations, regulatory authorities, EU institutions, academia, and market participants from across the European Union. [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 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.

New Industry-Led Developments

- **Central Database of Reporting Entity Contact Details for EU and UK EMIR.** On October 17, ISDA produced a central database of contact details to assist members resolve reconciliation breaks with counterparties for EU and UK European Market Infrastructure Regulation ("EMIR") reporting. The central database was created by contributing firms' submissions and includes details such as entity names, legal entity identifiers and reporting contact emails.

- **ISDA, GFXD respond to ESMA on Order Execution Policies.** On October 16, ISDA and the Global FX Division of the Global Financial Markets Association responded to a consultation paper from ESMA on "Technical Standards specifying the criteria for establishing and assessing the effectiveness of investment firms' order execution policies." In the response, the associations discuss the requirement for pre-selected execution venues, mandatory consumption of consolidated tapes and categorization of financial instruments under the Markets in Financial Instruments Regulation, among other issues. [NEW]

- **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.

- **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.

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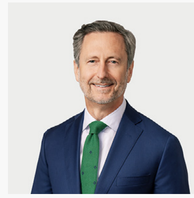

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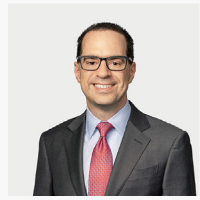

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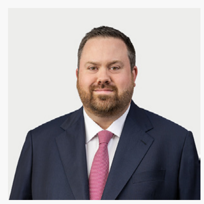

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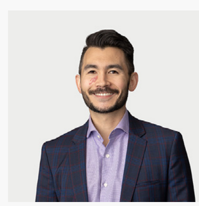

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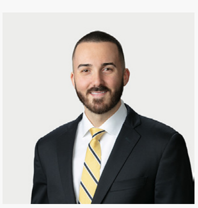

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