Katten

FUTURES INDUSTRY ASSOCIATION

LAW & COMPLIANCE DIVISION CONFERENCE

PANEL:
INTERNATIONAL TRADING: LET'S GET IT ON

(Thursday, April 16, 2026 - 11:15 am)

AUTHORS:
CHRISTOPHER COLLINS
ELEANOR BINES

15771415

Clearing Agencies under the Exchange Act – Navigating the Regulatory Perimeter from Outside the US

INTRODUCTION

This paper is intended to provide a structured overview of the regulatory framework governing securities clearing agencies under the Securities Exchange Act of 1934 (the "**Exchange Act**") for potential non-US registrants. The discussion draws upon the Exchange Act's statutory provisions, interpretive guidance by the Securities and Exchange Commission ("**SEC**"), and practical considerations arising from cross-border clearing operations.

Any organisation that engages in clearing, settlement, or related post-trade services in respect of instruments that may constitute "securities" under US federal law must grapple with a series of gating questions. These include:

- whether the relevant instrument is a "security" for Exchange Act purposes;
- whether the organisation's activities bring it within the statutory definition of a "clearing agency";
- whether US jurisdiction is triggered;
- whether any exemptions from registration are available; and
- if registration is required, by which route it should be pursued.

Each of these questions is addressed in turn below.

THE EXCHANGE ACT AND THE DEFINITION OF "SECURITY"

The Exchange Act is one of the four principal federal securities statutes, alongside the Securities Act of 1933 (the "**Securities Act**"), the Investment Company Act of 1940, and the Investment Advisers Act of 1940. While each statute addresses a different aspect of the US securities markets, the Exchange Act is primarily concerned with secondary market trading activities. Its regulatory remit encompasses, among other things, the registration of brokers, transfer agents, securities exchanges, and, most relevant here, clearing agencies.

The threshold question for any clearing organisation is whether the instruments it intends to clear or settle constitute "securities". Determining what is or is not a "security" can be a complicated exercise, not least due to decades of judicial interpretation and its constantly evolving perimeter.[1]

The starting point for the purposes of this paper is Section 3(a)(10) of the Exchange Act[2] which provides an expansive statutory definition, encompassing any note, stock, treasury stock, security future, security-based swap ("**SBS**"), bond, debenture, certificate of interest or participation in any profit-sharing agreement, transferable share, investment contract, voting-trust certificate, certificate of deposit for a

1 *See*, for instance, the SEC's recent interpretation in relation to cryptoassets: "Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets", Securities Act Release No. 33-11412 (March 17, 2026).

2 15 U.S.C. § 78c(a)(10).

security, and a broad range of options, puts, calls, and related instruments. The definition also includes any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing. The definition expressly excludes currency and certain short-term notes, drafts, and bills of exchange with a maturity at the time of issuance not exceeding nine months (exclusive of days of grace).

Of particular relevance to derivatives practitioners is the concept of a "security-based swap," defined in Section 3(a)(68) of the Exchange Act.[3] An SBS is any swap (as defined in the Commodity Exchange Act[4]) that is based on:

- a narrow-based security index;[5]
- a single security or loan (including any interest therein or on the value thereof); or
- the occurrence, non-occurrence or extent of an occurrence of an event relating to a single issuer, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.

The SBS definition also captures "mixed swaps".[6] Broadly speaking, mixed swaps are both a swap and an SBS. It encompasses instruments/transactions that meet the requirements above, while also being based on the value of one or more other interests, such as rates, currencies, commodities, indices or any other property, among other things.

Correctly characterising instruments is a critical first step in determining whether clearing agency registration obligations may apply. Organisations may need to undertake an unexpectedly detailed review of their products in order to make such a determination. If any relevant product is a security, the organisation will then need to consider whether the services they intend to provide bring them within the "clearing agency" definition.

WHAT IS A "CLEARING AGENCY"?

Statutory Definition

Section 3(a)(23) of the Exchange Act defines a "clearing agency" broadly.[7] It includes any person who:

- acts as an intermediary in making payments or deliveries in connection with securities;
- provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements, or for the allocation of securities settlement responsibilities;

---

3 15 U.S.C. § 78c(a)(68).

4 7 U.S.C. § 1a(47).

5 *See* 7 U.S.C. § 1a(35) for the definition of a narrow-based security index. In summary, an index is narrow-based if it meets any of four thresholds, which include having nine or fewer component securities, or any single component security comprising more than 30% of the index's weighting.

6 7 U.S.C. § 1a(47)(c).

7 15 U.S.C. § 78c(a)(23)(A).

- acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates; or

- otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of certificates.

The breadth of this definition is somewhat tempered by statutory exclusions. Section 3(a)(23)[8] expressly excludes Federal Reserve banks, Federal home loan banks, and Federal land banks. National securities exchanges and registered securities associations (such as FINRA) are also excluded in connection with their settlement comparison activities. Banks, broker-dealers, and other lenders are excluded to the extent they fall within the definition in connection with their customary brokerage or lending activities, and similar exclusions apply to insurance companies, mutual funds, and transfer agents.

SEC Interpretive Guidance on Non-CCP Activities

Beyond the core central counterparty ("**CCP**") clearing function, the SEC has issued interpretive guidance[9] identifying several categories of activity that may bring an organisation within the clearing agency definition, even where the organisation does not act as a CCP, as follows:

- **Collateral Management Services.** The SEC has indicated that services involving the calculation of collateral requirements and the facilitation of the transfer of collateral between counterparties, as well as entities that calculate net payment obligations among counterparties for SBS and provide instructions for payments (including with respect to quarterly interest, credit events, and upfront fees), are likely acting as intermediaries in making payments or deliveries in connection with securities transactions.

- **Trade Matching Services.** Trade matching, the process whereby an intermediary compares participants' trade data regarding the terms of settlement of securities transactions in order to reduce the number of settlements or allocate settlement responsibilities, also falls within the clearing agency definition. Intermediaries that capture trade information and perform an independent comparison of that information, resulting in the issuance of binding matched terms, are likely engaged in clearing agency activity.[10]

- **Tear-Up and Compression Services.** The SEC has further indicated that portfolio compression and tear-up services may constitute clearing agency activity. In a typical compression cycle, the provider executes an algorithm seeking to reduce the gross notional value and total number of trades without altering counterparty risk or market risk beyond specified parameters. Users submit all transactions they are willing to terminate, setting tolerances for counterparty exposures and trade termination costs. The provider proposes terminations across all participating parties, including

8 15 U.S.C. § 78c(a)(23)(B).

9 *See* Securities Exchange Act Release No. 64017 (March 3, 2011), 76 Fed. Reg. 14472 (March 16, 2011) and Order Pursuant to Section 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions From Clearing Agency Registration Requirements Under Section 17A(b) of the Exchange Act for Entities Providing Certain Clearing Services for Security-Based Swaps, 76 Fed. Reg. 39963 (July 7, 2011).

10 *See also* Exchange Act Release No. 39829 (April 6, 1998), 63 Fed. Reg. 17943 (April 13, 1998) (File No. S7-10-98) (the "**Trade Matching Release**") ("A vendor that provides a matching service will actively compare trade and allocation information and will issue the affirmed confirmation that will be used in settling the transaction.").

payments for termination, and users review and accept the proposal. Where all users accept, the relevant trades are terminated. The clearing agency definition applies even where payments and confirmations are exchanged outside the service and where a separate third party processes the tear-ups at the data repository.

These interpretive positions are of considerable practical significance. Organisations that offer ancillary post-trade services, collateral management, trade matching, or compression, must carefully assess whether their activities bring them within the clearing agency definition.

WHEN IS US JURISDICTION TRIGGERED?

A central question for non-US clearing organisations is whether and when US jurisdiction is triggered. The SEC has traditionally required registration (or an exemption) as a clearing agency if a foreign clearing agency provides services for US securities directly to US persons.[11] For SBS, Section 17A(g) of the Exchange Act[12] imposes registration requirements on any person who performs the activities of a clearing agency through the use of US jurisdictional means. In practice, however, the SEC has limited registration of SBS clearing agencies to those persons providing CCP services in respect of SBS to US clearing members.

US Persons

Applying the cross-border policy in respect of non-SBS securities requires determining who constitutes a "US person" and what constitutes a "US security." The term "US person" for these purposes includes any person having a US residence, based on the location of its executive office or principal place of business. This encompasses a US bank (as defined in Section 3(a)(6) of the Exchange Act[13]), a foreign branch of a US bank or a US broker-dealer, and any registered broker-dealer wherever located.[14]

US Securities and the "FIT Test"

The SEC has not expressly defined the term "US securities." It has, however, seemingly condoned the view that a non-US person providing clearing services to US persons in respect of "foreign and internationally-traded" ("**FIT**") securities does not need to register under the Exchange Act.[15] This has led to the elaboration of a so-called "**FIT Test**" to determine whether securities are "foreign and internationally-traded" for purposes of imposing clearing agency registration on non-US persons.

The FIT Test comprises two prongs. The first prong covers a foreign private or foreign government issuer of debt or equity securities that "trade principally in their home market and/or internationally." This

11 This policy was reaffirmed in May 2013. *See* "Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants; Proposed Rule", 78 Fed. Reg. 30968, n. 682 (May 23, 2013).

12 15 U.S.C. § 78q-1(g).

13 15 U.S.C. § 78c(a)(6).

14 *See* Exchange Act Release No. 34-39643, 63 Fed. Reg. 8232, n. 62 (February 18, 1998) ("**Euroclear Order**") (identifying "US participants" for purposes of an order exempting Morgan Guaranty Trust Company –the predecessor of Euroclear Bank – from clearing agency registration). This interpretation was reaffirmed in June 2013. *See* Exchange Act Release 34-69872, 78 Fed. Reg. 40220, n. 15 (July 3, 2013) (order exempting ICE Clear Europe Limited from the clearing agency registration requirement for LIFFE Securities Products).

15 *See* Exchange Act Release No. 34-38589, 62 Fed. Reg. 26833 (May 15, 1997) (notice that Morgan Guaranty Trust Company (as operator of the Euroclear system) requesting an exemption leading to the Euroclear Order).

includes foreign domestic debt and equity securities, Yankee bonds, securities issued by international organisations, GDRs and ADRs, and securities denominated and settled in a currency other than US dollars. The second prong covers a US issuer that has issued global depositary shares or globally distributed debt securities, in either case in an offering that is either registered or exempt under the Securities Act.

Practitioners should be aware that the FIT Test raises a number of challenging interpretive questions. For instance, it is not entirely clear when US dollar-denominated securities issued by a non-US issuer might constitute "foreign domestic" securities. Questions also arise in respect of index products such as ETFs, ETCs, and ETNs, and as to whether the SEC's statements regarding ADRs issued by non-US issuers should be taken at face value. These ambiguities underscore the importance of careful, fact-specific analysis when assessing whether clearing activities in respect of particular instruments trigger US registration requirements.

CLEARING AGENCY REGISTRATION PROCESS

Where registration (or an exemption) is required, there are three potential routes available to a foreign applicant.

- **Route 1 - Full Registration.** A foreign applicant may submit a complete Form CA-1 to the SEC. Under this approach, the SEC takes an "entity-wide" approach, meaning that a foreign registered clearing agency with no US nexus would nonetheless be subject to SEC supervision and oversight, including the requirement to make Rule 19b-4 rule amendment filings.

- **Route 2 - Partial Registration/Partial Exemption.** Alternatively, a foreign applicant may request registration for its activities with a US nexus and simultaneously request an exemption for its clearing agency activities that do not have a US nexus. This approach requires agreement with the SEC staff as to the precise scope of the exemptive relief requested and granted.

- **Route 3 - Exemptive Relief for Non-CCP Services.** As discussed above, the statutory definition of "clearing agency" captures not only CCP services but also trade matching services, collateral management, and tear-up and compression services (for SBS). The SEC has conceded that, for these non-CCP activities, full clearing agency registration may not be warranted.[16] Persons engaging in any of these services may apply for, and be granted, exemption from clearing agency registration. The conditions of the exemptive relief typically impose ongoing compliance, reporting, and other requirements. It remains unclear, however, how certain traditional conditions may apply to exempt clearing agencies in the SBS space.

SUMMARY AND KEY TAKEAWAYS

The regulatory framework governing securities clearing agencies under the Exchange Act is both broad in its reach and nuanced in its application. Compliance professionals and in-house counsel at organisations engaged in clearing, settlement, or related post-trade services should bear in mind the following key points:

- **Instrument characterisation is foundational.** The definition of "security" is expansive and includes SBS. Correctly characterising the instruments being cleared is the essential first step in any regulatory analysis.

---

16 *See* the Trade Matching Release at 17947.

- **The clearing agency definition captures more than CCP services.** Trade matching, collateral management, and tear-up and compression services may all bring an organisation within the statutory definition, triggering registration or exemption obligations.

- **Cross-border organisations must navigate the FIT Test carefully.** The SEC's policy on cross-border registration turns on whether services are provided to US persons in respect of US securities. The FIT Test, whilst widely relied upon, raises interpretive questions that require careful, fact-specific analysis.

- **Registration route selection has significant implications.** The choice between full registration, partial registration with partial exemption, and exemptive relief for non-CCP services will have material consequences for the scope of SEC oversight.