GIBSON DUNN

This Week in Derivatives

November 8, 2024

From the Derivatives Practice Group: The CFTC published a final rule adopting amendments to regulations governing the self-certification of registered entities.

New Developments

- **CFTC Publishes Final Rule Adopting Amendments to Regulations Governing Registered Entities.** On November 7, the CFTC adopted amendments to its regulations under the Commodity Exchange Act that govern how registered entities submit self-certifications, and requests for approval, of their rules, rule amendments, and new products for trading and clearing, as well as the CFTC's review and processing of such submissions. According to the CFTC, the amendments are intended to clarify, simplify and enhance the utility of those regulations for registered entities, market participants and the CFTC. The effective date for this final rule is December 9, 2024. [NEW]

- **CFTC Market Risk Advisory Committee to Hold Public Meeting on December 10.** On November 5, the CFTC's Market Risk Advisory Committee ("MRAC") announced that, on December 10, 2024, from 9:30 a.m. to 12:30 p.m. (Eastern Standard Time), it will hold a public, in-person meeting at the CFTC's Washington, DC headquarters, with options for virtual attendance. The MRAC indicated that it plans to discuss current topics and developments in the areas of central counterparty ("CCP") risk and governance, market structure, climate-related risk, and innovative and emerging technologies affecting the derivatives and related financial markets, including discussions led by the CCP Risk & Governance and Market Structure subcommittees with recommendations related to CCP cyber resilience and critical third-party service providers and the cash futures basis trade, respectively. [NEW]

- **CFTC Warns of Potential Dangers for Messaging App Users.** On October 31, the CFTC Office of Customer Education and Outreach released a customer advisory alerting messaging app users to beware of schemes to defraud them of assets, specifically crypto assets. Fraudsters are exploiting the default settings of commonly used messaging apps, telephone networks, and mobile devices to lure users into crypto pump-and-dump schemes and other scams.

- **Commissioner Pham Announces CFTC Global Markets Advisory Committee Meeting on November 21.** CFTC Commissioner Caroline D. Pham, sponsor of the Global Markets Advisory Committee ("GMAC"), announced the GMAC will hold a virtual public meeting Thursday, Nov. 21, from 9:30 a.m. to 10:30 a.m. EST. At this meeting, the GMAC will hear a presentation by the Tokenized Collateral workstream of the GMAC's Digital Asset Markets Subcommittee on expanding use of non-cash collateral through use of distributed ledger technology and consider a recommendation from the Subcommittee. The meeting will also include a presentation by the Utility Tokens workstream of the Digital Asset Markets Subcommittee summarizing their work to-date on defining utility tokens and developing guidance for market participants.

- **SEC Adopts Rule Amendments and New Rule to Improve Risk Management and Resilience of Covered Clearing Agencies.** On October 25, the SEC adopted rule amendments and a new rule to improve the resilience and recovery and wind-down planning of covered clearing agencies. The rule amendments establish new requirements regarding a covered clearing agency's collection of intraday margin as well as a covered clearing agency's reliance on substantive inputs to its risk-based margin model. The new rule prescribes requirements for the contents of a covered clearing agency's recovery and wind-down plan. The rule amendments require that a covered clearing agency that provides central counterparty services has policies and procedures to establish a risk-based margin system that monitors intraday exposures on an ongoing basis, includes the authority and operational capacity to make intraday margin calls as frequently as circumstances warrant (including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility), and documents when the covered clearing agency determines not to make an intraday call pursuant to its written policies and procedures.

- **SEC Division of Examinations Announces 2025 Priorities.** On October 21, the SEC's Division of Examinations released its 2025 examination priorities. The Division of Examinations indicated that it will continue to focus on whether security-based swap dealers ("SBSDs") have implemented policies and procedures related to compliance with security-based swap rules generally, including whether they are meeting their obligations under Regulation SBSR to accurately report security-based swap transactions to security-based swap data repositories and, where applicable, whether they are complying with relevant conditions in SEC orders governing substituted compliance. For other SBSDs, the Division of Examinations said that it may focus on SBSDs' practices with respect to applicable capital, margin, and segregation requirements and risk management. The Division of Examinations also indicated that it expects to assess whether SBSDs have taken corrective action to address issues identified in prior examinations. Additionally, the

Division of Examinations advised that it may begin conducting examinations of registered security-based swap execution facilities in late fiscal year 2025.

New Developments Outside the U.S.

- **ESAs Publish 2024 Joint Report on Principal Adverse Impacts Disclosures Under the Sustainable Finance Disclosure Regulation.** On October 30, the European Supervisory Authorities ("ESAs") published their third annual Report on disclosures of principal adverse impacts under the Sustainable Finance Disclosure Regulation ("SFDR"). The Report assesses both entity and product-level Principal Adverse Impact disclosures under the SFDR. These disclosures aim at showing the negative impact of financial institutions' investments on the environment and people and the actions taken by asset managers, insurers, investment firms, banks and pension funds to mitigate them.

- **The ESAs Finalize Rules to Facilitate Access to Financial and Sustainability Information on the ESAP.** On October 29, the ESAs published the Final Report on the draft implementing technical standards ("ITS") regarding certain tasks of the collection bodies and functionalities of the European Single Access Point ("ESAP"). The requirements are designed to enable future users to be able to access and use financial and sustainability information effectively and effortlessly in a centralized ESAP platform.

- **ESMA Consults on Amendments to MiFID Research Regime.** On October 28, ESMA launched a consultation on amendments to the research provisions in the Markets in Financial Instruments II ("MiFID II") Delegated Directive following changes introduced by the Listing Act. The Listing Act introduces changes that enable joint payments for execution services and research for all issuers, irrespective of the market capitalization of the issuers covered by the research. The Consultation Paper includes proposals to amend Article 13 of the MiFID II Delegated Directive in order to align it with the new payment option offered.

New Industry-Led Developments

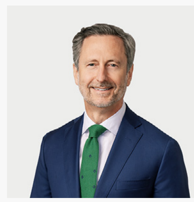
- **Ark 51 Adopts CDM for CSA Data Extraction.** On November 5, ISDA announced that Ark 51, an artificial intelligence (AI) and data analytics service developed by legal services provider DRS, has used the Common Domain Model (CDM) to convert information from ISDA's regulatory initial margin (IM) and variation margin (VM) credit support annexes (CSAs) into digital form. Ark 51 is a contract and risk management system that uses AI to extract key data from legal agreements, including IM and VM CSAs. The CDM transforms that data into a machine-readable format that can be quickly and efficiently exported to other systems, cutting the resources associated with manual processing. [NEW]

- **ISDA Letter to FASB on Share-based Payment from a Customer in a Revenue Contract.** On October 21, ISDA submitted a response to the Financial Accounting

Standards Board ("FASB") on File Reference No. 2024-ED100, Derivatives Scope Refinements and Scope Clarification for a Share-based Payment from a Customer in a Revenue Contract. ISDA believes the FASB's proposal will improve the application and relevance of the Derivatives and Hedging (Topic 815) and Revenue from Contracts with Customers (Topic 606) guidance and has provided potential refinements to the guidance in the letter.

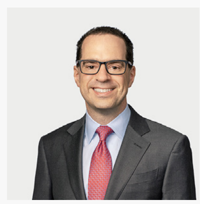
Practice Group Members

Jeffrey L. Steiner
Washington, D.C.
202.887.3632
jsteiner@gibsondunn.com



Michael D. Bopp
Washington, D.C.
202.955.8256
mbopp@gibsondunn.com

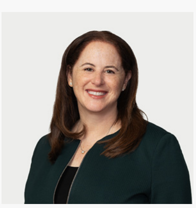
Michelle M. Kirschner
London
+44 (0)20 7071.4212
mkirschner@gibsondunn.com



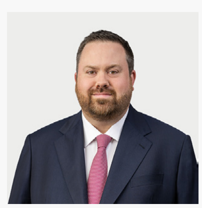
Darius Mehraban
New York
212.351.2428
dmehraban@gibsondunn.com

Jason Cabral
New York
212.351.6267
jcabral@gibsondunn.com

Adam Lapidus
New York
212.351.3869
alapidus@gibsondunn.com

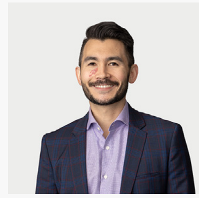


Stephanie L. Brooker
Washington, D.C.
202.887.3502
sbrooker@gibsondunn.com

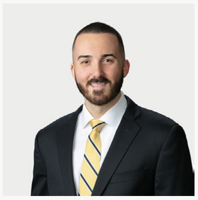


William R. Hallatt
Hong Kong
+852.2214.3836
whallatt@gibsondunn.com

David P. Burns
Washington, D.C.
202.887.3786
dburns@gibsondunn.com



Marc Aaron Takagaki
New York
212.351.4028
mtakagaki@gibsondunn.com



Hayden K. McGovern
Dallas
214.698.3142
hmcgovern@gibsondunn.com

Karin Thrasher
Washington, D.C.
202.887.3712
kthrasher@gibsondunn.com