

## This Week in Derivatives

May 31, 2024

**From the Derivatives Practice Group:** CFTC Chairman Rostin Behnam has been re-elected the Vice Chair of the International Organization of Securities Commissions.

### New Developments

- **Biden-Harris Administration Announces New Principles for High-Integrity Voluntary Carbon Markets.** On May 28, the Biden-Harris Administration released a [Joint Statement of Policy and new Principles for Responsible Participation in Voluntary Carbon Markets \(VCMs\)](#) that codifies the U.S. government's approach to advance high-integrity VCMs. The Principles for Responsible Participation include: (1) carbon credits and the activities that generate them should meet credible atmospheric integrity standards and represent real decarbonization; (2) credit-generating activities should avoid environmental and social harm and should, where applicable, support co-benefits and transparent and inclusive benefits-sharing; and (3) corporate buyers that use credits should prioritize measurable emissions reductions within their own value chains, among others. The announcement of the Principles also highlighted valuable work performed by the CFTC, including new guidance at COP28 to outline factors that derivatives exchanges may consider when listing [voluntary carbon credit derivative contracts](#) to promote the integrity, transparency, and liquidity of these developing markets and a new [Environmental Fraud Task Force](#) to address fraudulent activity and bad actors in carbon markets. [NEW]
- **IOSCO Board Re-Elects CFTC Chairman Behnam as Vice Chair.** The Board of the International Organization of Securities Commissions (IOSCO) has re-elected CFTC Chairman Rostin Behnam as a Vice Chair for the term 2024-2026, a role to which he was originally elected in October 2022. This year's election took place at IOSCO's 2024 Annual Meeting in Athens, Greece. As a member of the IOSCO Board's Management

Team, Chairman Behnam helps guide IOSCO's policy development and overall management. In addition to steering the CFTC's engagement in an array of policy work within IOSCO, Chairman Behnam has co-led IOSCO's Financial Stability Engagement Group and currently co-chairs the Carbon Markets Workstream within IOSCO's Sustainable Finance Task Force. [NEW]

- **CFTC Announces Updated Part 43 Block and Cap Sizes and Further Extends No-Action Letter Regarding the Block and Cap Implementation Timeline.** On May 23, the CFTC's Division of Data published updated post-initial appropriate minimum block sizes and post-initial cap sizes as determined under CFTC regulations. The Division of Market Oversight (DMO) also issued a letter further extending the no-action position originally taken in CFTC Letter No. [22-03](#) regarding the compliance dates for certain amendments, adopted in November 2020, to the CFTC's swap data reporting rules concerning block trades and post-initial cap sizes. The updated post-initial appropriate minimum block and cap sizes will be effective October 7. The updated post-initial appropriate minimum block and post-initial cap sizes, as well as other swap reporting rules, forms, and requirements, are at [Real-Time Reporting | CFTC](#).
- **CFTC Announces Global Markets Advisory Committee Meeting on June 4.** On May 23, CFTC Commissioner Caroline D. Pham, sponsor of the Global Markets Advisory Committee (GMAC), announced the GMAC will hold a public meeting on Tuesday, June 4, from 10:00 a.m. to 3:00 p.m. EDT at the CFTC's New York Regional Office. At this meeting, the GMAC will hear a presentation from the GMAC's Global Market Structure Subcommittee, Technical Issues Subcommittee, and Digital Asset Markets Subcommittee on various workstreams, and consider recommendations from the Subcommittees on such workstreams.

## New Developments Outside the U.S.

- **ESAs Publish Templates and Tools for Voluntary Dry Run Exercise to Support the DORA Implementation.** On May 31, the European Supervisory Authorities (EBA, EIOPA and ESMA – the ESAs) published templates, technical documents and tools for the dry run exercise on the reporting of registers of information in the context of Digital Operation Resilience Act (DORA) [announced in April 2024](#). Financial entities can use these materials and tools to prepare and report their registers of information of contractual arrangements on the use of ICT third-party service providers in the context of the dry run exercise, and to understand supervisory expectations for the reporting of such registers from 2025 onwards. [NEW]
- **Final MiCA Rules on Conflict of Interest of Crypto Assets Providers Published.** On May 31, ESMA published the [Final Report](#) on the rules on conflicts of interests of crypto-asset service providers (CASP) under the Markets in Crypto Assets Regulation (MiCA). In the report ESMA sets out draft Regulatory Technical Standards on certain requirements in relation to conflicts of interest for crypto-asset service providers (CASPs) under MiCA, with a view to clarifying elements in relation to vertical integration of CASPs and to further

align with the draft European Banking Authority rules applicable to issuers of asset-referenced tokens. [NEW]

- **ESMA Provides Guidance to Firms Using Artificial Intelligence in Investment Services.** On May 30, ESMA issued a [Statement](#) providing initial guidance to firms using Artificial Intelligence technologies (AI) when they provide investment services to retail clients. When using AI, ESMA expects firms to comply with relevant MiFID II requirements, particularly when it comes to organizational aspects, conduct of business, and their regulatory obligation to act in the best interest of the client. [NEW]
- **ESMA Reports on the Application of MiFID II Marketing Requirements.** On May 27, ESMA published a combined [report](#) on its 2023 Common Supervisory Action (CSA) and the accompanying Mystery Shopping Exercise (MSE) on marketing disclosure rules under MiFID II. In the report, ESMA identifies several areas of improvements, such as the need for marketing communications to be clearly identifiable as such, and to contain a clear and balanced presentation of risks and benefits. In cases where products and services are marketed as having 'zero cost', ESMA identified they should also include references to any additional fees. [NEW]
- **ESMA Consults on Commodity Derivatives Under MiFID Review.** On May 23, ESMA launched a public consultation on proposed changes to the rules for position management controls and position reporting. The changes come in the context of the review of the Market in Financial Instruments Directive (MiFID II). ESMA is consulting on changes to the technical standards (RTS) on position management controls, the Implementing Technical Standards (ITS) on position reporting, and on position reporting in Commission Delegated Regulation (EU).
- **ESMA Consults on Consolidated Tape Providers and Their Selection.** On May 23, ESMA [invited comments](#) on draft technical standards related to Consolidated Tape Providers (CTPs), other data reporting service providers (DRSPs) and the assessment criteria for the CTP selection procedure under the Markets in Financial Instruments Regulation (MiFIR). The proposed draft technical standards are developed in the context of the review of MiFIR and will contribute to enhancing market transparency and removing the obstacles that have prevented the emergence of consolidated tapes in the European Union.
- **ESMA Makes Recommendations for More Effective and Attractive Capital Markets in the EU.** On May 22, ESMA published its [Position Paper](#) on "Building more effective and attractive capital markets in the EU". The Paper includes 20 recommendations to strengthen EU capital markets and address the needs of European citizens and businesses.
- **ESMA Consults on Three New Technical Standards.** On May 21, ESMA launched a [public consultation](#) on non-equity trade transparency, reasonable commercial basis (RCB) and reference data under the MiFIR review. ESMA is seeking input on three topics: (1) pre- and post-trade transparency requirements for non-equity instruments (bonds, structured finance products and emissions and allowances); (2) obligation to make pre-and post-trade data available on an RCB intended to guarantee that market

data is available to data users in an accessible, fair, and non-discriminatory manner; and (3) obligation to provide instrument reference data that is fit for both transaction reporting and transparency purposes.

- **ESMA Publishes Data on Markets and Securities in the EEA.** On May 16, ESMA published the [Statistics on Securities and Markets \(ESSM\) Report](#), with the objective of increasing access to data of public interest. The report provides details about how securities markets in the European Economic Area (EEA30) were organized in 2022, including structural indicators on securities, markets, market participants and infrastructures. It covers the distribution of legal entities by member states, either based on their supervisory role or their location. It also contains information on third country entities when their activities are recognized (e.g., CCPs or benchmark administrators) or when their securities are traded in EEA30 (e.g., information on issuers and securities available for trading).
- **ESMA to Host Web Event on Effective and Attractive Capital Markets.** On May 22, ESMA will host an online event focused on the launch of its Position Paper on the effectiveness of capital markets in the European Union. Natasha Cazenave, ESMA Executive Director, will be moderating the event and Verena Ross, ESMA Chair, will present the paper and take questions from the audience. [Registrations are now open](#).
- **ESMA Guidelines Establish Harmonized Criteria for use of ESG and Sustainability Terms in Fund Names.** On May 14, following the [public statement of December 14, 2023](#), ESMA published the [final report](#) containing Guidelines on funds' names using ESG or sustainability-related terms. The objective of the Guidelines is to ensure that investors are protected against unsubstantiated or exaggerated sustainability claims in fund names, and to provide asset managers with clear and measurable criteria to assess their ability to use ESG or sustainability-related terms in fund names. The Guidelines establish that to be able to use these terms, a minimum threshold of 80% of investments should be used to meet environmental, social characteristics or sustainable investment objectives.

## New Industry-Led Developments

- **Preparing for the Dynamic Risk Management Accounting Model.** On May 29, the International Accounting Standards Board (IASB) announced it has a project underway to develop a new model to account for dynamic risk management (DRM) activities under International Financial Reporting Standards (IFRS). It is widely expected that banks will need to apply this model, which could replace existing macro-hedge accounting models within IFRS. The IASB will also explore whether the DRM model could be applied to other risk types at a future date. ISDA [published a whitepaper](#) that sets out ISDA's preliminary observations on the tentative decisions made by the IASB to date. According to ISDA, these observations are based on the current understanding of the model and interpretations of ongoing discussions, but they do not represent a formal industry view, which will not be possible until the IASB has publishes a discussion paper, an exposure draft or a set of deliberations. [NEW]

- **ISDA Submits Policy Paper on Derivatives and EU Agenda to European Commission.** On May 24, ISDA shared its EU [public policy paper](#), A Competitive, Resilient, Sustainable Europe: How derivatives can serve the EU’s strategic agenda, with the European Commission. The paper offers a roadmap for how derivatives can play a positive role in supporting key EU strategic priorities for the bloc’s 2024-2029 mandate. It shows that the financial system in general, and derivatives specifically, can help the EU to pursue competitiveness, economic security and a successful green transition. [NEW]
- **ISDA Tokenized Collateral Guidance Note.** On May 21, ISDA published a [guidance note](#) to inform how counsel may approach a legal opinion on the enforceability of collateral arrangements entered into under certain ISDA collateral documentation where the relevant collateral arrangement comprises tokenized securities and/or stablecoins (together, “Tokenized Collateral”). This guidance note sets forth (i) a basic taxonomy of common tokenization structures and (ii) a non-exhaustive list of key issues to consider when analyzing the enforceability of collateral arrangements involving Tokenized Collateral.
- **ISDA Response to SFC and HKMA Joint’s Consultation Paper on Implementing UTI, UPI, and CDE.** On May 17, ISDA [responded](#) to the Securities and Futures Commission (SFC) and Hong Kong Monetary Authority’s (HKMA) joint further consultation on enhancements to the OTC derivatives reporting regime for Hong Kong to mandate – (1) the use of Unique Transaction Identifier (UTI), (2) the use of Unique Product Identifier (UPI) and (3) the reporting of Critical Data Elements (CDE).
- **US Basel III Endgame: Trading and Capital Markets Impact.** On May 16, in response to the US Basel III proposal, ISDA and the Securities Industry and Financial Markets Association (SIFMA) conducted a [quantitative impact study](#) (QIS) that showed that the market risk portion of the proposal, known as the Fundamental Review of the Trading Book, will result in a substantial increase in market risk capital of between 73% and 101%, depending on the extent to which banks use internal models.
- **International Money Market Dates Market Practice Note.** On May 15, ISDA published the [International Money Market Dates Practice Note](#) regarding setting the start date/effective date for over-the-counter interest rate derivatives traded by reference to an international money market date.
- **ISDA Publishes DC Review and Launches Market Consultation.** On May 13, ISDA published an independent review on the structure and governance of the Credit Derivatives Determinations Committees (DCs) and launched a market-wide consultation on its recommendations. The review covers the composition, functioning, governance, and membership of the DCs. The report makes several recommendations on possible changes that could be made to improve the structure of the DCs, [which are now available on the ISDA website for public consultation](#).
- **ISDA and FIA Response to CFTC on Swaps LTR Rules (Part 20).** On May 13, [ISDA and FIA responded](#) to the CFTC’s proposed request for approval from the Office of Management and Budget to continue to collect information related to certain physical

commodity swap positions in accordance with the CFTC's swaps large trader reporting (LTR) rules. In the response, the associations request that the CFTC sunset the swaps LTR rules with §20.9 sunset provision.

## Practice Group Members



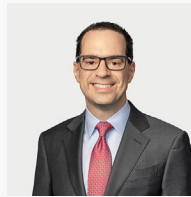
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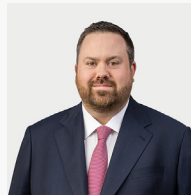
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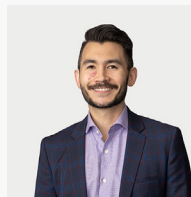
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