I'm Not American – and So Can You!

April 2026

Prepared for the 2026 FIA Law & Compliance Conference

Panel: *International Trading: Let's Get it On*

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I. Introduction

Markets are global and investors and intermediaries operate and transact from all over the world. Nevertheless, the laws and rules governing activities in financial services largely apply at the level of national regulators. Persons engaging in a highly-regulated activities such as financial services must carefully consider the location(s) of their activities (and the persons with whom they engage in such activities) and, thus, the requirements of a potentially wide variety of jurisdictions in designing their business and determining what legal requirements accompany those activities.

Persons engaging in the financial services business in a way that involves the jurisdiction of the United States have added complication given the numerous regulators that oversee financial services activities in the United States. Even among those regulators, activities must often be analyzed at a granular level, as regulators (often driven by statutory demands) do not always take the same view of the scope of their own jurisdiction across differing products and activities. In 2025, the Commodity Futures Trading Commission (the "**CFTC**") issued two staff interpretive letters that attempt to limit some of these concerns for businesses by consolidating certain of the determinations for whether a person is, effectively, "in" the United States for purposes of applying CFTC regulatory requirements. This paper looks at what these two letters did and considers how they might impact how persons engaged in the financial services business might craft their activities in light of the new interpretations.

II. CFTC Jurisdictional Interpretations

In 2025, still under interim leadership, the CFTC issued two significant letters that interpret the agency's regulations governing when a person is considered, essentially, availing itself of U.S. jurisdiction and thus subject to CFTC regulation.

A. Letter 25-14

In CFTC Letter 25-14, the staff of the Market Participants Division ("**MPD**") and the Division of Market Oversight ("**DMO**") provided, to a digital assets proprietary trading firm (the "**Requesting Firm**" or "**Firm**"), interpretations of four CFTC regulations relating to the status of a person for purposes of CFTC jurisdiction. The letter is fairly fact-intensive and the details regarding the

[1] The views expressed herein, and any errors made, are solely those of the author do not necessarily reflect the views of Fried, Frank, Harris, Shriver & Jacobson LLP or any of its clients.

Requesting Firm are important to note for market participants seeking to discern the policy implications of the staff interpretations.

The Requesting Firm was organized in, and licensed pursuant to, the law of the Bahamas. The Firm conducted a digital asset market-making and trading business over-the-counter and on exchanges in futures, options, perpetual contracts and other derivatives. The Firm's trading was primarily based on the use of automated algorithms. The Firm was indirectly owned by U.S.-resident natural persons who also co-own and co-manage a separate U.S.-based proprietary trading firm (the "**US Affiliate**"). The Firm entered into services agreements with the US Affiliate for information technology, legal, compliance and administrative services, but not trading services and the Firm did not use the US Affiliate's trading algorithms. In its request, the Firm indicated that it would like to expand its U.S. presence by (1) engaging "U.S.-based traders, quantitative researches and software developers" employed by an affiliate;[2] and (2) licensing trading technology from that affiliate and hosting technology on U.S.-located servers.

In light of its contemplated expansion of U.S.-related activities, the Firm sought interpretations from the CFTC on various regulations as to its jurisdictional status:

- Under Part 48 of the CFTC regulations, if the Firm were considered to be "located in the United States,"[3] any non-U.S. exchange providing direct access to the Firm would be required to register with the CFTC as a "foreign board of trade."[4]
- Under Part 30 of the CFTC regulations, if the Firm were considered to be "located in the United States,"[5] a non-U.S. broker used by the Firm would be required to register with the CFTC as a "futures commission merchant."[6]
- Under CFTC Reg. 3.10, a "foreign located person"[7] need not register as an FCM if it engages in FCM activity only on behalf of foreign located persons."[8]
- Under Part 23 of the CFTC regulations (and related CFTC interpretations,[9] if the Firm were considered a "U.S. person"[10] it would be required to count the dealing swaps it engages in for purposes of the *de minimis* threshold for the "swap dealer" registration requirement[11] and be subject to trade reporting requirements, and non-U.S. exchanges and intermediaries used by the Firm would be required to register as a "swap execution facility."[12]

The CFTC has generally equated "location" with "domicile" for purposes of Parts 3, 30 and 48 and staff has generally looked to the location of formation and the "principal place of business" for this purpose." While not interpreting those (futures-related) provisions, the staff letter also cited the swaps Cross-Border Guidance for this purpose, where the CFTC said that "principal place of business" is the "location from which the officers, partners, or managers of the legal person

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[2] Like the Requesting Firm, the employing affiliate was organized in the Bahamas.
[3] CFTC Reg. 48.2(c).
[4] CFTC Reg. 48.3(a).
[5] CFTC Reg. 30.1(c).
[6] CFTC Reg. 30.4(a).
[7] CFTC Reg. 3.10(c)(1)(ii).
[8] CFTC Reg. 3.10(c)(2)(ii).
[9] CFTC Reg. 23.23(a)(23).
[10] 78 Fed. Reg. 45292 (July 26, 2013) (the "**Cross-Border Guidance**").
[11] CFTC Reg. 23.23.
[12] CFTC Reg. 37.3(a); CFTC Reg. 1.3, 3.10.

primarily direct, control, and coordinate the activities of the legal person."[13] As the staff letter notes, for certain purposes under the Title VII swap requirements, the CFTC has taken a more expansive view of "U.S. person," and included in that determination certain entities majority-owned by U.S. persons or for which U.S. persons had unlimited liability.[14]

In providing the interpretation to the Requesting Firm, the staff analysis focuses almost entirely, for purposes of *all the relevant definitions*, on whether the Firm is (1) organized in or (2) has its "principal place of business" in the United States.[15] This interpretation is notable for taking a somewhat new analysis in order to get to a likely unsurprising result. The letter is the CFTC's first significant interpretation (at least in a number of years) of these various statuses and takes and analyzes a fairly complicated fact pattern with broad strokes.

The letter specifically accepts the Firm's proposed expanded activities without providing significant detail on the nature or extent of the use of U.S.-based traders, quantitative researches and software developers. In contrast to, for example, the SEC approach under its "arranged, negotiated, executed" concepts in its Title VII rulemaking or under the SEC's "territorial" approach to broker-dealer regulation in Rule 15a-6, the CFTC staff letter suggests that U.S. presence is unimportant insofar as the Firm can continue to view its "principal place of business" as being in the United States. But with all of that said, it is hard to clearly identify where the letter diverges from CFTC policies under various interpretations of the rules that existed prior to the issuance of the letter. Particularly in recent statements on the swap rules, the CFTC has moved towards a reading of its jurisdiction that focused on jurisdiction of organization and principle place of business, rather than other factors previously included in the Cross-Border Guidance.

Although the CFTC, as is standard, emphasizes the "facts and circumstances" nature of the analysis provided in the letter, it would be common for other market participants to look at the published letter for purposes of guiding their own activities. Unfortunately for market participants, there are limited details to glean from the letter than could not have been inferred from existing guidance. Even in the Cross-Border Guidance, the CFTC had identified limited circumstances in which a firm could employ U.S.-based personnel but still be considered to have its "principal place of business" in the United States.[16] It is however, helpful, that the CFTC effectively restated their view that the SEC "arranged, negotiated, executed" concepts would not be carried over to "swap" determinations – transactions conducted in the United States may still be considered outside of U.S. jurisdiction, at least for certain determinations under Reg. 23.23.

B. Letter 25-42

In contrast to the single-firm based analysis in Letter 25-14, the CFTC provided broad, market-wide interpretations of swaps-related cross-border status in Letter 25-42. The letter, from the staff

[13] See also the adopting release for Reg. 23.23, 85 Fed. Reg. 56924, 56936-37 (Sept. 14, 2020) (citing SEC guidance and case law).
[14] *See* Cross-Border Guidance.
[15] In the letter, the CFTC notes that these are "the factors that are relevant."
[16] As footnote 21 of the letter points out, while the Cross-Border Guidance provided limited examples, it did specifically address the use of U.S. personnel involved in managing an investment portfolio of an asset manager so long as they remain subject to the direction of senior personnel of the U.S. personnel. *See* Cross-Border Guidance at 45310-11.

of the MPD, DMO and the Division of Clearing and Risk, addresses the status of market participants for purposes of the various cross-border statuses relevant to the CFTC swap rulemaking under Title VII of Dodd-Frank. In particular, the letter addresses status of counterparties under three separate definitions of "U.S. person" (and related terms)[17] used by the CFTC for Title VII purposes: (1) Regulation 23.23 (applicable for determination of "swap dealer" status and the rules applicable to registered swap dealers, except margin); (2) Regulation 23.160 (applicable for swap margin requirements) and (3) the Cross-Border Guidance (applicable for all other purposes, including clearing and trade reporting).

Under the letter, market participants are permitted to:

(1) classify a person, for purposes of margin requirements (23.160) and the requirements addressed under the Cross-Border Guidance, through use of the definitions of "U.S. Person" and "guarantee" in Reg. 23.23;
(2) classify a person, for purposes of relevant swap dealer requirements addressed in Reg. 23.23,[18] based on (a) representations given based on the definitions of "U.S. person" and "guarantee" in Reg. 23.160; or the Cross-Border Guidance, if, in each case, the representations were initially provided prior to the effective date of Reg. 23.23; and
(3) ignore the classification of "conduit affiliates" as the term was used in the Cross-Border Guidance.

Now, for those new to this space, you might wonder, why exactly did the CFTC need three different definitions of U.S. person in the first place? The answer is, for all practical purposes, "nobody knows."[19] The Cross-Border Guidance was fairly controversial from the outset, criticized for its expansive interpretations, novel concepts for cross-border financial regulation (*e.g.*, "conduit affiliate") and the absence of clear rules in favor of general guidance. The margin rules, adopted roughly three years later took much of, but not all of, the concepts used in the Cross-Border Guidance when it came to what is a "U.S. Person" and implemented them in a formal rulemaking.[20] Finally, under a different presidential administration in 2020, the CFTC adopted more narrowly-tailored definitions in Reg. 23.23, that were largely based on similar rulemaking provided by the CFTC.

The letter raises some questions as to administrative process. It is, effectively, an amendment via staff action of (i) a previously published CFTC interpretation and (ii) a formally adopted regulation – Reg. 23.160. Setting aside that process question, the result is undoubtedly more practical and probably right on policy. It makes little sense for market participants – and keeping in mind the ask applies to *all* market participants, not just intermediaries[21] – to be asked to interpret three

[17] While this paper focuses on "U.S. person" status, the "guarantee" interpretation is significant and the analysis becomes much simpler as Reg. 23.23 takes a more specific and tailored view of that term, whereas the Cross-Border Guidance put forth a fairly amorphous view of "support" that would constitute a guarantee.
[18] Referred to as the "Group B" and "Group C" requirements. When adopting Reg. 23.23, the CFTC provided relief to market participants to continue to rely on representations received pursuant to Reg. 23.160 or the Cross-Border Guidance until December 21, 2027. 85 Fed. Reg. at 56938-39 and 41-42.
[19] *Cf*. "Washington's Dream" (*Saturday Night Live* sketch featuring Nate Bargatze).
[20] 81 Fed. Reg. 34818 (May 31, 2016).
[21] Certain of the Title VII rules apply directly to all participants (*e.g.*, trade reporting and recordkeeping) and others that apply to registered intermediaries are effectively made applicable to all participants given the need for intermediaries to rely on their customers for status under the rules.

separate CFTC definitions of the same terms in order to transact in a single CFTC-regulated product. Moreover, Reg. 23.23 essentially tracks the definitions used by the SEC in its parallel Title VII rulemaking applicable to "security-based swaps," creating further potential market efficiencies.

Unfortunately for market participants, while the regulations can hit a kind of reset button, it is more difficult for compliance policies and processes to do the same. Market participants will likely need to re-asses longstanding procedures and documentation. For over a decade now, firms have been obtaining representations based on the Cross-Border Guidance[22] and relevant published ISDA documentation (made available through an online platform as well) has become very standard for use in onboarding new derivatives counterparties.

[22] While many firms also have received information based on Reg. 23.160, a significant portion of the market has not, given that many swap dealers are overseen, for margin purposes, by a "prudential regulator" (generally, banking regulators), rather than the CFTC.