Davis Polk + FIA

Thank you for joining today's FIA Law and Compliance Division webinar

We will begin momentarily

Reminders

- The webinar will be recorded and posted to the FIA website within 24 hours of the live webinar
- Please use the “question” function on your webinar control panel to ask a question to the moderator or speakers
- Disclaimer: This webinar is intended for informational purposes only and is not intended to provide investment, tax, business, legal or professional advice. Neither FIA nor its members endorse, approve, recommend, or certify any information, opinion, product, or service referenced in this webinar. FIA makes no representations, warranties, or guarantees as to the webinar’s content

Davis Polk + FIA

Developments in Cross-Border Derivatives Jurisdiction

Presented by Dan Kahn, Gabe Rosenberg, Carl Emigholz & Tyler Senackerib

May 7, 2026

Agenda

01 CFTC Cross-Border Developments

02 Cross-Border Reach of SEC Treasury Clearing Mandate

03 Cross-Border Enforcement Actions

CFTC Cross-Border Developments

01

Background on CFTC Cross-Border Regulatory Regime

- The CFTC's cross-border regulatory regime remains highly complex and constantly evolving
- Different frameworks apply to different types of registration categories, and each framework has its own complexities
- For example:
  - Swap dealer registration and compliance is subject to three different, complex cross-border frameworks: (1) 2013 Cross-Border Guidance, (2) Cross-Border Margin Rules, and (3) CFTC Rule 23.23
  - Foreign-located FCMs may be exempt from registration under CFTC Rule 3.10 or able to rely on a CFTC Rule 30.10 exemption
  - Non-U.S. exchanges and clearinghouses are subject to limited cross-border guidance on DCM, DCO and SEF registration and often rely on individual exemptions or no-action relief

Swap Dealer Cross-Border Frameworks

– The cross-border application of swap dealer rules is determined by classifying counterparties into different categories based on "U.S. person" status, U.S. person "guarantees," and the applicable category of affiliate with a significant U.S. connection

	2013 Cross-Border Guidance	Cross-Border Margin Rules	CFTC Rule 23.23
Applicable Requirements	Clearing, trade execution, reporting	Uncleared swap margin rules	All other requirements
"U.S. person" entities	Open-ended definition with look-through to owners	Closed-ended definition with limited look-through to owners	Closed-ended definition without look-through to owners
"Guarantee"	Broadest definition, including keepwells, liquidity puts, etc.	Limited to more traditional guarantees that include rights of recourse	Same as Cross-Border Margin Rules
Affiliate Category	Conduit affiliates	Foreign consolidated subsidiary	Significant risk subsidiary

CFTC Letter 25-42

- In December 2025, CFTC staff issued No-Action Letter 25-42, which effectively gives more flexibility to use the same definition of “U.S. person” and “guarantee” across the different sets of CFTC swap dealer cross-border standards, and eliminates the conduit affiliate concept
  - Allows use of CFTC Rule 23.23 definitions to determine application of requirements still subject to the 2013 Cross-Border Guidance
  - Allows use of 2013 Cross-Border Guidance or Cross-Border Margin Rule definitions to determine application of requirements subject to CFTC Rule 23.23 indefinitely, if representations were made period to the effective date of CFTC Rule 23.23
- The letter is a helpful first step in simplifying the number of definitions used in the swap dealer cross-border framework and representations needed from counterparties
- But no-action relief comes with uncertainty, and the market has been slow to embrace the change
- The ISDA 2021 U.S. Self-Disclosure Letter still incorporates all of the different definitions

Navigating U.S. Connections

- For some registration categories, it can be difficult to assess what level of connection to the United States is sufficient to trigger the application of CFTC rules, especially for newer market participants
- Under the last administration, purportedly non-U.S. exchanges and other intermediaries were frequent targets of enforcement actions for failing to register with the CFTC, particularly for digital asset firms
- These enforcement actions described many types of connections to the United States without analysis of how to weigh the relevance of different factors in determining whether registration would be required

Clear	Unclear
Firm is organized under U.S. law	Location of front- and back-office employees
Firm has a principal place of business in the United States	U.S. ultimate beneficial owners
Customers are U.S. persons	U.S.-based parent company / senior management
	U.S.-located servers
	Licensing technology from U.S.-located affiliate

CFTC Letter 25-14

- In May 2025, CFTC staff issued an interpretive letter to a non-U.S. digital assets trading firm providing that this trading firm would not be considered "located" in the United States or a U.S. person for purposes of both the firm's own, and its counterparty's, potential registration requirements
- The interpretation describes the key factors in the analysis as being (1) jurisdiction of organization and (2) principal place of business
- But other U.S. connections, including U.S.-based owners, employees and computer servers, "would not impact" the firm's status:

> Finally, the Divisions note that, as described in the Request for Interpretation, SCB's desire to expand its activities into the United States through: (1) the engagement of U.S.-based traders, quantitative researchers and software developers employed by SCBA; (2) the licensing of certain trading technology from the related firm; and (3) the hosting of trading technology on U.S.-located servers, would not impact SCB's status as a "non-U.S. person," a person that is not "located in the United States," and a "foreign located person" for purposes of the related Commission regulations. Regardless of SCB's proposed expansion activities, the Divisions are of the view that, taking into consideration the requirements in Parts 30 and 48 and Commission regulations 3.10(c), 23.23, and the 2013 Guidance, SCB's place of organization and principal place of business are the factors that are of relevance in determining its cross-border status.

davispolk.com

Davis Polk

Substituted Compliance Examinations

- In May 2025, the CFTC Market Participants Division and Division of Enforcement issued procedures describing how the Divisions will address potential non-compliance with home country rules when a swap dealer is relying on substituted compliance
  - Under the procedures, MPD will generally defer to and coordinate with home country regulators regarding potential non-compliance matters and not recommend further action if the home country regulator:
    - Determines the swap dealer is in compliance
    - Does not make a final determination of non-compliance
    - Is in discussion with the swap dealer as to remediation
    - Is satisfied that appropriate remedial actions have been or will be taken, absent extraordinary circumstances
  - The Divisions will also not recommend further action under CFTC Rule 166.3 (diligent supervision) when the swap dealer relies on substituted compliance for CFTC Rule 23.602 and the matter relates to swap dealer business
- For SBSDs, where the SEC has historically been more focused on substituted compliance, the SEC 2026 examination priorities for SBSDs no longer refer to substituted compliance as a priority

Practical Considerations for Non-U.S. Firms

- As retail trading of derivatives continues to grow, firms that are not registered in the United States should ensure they have appropriate controls in place to reasonably prevent access by U.S. persons
- Growth in newer products that are swaps under the CEA, like event contracts and digital asset derivatives, will require non-U.S. firms to consider less common registration categories, like FCM, IB or CTA registration, which have less developed cross-border frameworks compared to swap dealers
- Even where substituted compliance is available, comparability determinations come with conditions
- As non-U.S. regulatory regimes grow and mature, consider opportunities to seek comparability determinations and/or individual no-action relief

Looking Ahead

- The CFTC's recent cross-border actions have been through interpretive and no-action staff letters, which are less permanent than formal rulemaking
- There remains a risk of whiplash as administrations and enforcement priorities change over time
- When digital asset market structure legislation is passed, the CFTC will have to develop further cross-border rules to govern new registrants and activities within its jurisdiction

119TH CONGRESS
1ST SESSION

H. R. 3633

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 18 (legislative day, SEPTEMBER 16), 2025

Received; read twice and referred to the Committee on Banking, Housing, and Urban Affairs

AN ACT

To provide for a system of regulation of the offer and sale of digital commodities by the Securities and Exchange Commission and the Commodity Futures Trading Commission, to amend the Federal Reserve Act to prohibit the Federal reserve banks from offering certain products or services directly to an individual, to prohibit the use of central bank digital currency for monetary policy, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Cross-Border Reach of SEC Treasury Clearing Mandate

02

Background on Treasury Clearing

- The SEC adopted the treasury clearing rule in December 2023. The rule requires that clearing agencies that clear U.S. treasury securities adopt rules that require clearing agency members to submit for clearing certain cash and repo treasury transactions
- Mandatory clearing applies to:
  - Repo transactions involving Treasury securities where one counterparty is a clearing member.
  - Cash purchases or sales of Treasury securities between clearing members and other specific institutions, such as registered broker-dealers, government securities brokers, and government securities dealers.
  - Cash purchases or sales of Treasury securities between a clearing member and multiple buyers or sellers through a trading facility (e.g., a limit order book), where the clearing member acts as a counterparty to both the buyer and seller in separate transactions. This includes cash transactions involving interdealer brokers (IDBs)
- The current compliance dates are December 31, 2026 for cash transactions, and June 30, 2027 for repo transactions

Treasury Clearing – Exceptions

davispolk.com

- There are some exceptions to the mandatory clearing requirement. These include:
  - Cash and repo transactions involving a central bank, sovereign entity, international financial institution (e.g., the IMF) or a natural person
  - Repos with state or local governments and clearing organizations
  - General collateral triparty repo in which treasuries are permissible substitutes for other types of collateral
  - Interaffiliate repos with banks, brokers, dealers, and FCMs (or the foreign equivalent) where the non-clearing affiliate clears all outward facing repos (referred to as the "outward facing requirement")
    - The requirement that the non-clearing affiliate clear all other trades is designed to prevent evasion of the rule by having the non-clearing affiliate execute outward facing repo – which do not have to be cleared– and then transferring those positions to the clearing member via an interaffiliate trade

Davis Polk

Treasury Clearing – Extraterritorial Reach

- The treasury clearing mandate itself does not have any extraterritorial limitations. Rather, it applies to any eligible transaction entered into with a member of a treasury clearing agency – as applied by the rules of that clearing agency
  - According to the Congressional Research Service, as of December 2024 there is an estimated over $8 trillion of U.S. treasury securities owned outside the United States, with approximately $4.8 trillion of that held by private investors, and so are potentially in scope for the clearing mandate depending on their trading partners
  - However, surveys show large splits in familiarity with the rule between the United States and foreign market participants, with foreign market participants much less familiar with the rule
  - This has the potential to significantly restrict the availability of counterparties, and a correspondent impact on liquidity outside of the U.S.
- The SEC recently published for comment two requests for exemptive relief that address this extraterritorial issue

Treasury Clearing – Extraterritorial Reach

davispolk.com

- *Non-U.S. Transactions.* The SEC has requested comment on an exemption that would exempt from the trade submission requirement transactions between a non-U.S. direct participant and a non-U.S. counterparty that is not a direct participant. For these purposes, a non-U.S. person means a person that is not:
  - a U.S. person as defined by Exchange Act Rule 3a71-3 (i.e., the same definition as used for cross border SBS activity);
  - a U.S. branch of a non-U.S. person; or
  - a non-U.S. person whose obligations under the transaction are guaranteed by a U.S. person
- *Interaffiliate Repo*. The SEC has also requested comment on a proposed exemption that would (i) expand the entities eligible for the interaffiliate exemption to include affiliates other than investment companies and (ii) exempt from the "outward facing requirement" repos between a non-U.S. affiliate and a non-U.S. counterparty, up to a volume-based threshold
- The comment period expires on May 29

Davis Polk

Cross-Border Enforcement Actions

03

Recent Enforcement Trends Under Trump Administration

- DOJ, CFTC and SEC priorities have changed significantly under Trump Administration
- Prediction markets are a key area of focus, including insider trading
- Enforcement collaboration among U.S. and foreign authorities remains strong
- Willful violations of AML and KYC requirements are an important issue for cross-border operations

Commodity Futures Trading Commission

Division of Enforcement

Presenter Bios

Gabriel D. Rosenberg

Partner, Financial Institutions

New York
+1 212 450 4537
gabriel.rosenberg@davispolk.com

Counsels the most sophisticated clients on all aspects of financial regulation.

For full bio, please visit davispolk.com

Gabe is a member of our Financial Institutions and Fintech practices. He counsels clients across the financial services, banking and innovation sectors on regulatory issues that matter to their business. This includes helping clients navigate interactions with regulators, implement legislative and regulatory requirements, defend against enforcement actions and advocate for fit-for-purpose regulation.

Clients look to Gabe for his analysis and guidance on the legal and regulatory issues related to novel business proposals. His advanced degree in mathematics enables him to understand clients' trading, tech and data businesses to provide them with commercial-minded, practical advice.

Gabe is a frequent writer, commentator and lecturer on regulatory issues. He co-edits *Regulation of Swaps and Security-Based Swaps in the United States*, now in its sixth edition, and has held academic appointments at Yale Law School, the Yale School of Management and UC Berkeley's Haas School of Business.

Gabe's work has included:

- Representing many of the most significant crypto-native firms on key legal, regulatory and transactional issues, including the cross-border application of US regulatory requirements
- Advising traditional financial institutions, including several G-SIBs and asset managers, on digital asset and fintech initiatives
- Advising many of the largest financial institutions on a myriad of regulatory, advocacy and enforcement issues, including swap dealer regulation, the Volcker Rule, TLAC, the QFC Stay Rule and capital and liquidity
- Development of prime brokerage offerings
- Representing clients in enforcement actions related to regulatory and compliance issues
- Representing clients in transactional arrangements related to insolvency proceedings
- Serving as co-author of numerous academic pieces relating to swap trading and the Volcker Rule

Recognition

- *Chambers USA* – Financial Services Regulation: Banking (Compliance)
- *Chambers FinTech* – FinTech Legal: Blockchain & Cryptocurrencies
- *Legal 500 U.S.* – Financial Services Regulation, Next Generation Partner
- *IFLR1000* – Financial Services Regulatory, United States, Highly Regarded

Education

J.D., Yale Law School
Managing Editor, *Yale Journal of Law & Technology*
Articles Editor, *Yale Journal on Regulation*
Member, *Yale Law Journal*

M.Sc., Applicable Mathematics, London School of Economics and Political Science
with distinction

A.B., Economics, Harvard University
magna cum laude
Phi Beta Kappa

Daniel S. Kahn

Partner, White Collar Defense & Investigations

Washington DC
+1 202 962 7140
daniel.kahn@davispolk.com

Former senior DOJ official with more than two decades of experience in criminal and regulatory investigations. Headed DOJ's Fraud Section and FCPA Unit.

For full bio, please visit davispolk.com

Dan represents companies and individuals in government enforcement matters, internal investigations and compliance matters, and has secured numerous favorable resolutions for clients with various enforcement authorities.

He is ranked in Band 1 for his FCPA work by *Chambers USA*, which also recognizes him for White-Collar Crime & Government Investigations.

Dan served for 11 years in senior roles at DOJ, including as Chief of the Fraud Section and the FCPA Unit. The *Wall Street Journal* described him as DOJ's "most recognizable expert on the Foreign Corrupt Practices Act." At DOJ, he supervised matters involving the FCPA, money laundering, and commodities, securities, healthcare and procurement fraud, and played a central role in developing enforcement policies on the FCPA, corporate enforcement, and compliance.

Dan co-authored a treatise on corporate investigations, and teaches corporate investigations at Harvard Law School and anti-corruption at Georgetown Law Center.

- Resolved an FCPA matter with DOJ and SEC involving a multi-national aviation company
- Secured an FCPA opinion release from DOJ for a global fiber optic cable company involving demands for potentially improper payments in Southeast Asia
- A global defense company in an FCPA investigation by DOJ
- Resolved a financial institution in connection with a CFTC investigation into swap dealer reporting issues
- A multi-national electronics company in connection with a DOJ False Claims Act investigation
- A publicly traded mining company in connection with a securities fraud and insider trading DOJ and SEC investigation
- A healthcare company in connection with DOJ and SEC investigation into potential FCPA violations
- Multiple pharmaceutical companies in FCPA investigations by DOJ and SEC
- A publicly traded healthcare company in connection with a DOJ civil and criminal investigation into potential Anti-Kickback Statute and False Claims Act violations
- A board of a multinational automobile maker concerning potential governance issues
- A retail company in connection with compliance with a Federal Food, Drug, and Cosmetic Act matter with DOJ
- A publicly traded company concerning a DOJ investigation into short-selling and manipulative trading
- A special committee of the board of a publicly traded telecommunications company concerning potential governance issues and fraud by management
- The board of a public international organization concerning allegations of misconduct by a senior executive
- A publicly traded multinational defense contractor in connection with a DOJ investigation into potential False Claims Act violations
- A multinational publicly traded technology company in connection with potential FCPA violations and fraud

Daniel S. Kahn

Partner, White Collar Defense & Investigations

- A global financial institution in investigations by multiple U.S. regulators for potential anti-money laundering violations
- A global consulting firm in connection with potential FCPA violations
- Served as a testifying anti-corruption expert witness for a multinational energy company in an arbitration against a Latin American government
- A corporate executive concerning an antitrust investigation
- A corporate executive in a healthcare fraud investigation
- Multiple corporate executives in connection with DOJ and SEC investigations into potential FCPA violations
- A global communications company in an internal investigation into allegations related to governance and revenue recognition issues

Recognition

- *Chambers USA* – FCPA, Band 1
- *Chambers USA* – White-Collar Crime & Government Investigations, District of Columbia
- *Law360* – White Collar Editorial Advisory Board, 2022
- CFTC Chairman’s Award for Regulatory Excellence, 2020
- FBI Outstanding Service Award, 2019
- Assistant Attorney General’s Award for Exceptional Service, 2015 and 2017
- Assistant Attorney General’s Award for Distinguished Service, 2012

Education

J.D., Harvard Law School
cum laude

B.S., Cornell University
summa cum laude

davispolk.com

DavisPolk

Carl Emigholz

Counsel, Financial Institutions

Washington DC
+1 202 962 7044
carl.emigholz@davispolk.com

Advises financial institutions and market participants on securities and derivatives regulatory, transactional and enforcement matters.

For full bio, please visit davispolk.com

Carl focuses on regulation of broker-dealers, swap dealers, trading platforms, clearinghouses and other market participants. This includes advising on rules relating to a wide variety of regulatory matters, including status and registration, ongoing capital, customer protection, margin advice, market structure issues, the permitted scope of securities-related activities for banks and market and trading conduct rules. He also advises on regulatory matters for corporate transactions, examinations and investigations.

At the SEC, Carl served as the staff representative on the IOSCO Committee on Regulation of Market Intermediaries, worked on broker-dealer and security-based swap dealer registration and status issues, and advised the Director on a wide range of issues, including market structure, Dodd-Frank Act implementation, Regulation SHO, and broker-dealer registration and sales practices. Carl has also advised the Division of Enforcement on litigation and investigations.

Education

J.D., Rutgers Law School
Articles Editor, *Rutgers University Law Review*

Master, Forensic Science, George Washington University

B.S., Biopsychology and Cognitive Sciences, University of Michigan

Tyler X. Senackerib

Counsel, Financial Institutions

New York
+1 212 450 3419
tyler.senackerib@davispolk.com

Advises on all aspects of derivatives and securities regulatory, transactional and enforcement matters.

For full bio, please visit davispolk.com

Tyler helps clients navigate and understand all aspects of financial regulation, with a focus on derivatives and securities regulation and transactions. He regularly advises a range of U.S. and non-U.S. market participants, including G-SIBs, swap dealers, broker-dealers, asset managers, trading platforms, fintechs and digital asset firms. His practice includes advising on registration requirements, interpretation and implementation of regulations, and interactions with regulators. Tyler also works closely with financial institutions to address regulatory enforcement actions.

Tyler advises clients on many transactional matters, including derivatives and other trading agreements, capital markets offerings, mergers and acquisitions, and structuring and offering digital asset services. He is a coauthor of two chapters in a leading resource on the swap regulatory regime, *Regulation of Swaps and Security-Based Swaps in the United States*, covering swap dealer capital requirements and cross-border matters.

Tyler's work has included advice to:

- Many of the largest financial institutions on a range of regulatory, advocacy and enforcement issues, with a focus on Title VII of the Dodd-Frank Act
- UBS on its acquisition of Credit Suisse
- A range of market participants in negotiating derivatives and securities trading agreements, including ISDA master agreements
- Digital asset firms on regulatory and transactional matters, including developing prime brokerage offerings
- Several financial institutions on regulatory enforcement actions, including a global systemically important bank (G-SIB) on consent order remediation
- Morgan Stanley Bank on the establishment of its global notes program
- Issuers and underwriters on numerous debt and equity securities offerings by banks and nonbank financial companies
- Long-Term Stock Exchange on its registration with the SEC as a national securities exchange

Education

J.D., University of Southern California Gould School of Law
Senior Submissions Editor, *Southern California Law Review*

B.S., Accounting and Marketing, New York University
magna cum laude