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CFTC Cross-Border Roundup: 2025 Guidance on Cross-Border Application of Certain Futures and Swaps Regulations

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In 2025, the staff of the Commodity Futures Trading Commission ("**CFTC**" or "**Commission**") issued two letters providing critical guidance on the Commission's cross-border jurisdiction over futures and swaps transactions. CFTC Letter No. 25-14 (the "U.S. Person Interpretive Letter") clarified that an entity's status as a "non-U.S. person" turns solely on its place of organization and "principal place of business", i.e., the location where the firm's high-level officers primarily direct, control, and coordinate its activities. CFTC Letter No. 25-42 (the "Cross-Border Swaps Relief Letter") streamlined the process for classifying swap counterparties as "U.S. Persons" by permitting firms to rely on the definitions in the Cross-Border Swap Dealer Rule[1] for all cross-border swaps requirements. Taken together, these letters signal a significant shift toward reducing the regulatory burden for entities conducting cross-border derivatives transactions.

A. The U.S. Person Interpretive Letter

1. Summary

On May 21, 2025, the CFTC Staff issued the U.S. Person Interpretive Letter[2], clarifying that an entity with a non-U.S. place of organization **and** "principal place of business" is a "non-U.S. person" under the CFTC's cross-border rules, and that other U.S. connections—including U.S.-based owners, employees, and computer servers—do not affect this determination. Specifically, an entity organized and principally based outside the United States will be considered a "non-U.S. person" for purposes of:

i. Part 30 of the CFTC Rules governing **transactions in non-U.S. futures** with "a person located in the United States";
ii. Part 48 of the CFTC Rules governing **foreign boards of trade** ("**FBOTs**") that provide direct access to "a participant located in the United States".
iii. CFTC Rule 3.10(c)(2)(ii), which provides an exemption from CFTC registration to a **foreign futures commission merchant ("FCM")** that transacts with a "foreign located person"; and
iv. the Cross-Border Swap Dealer Rule and the 2013 Cross-Border Guidance.[3,4]

[1] 17 CFR § 23.23.
[2] *See* CFTC Staff Letter No. 25-14, *Staff Interpretation Regarding Certain Cross-Border Definitions* (May 21, 2025). As a terminology matter, we note that (i) CFTC Rule 30.1(c) uses the term "foreign futures or foreign options customer," (ii) CFTC Rule 48.2(c) uses the term "participant in the United States," (iii) CFTC Rule 3.10(c)(1)(iii) uses the term "foreign located person," and (iv) CFTC Rule 23.23 uses the term "U.S. person." For the sake of simplicity, this analysis uses the term "non-U.S. person" to refer to (i) an entity that would **not** be considered a "person located in the United States" under CFTC Rule 30.1(c) or (ii) a "participant [of an FBOT] in the United States," under CFTC Rule 48.2(c), and (iii) an entity that would be considered a "foreign located person," under CFTC Rule 3.10(c)(1)(iii) and (iv) a "non-U.S. person" under CFTC Rule 23.23 and the 2013 Cross-Border Guidance.
[3] *See* CFTC Interpretive Guidance and Policy Statement, *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 FED. REG. 45292 (July 26, 2013) ("**2013 Cross Border Guidance**").
[4] *See* U.S. Person Interpretive Letter at pp. 7-8.

2. Regulatory Background: CFTC's Cross-Border Jurisdiction

Futures: The Commodity Exchange Act ("CEA") grants the Commission authority to regulate non-U.S. futures activity of persons "located in the United States.[5] The Commission has historically determined a legal entity's "location" by reference to its place of formation and principal place of business.[6]

Swaps: Section 2(i) of the CEA establishes the CFTC's extraterritorial jurisdiction over non-U.S. swaps activity connected to U.S. commerce.[7] The Cross-Border Swap Dealer Rule defines "U.S. person" to include a legal person organized under U.S. law **or** having its "principal place of business" in the United States,[8] defined as the location from which officers primarily direct, control, and coordinate the entity's activities.[9] The 2013 Cross-Border Guidance interpreted the phrase "principal place of business" to include entities that are organized outside the United States but have the "center of direction, control, and coordination of their business activities in the United States," i.e., the "nerve center."[10]

Recent Regulatory Uncertainty: In the years preceding the U.S. Person Interpretive Letter, the CFTC created regulatory uncertainty regarding the scope of its extraterritorial jurisdiction through enforcement actions against digital asset market participants. Most notably, in its May 2024 enforcement action against Seychelles-based Falcon Labs, Ltd. ("**Falcon Labs**"), the CFTC advanced a novel test for extraterritorial application of the CEA, alleging that entities were "located in the United States" based on the location of their ultimate beneficial owners and the location of personnel controlling non-U.S. sub-accounts—criteria not previously applied by the Commission.[11]

3. U.S. Person Interpretive Letter: Factual Background and Request

The U.S. Person Interpretive Letter was issued in response to a request from a proprietary trading firm organized in the Bahamas whose high-level officers primarily directed, controlled, and coordinated

[5] *See* CEA Section 4(b) (7 U.S.C. § 4(b)); 17 C.F.R. Part 30 (CFTC regulations regarding foreign futures and foreign options transactions); 17 C.F.R. Part 48 (CFTC regulations regarding foreign boards of trade).

[6] *See* U.S. Person Interpretive Letter Letter at p. 3; CFTC Final Rule, *Foreign Futures and Foreign Options Transactions*, 52 FED. REG. 28980 (Aug. 5, 1987) ("With the development of international futures markets and increasing public awareness of such markets, these regulations will add to the Commission's existing customer protection regulatory scheme coverage of foreign futures and options transactions undertaken by U.S. domiciliaries."); *CFTC Staff Letter 05-02* (Dec. 10, 2005) (citing 17 C.F.R. § 4.7, which defines the term "non-United States person" to include, in part, a "corporation…organized under the laws of a foreign jurisdiction which has its principal place of business in a foreign jurisdiction.").

[7] *See* U.S. Person Interpretive Letter at 3. More specifically, Section 2(i) of the CEA, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, grants the CFTC extraterritorial jurisdiction over swaps activity outside of the United States when "those activities…have a direct and significant connection with activities in, or effect on, commerce of the United States." *See* CEA Section 2(i) (7 U.S.C. § 2(i)). Notably, the CEA's statutory focus on whether non-U.S. swaps activity has a connection to U.S. commerce is distinct from the Commission's extraterritorial jurisdiction over futures activities, which focuses on physical location.

[8] CFTC Rule 23.23(a)(23)(i)(B) (17 C.F.R. § 23.23(a)(23)(i)(B)).

[9] CFTC Rule 23.23(a)(23)(ii) (17 C.F.R. § 23.23(a)(23)(ii)).

[10] *See* 2013 Cross-Border Guidance at 45309; U.S. Person Interpretive Letter at p. 4.

[11] *See* *In re Falcon Labs Ltd.* at pp. 3-4 (May 13, 2024). This novel test of extraterritorial jurisdiction also appeared in an earlier March 2023 CFTC enforcement action against a major offshore digital asset exchange. *See CFTC v. Changpeng Zhao et al.* (N.D. Ill. March 27, 2023). That action was ultimately settled in December 2023 with the U.S. District Court for the Northern District of Illinois entering a consent order requiring the digital asset exchange to, among other things, disgorge $1.35 billion of ill-gotten transaction fees and pay a penalty of $1.35 billion. *See* CFTC Press Release, *Federal Court Enters Order Against Binance and Former CEO, Zhao, Concluding CFTC Enforcement Action* (Dec. 18, 2023).

activities from the Bahamas.[12] Although the firm had no U.S. offices, it was indirectly owned by U.S. residents who also co-owned a separate U.S.-based proprietary trading firm. The Bahamas-based firm sought to expand its U.S. connections[13] by engaging U.S.-based traders and developers (employed by a Bahamas-organized affiliate), licensing trading technology from the U.S.-based firm, and hosting trading technology on U.S.-located servers. Given these connections and the novel test applied in Falcon Labs, the firm sought confirmation that it would qualify as a "non-U.S. person" for purposes of the CFTC's futures and swaps regulations.[14]

4. CFTC Response

The CFTC Staff stated that the "**place of organization and principal place of business are the factors that are of relevance in determining [the entity's] cross-border status**."[15] Applying these factors, the CFTC Staff determined that because the Bahamas-based firm's place of organization and the location where its high-level officers primarily direct, control, and coordinate the firm's activities were outside the United States, the Bahamas-based firm qualified as a "non-U.S. person" for purposes of the CFTC's futures and swaps regulations. Importantly, the CFTC staff stated that the Bahamas firm's non-U.S. status was unaffected by its proposed connections with the United States through (i) engagement of U.S.-based traders, quantitative researchers and software developers employed by another company organized in the Bahamas, (ii) licensing of certain trading technology from the U.S.-based proprietary trading firm, and (iii) hosting of trading technology on U.S.-located servers.

B. The Cross-Border Swaps Relief Letter

1. Regulatory Background

The Cross-Border Swaps Relief Letter addressed the prevailing inconsistency among the multiple definitions of "U.S. person" and "guarantee" across three CFTC cross-border swaps rulemakings: (a) the 2013 Cross-Border Guidance, which provided guidance on the cross-border application of swap dealer registration, *clearing, trade execution, and reporting requirements (collectively, the "Covered Requirements"), using its own definitions of "U.S. person," "guarantee," and "conduit affiliate"; (b) the Cross-Border Uncleared Swaps Margin Rule (CFTC Rule 23.160), adopted in 2016, which incorporated amended definitions of "U.S. person" and "guarantee" for uncleared swaps margin requirements; and (c) the Cross-Border Swap Dealer Rule (CFTC Rule 23.23), adopted in 2020, which further modified the "U.S. person" definition for swap dealer registration thresholds and specified transaction-level requirements ("Group B and Group C Transaction-Level Requirements"), but did not supersede the 2013 Cross-Border Guidance as applied to clearing, trade execution, and reporting requirements (the "Unaddressed Requirements") or the Cross-Border Uncleared Swaps Margin Rule.* The 2020 rulemaking permitted reliance on pre-existing "U.S. person" representations obtained before November 13, 2020, but only until December 21, 2027.[16] The Appendix to this alert compares the definitions of "U.S. person" under each of these rules.

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[12] U.S. Person Interpretive Letter at p. 5.
[13] U.S. Person Interpretive Letter at p. 5.
[14] U.S. Person Interpretive Letter at p. 5.
[15] U.S. Person Interpretive Letter at p. 7 (emphasis added).
[16] *See* CFTC Rule 23.23(a)(9) (17 C.F.R. § 23.23(a)(9)) and CFTC Rule 23.23(a)(23)(iv) (17 C.F.R. 23.23(a)(23)(iv)); *see also* 2020 Cross-Border Rule Adopting Release at 56938-39, 56941-42. As the CFTC notes in the Cross-Border Swaps Relief Letter, "[t]o classify their counterparties, [swap dealers] must collect representations designed to conform to three different CFTC rulesets, in addition to the [rules of the Securities and Exchange Commission] and the rules of the prudential regulators [*i.e.*, the Board of Governors of the Federal Reserve System, the Office of the

2. Harmonized Application of "U.S. Person" and "Guarantee" Definitions

In order to alleviate the regulatory burden associated with obtaining representations as to a counterparty's status as a "U.S. person" under each of the cross-border swaps rules, the Cross-Border Swaps Relief Letter permits swaps market participants to:

i. classify a counterparty based on the definitions of "U.S. person" and "guarantee" set forth in the Cross-Border Swap Dealer Rule for purposes of determining the applicability of **all** swaps requirements, including the Cross-Border Uncleared Swaps Margin Rule and the Unaddressed Requirements in the 2013 Cross-Border Guidance and;

ii. classify a counterparty based on representations made pursuant to the "U.S. person" and "guarantee" definitions in the 2013 Cross-Border Guidance or Cross-Border Uncleared Swaps Margin Rule for purposes of the Group B and Group C Transaction-Level Requirements **provided** the counterparty initially made the representations prior to November 13, 2020 (the effective date of the Cross-Border Swap Dealer Rule); and

iii. treat non-U.S. person counterparties that are "conduit affiliates" as outside scope of the Unaddressed Requirements of the 2013 Cross-Border Guidance.[17]

The CFTC Letter confirmed that these no-action positions supersede any prior no-action letters that cross-reference the 2013 Cross-Border Guidance or the Cross-Border Uncleared Swaps Margin Rule in ways that are inconsistent with the CFTC Staff's current position."[18]

C. Conclusions and Practical Implications

1. The U.S. Person Interpretive Letter

The U.S. Person Interpretive Letter implicitly disavows the expansive "U.S. person" definition applied in *Falcon Labs* and provides a uniform definition **focusing on place of establishment** and **principal place of business**. Entities established outside the United States should ensure that their "nerve center", i.e., the location where high-level officers primarily direct, control, and coordinate activities, remains offshore. While significant U.S. connections (including U.S. ownership, employees, and technology) are permissible,

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Comptroller of the Currency, and the Federal Deposit Insurance Corporation]…[B]ecause the Commission adopted its cross-border rules at different times, [swap dealers] have been forced to collect representations from these counterparties multiple times, stating that the situation will worsen when the 2020 Cross-Border [Swap Dealer] Rule's safe harbor for reliance on prior representations expires at the end of 2027, at which time market participants will need to collect updated representations once again." *See* Cross-Border Swaps Relief Letter at p. 6.

[17] Cross-Border Swaps Relief Letter at p. 8. Although this analysis does not substantively address the category of "conduit affiliate," the Commission explained in the 2013 Cross-Border Guidance that such regulatory entity type could be identified based on consideration of such factors as whether: (i) the non-U.S. person is a majority-owned affiliate of a U.S. person; (ii) the non-U.S. person is controlling, controlled by or under common control with the U.S. person; (iii) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and (iv) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with a third party(ies) to its U.S. affiliates. *See* 2013 Cross-Border Guidance at 45358-59. We note as well that neither CFTC Rule 23.23, nor the Cross-Border Uncleared Swaps Margin Rule, contains the "conduit affiliate" category from the 2013 Cross-Border Guidance.

[18] Cross-Border Swaps Relief Letter at p. 8.

non-U.S. firms should maintain appropriate documentation demonstrating that their principal place of business remains outside the United States.

2. The Cross-Border Swaps Relief Letter

As a result of the Cross-Border Swaps Relief Letter:

Swap counterparties that entered into swap documentation before November 13, 2020 will not be required to update their “U.S. person” representations to reflect the definition of “U.S. person” in the Cross-Border Swap Dealer Rule; and

Swap counterparties entering into new swap agreements will only need to make one set of “U.S. person” representations using the definitions in the Cross-Border Swap Dealer Rule. Market participants should monitor for updated ISDA documentation (including Dodd-Frank protocols) reflecting the Cross-Border Swaps Relief Letter.

3. Future Rulemaking

Market participants should also monitor for future CFTC rulemaking codifying, or amending the positions taken by the CFTC Staff in the 2025 letters, including any rulemaking on the Unaddressed Requirements in the 2013 Cross-Border Guidance.

APPENDIX

Comparison of Definitions of "U.S. Person" Under CFTC Cross-Border Swaps Regulations and Guidance

The chart below (i) provides a high-level overview of specific entity types specified as within the scope of the definition of "U.S. person" under the 2013 Cross-Border Guidance and (ii) identifies whether each such entity type specified in the 2013 Cross-Border Guidance is considered a "U.S. person" under each of the Cross-Border Uncleared Swaps Margin Rule and the Cross-Border Swap Dealer Rule. Definitional differences are highlighted in **red**.

Note that in contrast to the 2013 Cross-Border Guidance, neither the Cross-Border Uncleared Swaps Margin Rule nor the Cross-Border Swap Dealer Rule include a catchall provision, *i.e.*, these rules treat the enumerated categories under their respective "U.S. person" definitions as exclusive.[19] In addition, note that the definition of "U.S. person" under the Cross-Border Swap Dealer Rule excludes the following international institutions: (i) the International Monetary Fund; (ii) the International Bank for Reconstruction and Development; (iii) the Inter-American Development Bank; (iv) the Asian Development Bank; (v) the African Development Bank; (vi) the United Nations, and the agencies and pension plans of (i)-(vi), as well as any other similar international organizations, and their agencies and pension plans.[20]

2013 Cross-Border Guidance Definition of "U.S. Person"	Cross-Border Uncleared Swaps Margin Rule (CFTC Rule 23.160)	Cross-Border Swap Dealer Rule (CFTC Rule 23.23)
(i) Any natural person who is a resident of the United States;	Same as 2013 Cross-Border Guidance	Same as 2013 Cross-Border Guidance
(ii) Any estate of a decedent who was a resident of the United States at the time of death;	Same as 2013 Cross-Border Guidance	Same as 2013 Cross-Border Guidance
(iii) Any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than an entity described in prongs (iv) or (v), below) (a "legal entity"), in each case that is organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States;	Generally same as 2013 Cross-Border Guidance, but also includes any branch of such legal entity	Similar to 2013 Cross-Border Guidance. Expressly defines "principal place of business" to mean "the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person."[21] With respect to an "externally managed

[19] *See* Cross-Border Uncleared Swaps Margin Rule at 34821-24; 2020 Cross-Border Rule Adopting Release at 56932-38.
[20] CFTC Rule 23.23(a)(23)(iii) (17 C.F.R. § 23.23(a)(23)(iii)).
[21] CFTC Rule 23.23(a)(23)(ii) (17 C.F.R. § 23.23(a)(23)(ii)).

2013 Cross-Border Guidance Definition of "U.S. Person"	Cross-Border Uncleared Swaps Margin Rule (CFTC Rule 23.160)	Cross-Border Swap Dealer Rule (CFTC Rule 23.23)
		investment vehicle," this location is the office from which the manager of the vehicle primarily directs, controls, and coordinates the investment activities of the vehicle.
(iv) Any pension plan for the employees, officers or principals of a legal entity described in prong (iii), unless the pension plan is primarily for foreign employees of such entity;	Same as 2013 Cross-Border Guidance	No specific prong applicable to pension plans, but covered by place of organization and principal place of business prong
(v) Any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;	Same as 2013 Cross-Border Guidance	No specific prong applicable to pension plans, but covered by place of organization and principal place of business prong
(vi) Any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons;	Not included in the "U.S. Person" definition under the Cross-Border Uncleared Swaps Margin Rule	Not included in the "U.S. person" definition under CFTC Rule 23.23
(vii) Any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity; and	Same as 2013 Cross-Border Guidance except for (i) removal of the "directly or indirectly majority-owned" requirement; and (ii) addition of application to any branch of the relevant legal entity	Not included in the "U.S. person" definition under CFTC Rule 23.23
(viii) Any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prong (i), (ii), (iii), (iv), (v), (vi), or (vii)."	Similar to 2013 Cross-Border Guidance but covers individual or joint accounts with respect to modified definition of "U.S. person" as detailed in the rows above	Similar to 2013 Cross-Border Guidance, but covers an account (whether discretionary or non-discretionary) of a "U.S. person" (as defined in CFTC Rule 23.23(a)(23))

FERC Eliminates Western Power Price Cap

Casey Khan – Sidley Austin LLP

In response to the Western Energy Crisis of 2000-2001, the Federal Energy Regulatory Commission ("FERC") instituted a "soft" price cap on bilateral sales of spot electric energy transactions in the Western Electricity Coordinating Council ("WECC") region.[1] On February 19, 2026, FERC rescinded the WECC soft cap, retroactively effective July 18, 2025.[2]

As a purported means of mitigating against the exercise of market power and manipulation, FERC originally required market participants who bilaterally sell spot energy above the WECC soft cap to report such transactions to FERC with a justifying explanation of why the transactions exceed the cap with the potential for FERC to order refunds.[3] Initially, FERC set the soft cap to $250/MWh, and eventually raised it to $1,000/MWh. Separately, the California Independent System Operator ("CAISO")—though sitting within the WECC footprint—had and continues to maintain its own price cap structure up to $2,000/MWh.[4]

In the summer of 2020, the Western U.S. saw significant demand surges owing to extreme heat and therefore a number of transactions exceeding the $1,000 WECC soft cap. Accordingly, sellers exceeding the soft cap, were required to file justifications with FERC, but were uncertain as to how to make such justifications, whereby June 2021, FERC provided guidance.[5] The guidance set forth three frameworks for justification: 1) index publication; 2) production cost; and 3) opportunity cost. In June 2021 extreme heat brought about more sales exceeding the soft cap, and again in September 2022. In filing their justifications, most market participants worked with the index publication framework, whereby a market publications like *Platts Megawatt Daily* or the Intercontinental Exchange published weighted average index prices based on fixed price transactions that trade for a given spot transaction. More fundamentally, these market participants argued that the transactions exceeding the WECC soft cap were presumed to be just and reasonable and subject to a public interest standard of review under the *Mobile-Sierra* doctrine.[6]

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[1] *Cal. Indep. Sys. Operator Corp.*, 100 FERC ¶ 61,060, at P 46 (July 2002 Order), *order on reh'g and compliance*, 101 FERC ¶ 61,061, at P 17 (2002) (October 2002 Order) (promulgating a soft cap of $250 per megawatt ("MW") for spot market sales that are 24 hours or less in duration and that are entered into the day of or the day prior to delivery).

[2] *Western Electricity Coordinating Council*, 194 FERC ¶ 61,123 (2026).

[3] *Id*.

[4] *See id.*; *see also* CAISO, CAISO eTariff, §§ 30.7.12 (Validation of Bids in Excess of Bid or Minimum Load Cost Cap) (4.0.0), 39.6.1 (Maximum Bid Prices) (18.0.0).

[5] *ConocoPhillips Co.*, 175 FERC ¶ 61,226 (2021) (Guidance Order).

[6] *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332 (1956) ("*Mobile*"); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)("*Sierra*"); *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish Cty*, 554 U.S. 527 (2008)("*Morgan Stanley*"); *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010)("*NRG*").

The *Mobile-Sierra* doctrine sets forth a high standard of scrutiny whereby FERC can only adjust or abrogate contractual terms agreed by private parties for a jurisdictional product (*e.g.*, electric energy) upon finding an "unequivocal public necessity." The Supreme Court has explained that FERC finding a seller engaging in market manipulation would a key example of an extraordinary circumstance where there is an unequivocal public necessity to adjust or abrogate a contract for being unjust and unreasonable.[7]

In response to the justification filings made for the 2020-2022 WECC soft cap exceedances, FERC held that the *Mobile-Sierra* protection applies. Nevertheless, for any spot market sales that were made at a rate greater than an index average, sellers would need to refund the amount sold above the index average to the buyers. For example, when ICE published $1,400.50 for spot Palo Verde index for August 17, 2020, any transactions that were sold at a price greater than the Palo Verde index for that day required refunds for the exceedance, even when those fixed-price transactions were used to create the average index price.[8] FERC held that the WECC soft cap placed a limit on a seller's market-based rate authority and the refund adjustments were not done pursuant to *Mobile-Sierra*. Notably, FERC Commissioner Danly dissented from FERC's refund orders because FERC's application would have the effect of removing the *Mobile-Sierra* protections whereby FERC "could simply dictate all seller offers."[9]

After unsuccessfully requesting rehearing of the FERC refund orders, a number of market participants appealed, whereby in July 2024, the DC Circuit held that FERC must conduct a *Mobile-Sierra* public interest analysis prior to ordering refunds for sales that exceed the WECC soft price cap.[10] The court held that the purpose of the WECC soft cap justification filings is to "facilitate[] this review by obligating sellers to supply information showing that the conditions for the ordinary application of the *Mobile-Sierra* presumption (*e.g.*, the absence of market manipulation) were in place at the time of the above-cap sale." Upon remand, FERC engaged in a *Mobile-Sierra* analysis of each refund order and concluded that there was no basis for ordering refunds, and as such, reversed the prior decisions and ordered that refunding sellers were entitled to recoupment of the refunds.[11]

Separately, on July 15, 2025, FERC instituted a proceeding under section 206 of the Federal Power Act (FPA) to investigate whether the WECC soft price cap should be eliminated. On February 19, 2026, FERC decided to eliminate the WECC soft cap because it was no longer a just and reasonable mechanism.[12] FERC grounded its decision on a number of developments that have been instituted to prevent market power and manipulation since the initiation of the WECC soft cap in the early 2000s. Such developments include: 1) the evolution of WECC markets to include centralized spot markets like the Energy Imbalance Market; 2) the creation of

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[7] *Morgan Stanley* at 553-4.

[8] *See e.g.*, *Mercuria Energy America, LLC*, 179 FERC ¶ 61,033 (2022) (ordering refunds for exceeding the index average).

[9] *Id.* at Danly dissent.

[10] *Shell Energy N.A. (US), L.P. v. FERC*, 107 F.4th 981 (D.C. Cir. 2024).

[11] *See e.g., Mercuria Energy America, LLC*, 194 FERC ¶ 61,199 (2026) (ordering recoupment of refunds on remand).

[12] *Western Electricity Coordinating Council*, 194 FERC ¶ 61,123, at P 34 (2026)

more robust legal, surveillance, and enforcement capabilities for FERC to combat market manipulation; and 3) the filing burden of making soft cap justifications is unwarranted with limited benefits, particularly in light of FERC's enhanced capabilities.[13]

[13] *Id.* at 37.

Overview of Battery Storage Transactions

Dickson Chin, Jones Day[1]

This commentary explains how battery energy storage system (BESS) tolling agreements are structured and administered in organized U.S. power markets.

Parties and Roles in a BESS Tolling Structure

A BESS tolling hedge typically has three functional actors across organized markets. The project owner or seller develops, owns, and operates the battery, and it stands behind performance and availability covenants while retaining asset-level obligations, including compliance with interconnection, reliability, and safety standards and provision of revenue-grade metering and telemetry at the defined point of delivery. The hedge provider or offtaker becomes the economic "user" of the battery's capabilities for the term by acquiring exclusive rights to the battery's products and by taking the right to direct charge and discharge, while paying the owner a fixed or capacity-style consideration that stabilizes the owner's cash flow. The market-facing scheduler (such as a Qualified Scheduling Entity in ERCOT or a Scheduling Coordinator in CAISO) is appointed under the offtaker's control and interfaces with the organized market to submit day-ahead and real-time bids and offers, take ancillary services positions when applicable, relay deployments, and administer settlement; in many forms, the owner is expressly barred from self-dispatch outside of formal instructions, which reinforces that real-time decisions and market exposure reside with the offtaker.

Transaction Structure

In operation, the offtaker obtains exclusive rights to the battery's products and directs dispatch through the market-facing scheduler using formal "Charging Notices" and "Discharging Notices," and the owner must execute those instructions within agreed operating procedures and limits. The scheduler, acting at the offtaker's direction, submits bids and schedules, receives and processes market deployments, manages data flows, and handles settlement and disputes with the market operator, aligning all financial administration to the market's billing cycle. The contracts pair this framework with data rights: revenue-grade meters at the point of delivery and real-time telemetry and reporting that tie monthly invoices to settlement statements and open-book operational records. As a result, the hedge provider's market exposure is anchored in the same price nodes, settlements, and performance data that the scheduler administers, and deviations from instructions or technical limits are monetized through contract remedies and adjustments to protect the hedge value.

[1] *Any presentation by a Jones Day lawyer or employee should not be considered or construed as legal advice on any individual matter or circumstance. The contents of this document are intended for general information purposes only and may not be quoted or referred to in any other presentation, publication or proceeding without the prior written consent of the authors, which may be given or withheld at the authors' discretion. The distribution of this presentation or its content is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of Jones Day.*

Market Revenues and Cash-Settlement

Economically, there are two common approaches to align cash flows to market settlements. In a physical toll, the offtaker bears the cost of charging energy it initiates and retains the market revenues from discharging and related market products. Revenue-rights provisions sweep all product revenues to the offtaker against a monthly capacity-style payment to the owner, with variable O&M or start-up concepts layered as needed. The allocation stabilizes the owner's income and centralizes market P&L at the hedge provider, which is consistent with a "revenue sweep" hedge. In a financial toll, the offtaker pays a fixed monthly amount to the owner and then receives monthly market revenues, with a waterfall that first fills the fixed payment and then shares upside by formula. Both approaches are structured to align monthly netting with market timelines.

Physical Energy

Under a physical toll, provisions expressly pass title to charging energy from the offtaker to the owner and title to discharging energy from the owner to the offtaker. Under a financial toll, title is not referenced, but instead control and risk-of-loss over the physical energy transfer at the point of delivery. Owner is deemed to be in control and bears risk of loss, of all charging energy, stored energy and discharging energy at the delivery point, while the RTO/ISO is deemed to be in control, and bear all risk of loss, at and beyond delivery and receipt at the delivery point.

Performance Covenants and Remedies

Calibrated covenants and remedies keep the hedge economically whole against degradation and operational deviations. There are availability and round-trip efficiency guarantees with liquidated damages or reimbursement mechanisms that true-up if measured performance falls below guarantees, and they incorporate operating procedures that fix dispatch limits, outage coordination, and test protocols.

Legal Characterization

Determination of whether a transaction if a forward or a swap requires a facts and circumstances determination. Physical tolling agreements with the offtaker holding title to physical energy prior to delivery to the owner and holding title to physical energy after receipt from the owner, along the offtaker receiving market revenues from the RTO/ISO may lead to a characterization of these arrangements as forward contracts. Financial tolling agreements with the owner retaining control to physical energy except when it is within the control of the RTO/ISO, where the offtaker has no nexus with the physical energy, along the owner receiving market revenues from the RTO/ISO and passing them to the offtaker, may or may not lead to a characterization of these arrangements as swaps depending on the details.

Bank Authority if Offtaker is a Bank

Banks face a distinct overlay that sits alongside the forward-versus-swap characterization. If a bank is the offtaker and the structure is physical, the bank needs regulatory authority to transact in physical electricity. If the structure is a swap, the bank's authority to enter swaps is clear, and the arrangement sits squarely under Dodd-Frank with the expected reporting and other regulatory obligations. A subtler issue arises even in physical deals when banks take a security interest in tolling agreements. A bank that forecloses on its collateral may not be able to exercise “step-in” to run dispatch or otherwise transact physically unless it has the relevant authority. The practical mitigation is to rely on assignment to a qualified transferee rather than direct operational step-in. Non-bank offtakers generally do not face this bank-authority constraint.

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A Potential Non-de Minimis Exception to the *De Minimis* Exception

The CFTC's Recent No-Action Letter Excluding Energy Commodity End-User Swaps from Swap Dealer *De Minimis* Calculations

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On December 19, 2025, the Market Participants Division of the Commodity Futures Trading Commission ("**CFTC**") issued a letter (the "**No-Action Letter**") providing conditional no-action enforcement relief for market participants to exclude Energy Commodity End-User Swaps (as defined below) for the purposes of determining whether the market participant is deemed to be a swap dealer ("**SD**") under applicable CFTC Regulations.[1] The No-Action Letter is designed to create a pilot period for the CFTC to evaluate the SD *de minimis* threshold as it specifically relates to energy commodity swaps entered by end-users. While perhaps not a permanent position, the No-Action Letter represents a novel shift in the CFTC's approach to the swap dealing analysis for energy swaps with commercial energy companies.[2] The specific enforcement relief, and conditions for obtaining such relief, are discussed in more detail below.

I. BACKGROUND AND CONTEXT

As part of the CFTC's regulations with respect to SDs, the CFTC exempted persons from the SD definition whose aggregate gross notional amount ("**AGNA**") of swaps connected with swap dealing activity, during the preceding 12 months, falls below a *de minimis* threshold, including swaps of its affiliates under common control.[3] The CFTC initially established a $3 billion AGNA threshold for the *de minimis* test in 2012, subject to a phase-in threshold of $8 billion,[4] which the CFTC adopted as the permanent *de minimis* threshold in 2018.[5]

EEI requested the CFTC reassess the *de minimis* threshold as applied to certain energy commodity swaps entered by commercial energy companies. EEI noted that, in its 2018 final rulemaking, the CFTC stated the *de minimis* threshold balanced the policy goals of increasing efficiency, allowing limited ancillary dealing, encouraging new participants, and focusing

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1 CFTC No-Action Letter No. 25-51, accessible at: https://www.cftc.gov/PressRoom/PressReleases/9161-25.

2 The Department of Energy submitted a letter in support of regulatory reform to the SD *de minimis* threshold for energy commodity swaps, to reduce energy prices and volatility for consumers and industrial customers. The letter is available at: https://www.cftc.gov/PressRoom/PressReleases/9161-25.

3 17 C.F.R. 1.3.

4 *See* Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant," and "Eligible Contract Participant," 77 FR 30596, 30626-35 (May 23, 2012).

5 *See* De Minimis Exception to the Swap Dealer Definition, 83 FR 56666 (Nov. 13, 2018).

regulatory resources against the systemic risk reduction, counterparty protection, and market efficiency, orderliness, and transparency goals. Further, the CFTC acknowledged that lacked reliable data concerning AGNA for the non-financial commodity ("**NFC**") swap market when it set the SD *de minimis* threshold.

EEI argued that AGNA is not a reliable metric for NFC swaps, where volatility in commodity pricing can cause significant swings in the notional value of transactions, forcing market participants to reduce swap dealing activity even at the same level of swap dealing activity, depending on market conditions. EEI further noted that specifically with respect to energy commodity swaps, price volatility has increased substantially since the COVID-19 pandemic, and the *de minimis* threshold has remained static for effectively 13 years. These facts have led banks to comprise most of the SDs in the energy commodity markets, and costs to banks to engage in such activity have increased based on changes in regulatory capital requirements applicable to such banks. Thus, EEI requested the CFTC provide a no-action position permitting market participants to exclude energy commodity swaps with energy commercial end-users from the SD *de minimis* threshold to permit a broader range of swap counterparties commercial energy companies can hedge their energy commodity risks with.

II. SUMMARY OF THE CFTC'S NO-ACTION POSITION

Under the No-Action Letter, the CFTC will not recommend enforcement action where a person, or entity controlling, controlled by, or under common control with the person (a "**Covered Person**") fails to include energy commodity swaps with any counterparty that (1) is not a "financial entity," as defined in section 2(h)(7)(C)(i) of the Commodity Exchange Act ("**CEA**"),[6] and (2) is a "producer, processor, or commercial user of, or a merchant handling the energy commodity that is the subject of the energy commodity swap transaction, or the products or by-products thereof" and enters the swap for purposes related to such business (any such swap, an "**Energy Commodity End-User Swap**").

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[6] *See* 7 U.S.C. §2(h)(7)(C)(i) (including as "financial entities" the following categories: SDs, major swap participants, security-based swap dealers, major security-based swap participants, commodity pools, certain private funds, employee benefit plans and persons predominantly engaged in activities in the business of banking or activities that are financial in nature).

A Covered Person may benefit from the no-action relief if it meets the following conditions:

(1) It maintains records of its Energy Commodity End-User Swaps pursuant to applicable CFTC swap recordkeeping requirements, including records sufficient to demonstrate compliance with each condition of the no-action position;[7]

(2) It files advance notice of its intent to rely on the no-action position to MPDLetters@CFTC.gov specifying its full legal name and Legal Entity Identifier ("**LEI**"); and

(3) For a period of 3 months beginning with the first month following its advance notice of intent to the CFTC, it files a monthly report to MPDLetters@CFTC.gov containing certain specified information by the 10th day of the next calendar month.

Information to be included in the monthly reports is as follows: (a) reporting entity, (b) legal name and LEI, (c) current month and year, (d) commodity sub-category,[8] (e) aggregate notional value for the sub-category, and (f) the number of counterparties for the sub-category.[9]

We draw attention two aspects of the reporting. *First*, a firm reporting the CFTC under the No-Action Letter's pilot program must report all of the relevant commodity swaps traded, not just those swaps it deems to be swap dealing. Arguably, this requirement ignores several crucial qualitative distinctions. For example, a firm has no opportunity to exclude commodity swaps that might be hedges to participating firm. *Second*, the CFTC has adopted a sub-category reporting system that is not founded in the existing swap dealer regulations. Moreover, that sub-category regime is published by a non-government entity, the Derivatives Service Bureau ("**DSB**"), which serves to provide unique product identifiers (each, a "**UPI**"). However, that regime and its application to commodity swaps remains subject to a proposed rulemaking, one

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7 *See* 17 C.F.R. §45.2.

8 The subcategory specified for each Energy Commodity End-User Swaps should align with the commodity sub-categories provided by the DSB in its capacity as issue of unique product identifiers ("**UPIs**"). If a swap does not fall into any sub-category, it should be classified as "Other Energy Commodity."

9 *See* Annex A to the No-Action Letter for a template demonstrating the information to be reported in the required monthly reports.

for which many energy firms have expressed reservations. Although, it should be recognized that use of the DSB is commonplace for reporting under non-U.S. compliance regimes.

III. POTENTIAL IMPACT TO COMMERCIAL ENERGY COMPANIES

The full impact of the No-Action Letter is uncertain and will be better known after at least three months have passed since issuance of the No-Action Letter. However, as the CFTC has not identified any means by which the public can know about whether firms have availed themselves of the relief under the No-Action Letter, the impact on the energy derivatives market may be indirect and subject to interpretation.

Commercial energy firms may take advantage of the relief provided by the No-Action Letter to engage in broader swap dealing activities with other commercial energy companies seeking to hedge their commercial energy risks, provided that they comply with the conditions set out above. As mentioned above, it is not known whether such conditions might disincentives firms from participating in the pilot program. In particular, a firm must identify itself to the CFTC as engaging in a significant volume of swap dealing transactions, potentially drawing regulatory scrutiny to itself.

If the pilot program works and there are more firms offering to enter into energy swaps, then commercial energy companies seeking to hedge their own energy commodity risks may have broader group of potential counterparties. Potentially, a more competitive sell side likely would result in better cost savings for commercial firms entering into such hedges.

Commercial firms electing to enter into the pilot program should be aware of their significant reliance upon the No-action Letter. Relief under a no action letter is less certain than relief afforded by a rule adopted by the CFTC because the CFTC can remove or modify a no action letter with limited process. In contrast, a rule offers regulatory certainty to a firm that the relief will remain in place absent another rulemaking to remove a rule. Thus, if a firm has relied on the No-action Letter and has built a portfolio of swap dealing positions that exceeds the *de minimis* level and then the CFTC were to remove the No-Action Letter, that firm would most likely become obligated to register as a swap dealer and also be known to the CFTC as needing to register. Accordingly, to have greater regulatory certainty around the pilot program, one might reasonably anticipate that some market participants request the CFTC codify the relief of the No-Action Letter into a rule.

Commercial firms should also remember that holding a large portfolio of swaps also implicates the various tests for registration as a major swap participant. Accordingly, it's possible that a firm enjoys relief under the No-Action Letter, but must also register as a major swap participant, somewhat negating the benefits afforded by the No-Action Letter.

An open question is what consequences might follow should the pilot program not be successful. For example, if the CFTC were to declare that it did not receive enough participants into the program, it is not clear whether the CFTC might be amenable in the future to requests from commercial firms that use commodity derivatives to modify the swap dealer registration regime in other ways. In a sense, should the pilot program not be well subscribed, the CFTC might use that fact as evidence that the current regime is sufficient and that no other changes are necessary.

One such potential modification of the CFTC's swap dealer registration is the determination of notional amounts for commodity derivatives for purposes of the *de minimis* level and also for swaps reporting. The methodology for determining the notional amount for commodity swaps is not well calibrated. Unlike interest rates derivatives for which the stated notional amount determines a certain static amount, the notional amount for commodity derivatives is loosely the product of (a) a number of referenced units in a settlement period, (b) a market price per unit, and (c) the number of settlement periods. As a result, some of the notional amounts for commodity derivatives can be quite large when expressed in U.S. dollars. Accordingly, as notional amounts for commodity swaps increase, the available "head room" under the De Minimis Level decreases, as does the regulatory certainty for an applicable commodity firm. Moreover, a commercial market participant would do a substantially smaller number of transactions to become a swap dealer compared to a party trading other swap asset classes. This disparity is particularly perilous given the lower de minimis level when transacting with special entities, which is common given that special entities often seek to hedge exposures like the cost of heating oil for schools in the Northeast.

IV. CONCLUSION

The No-Action Letter introduces a unique exception to the CFTC's swap dealer regime. In the coming year, the market for commodity derivatives could change significantly if non-registered firms engaging in swap dealing take advantage of the pilot program. An open question is, should the pilot program be widely adopted, whether end-users find significantly more liquidity than already exists. Moreover, one can anticipate that market participants will urge to codify the relief in the No-Action Letter in an amendment to the rules that make up the CFTC's swap dealer regime. It is possible that market participants in other derivatives asset classes, should the pilot program be successful, seek similar relief from the CFTC. Thus, the No-Action Letter represents a significant development in the regulation of derivatives in the United States, but one for which the full impact will take time to observe.