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U.S. CFTC'S CROSS-BORDER REGULATION OF DERIVATIVES

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Overview

This article examines how the CFTC's 2025 Cross-Border Advisory Letters materially simplify—but do not fully unify—the CFTC's cross-border regulatory framework, particularly with respect to the definition of "U.S. person," the treatment of guarantees, and the long-running disconnect between the swaps, futures, and intermediary registration regimes for purposes of determining the "location" of a legal entity.

I. Introduction

Since the passage of the Dodd-Frank Act in 2010, the Commodity Futures Trading Commission (the "CFTC") has devoted significant focus and energy in the application of its expanded regulatory authority over derivatives products and market participants to the treatment and categorization of cross-border activities. For example, Title VII of the Dodd-Frank Act amended the Commodity Exchange Act (the "CEA") to provide that the swaps provisions of the CEA (together with applicable CEA rules and regulations) will apply to cross-border activities when certain conditions are met, namely, when such activities have a "direct and significant connection with activities in, or effect on, commerce of the United States" or when they contravene CFTC rules or regulations as are necessary or appropriate to prevent evasion of the swaps provisions of the CEA.[1] Notably, however, this provision only addresses the cross-border treatment of the CFTC's regulations regarding swaps. It does not apply to those regulatory provisions regarding futures contracts, for which cross-border regulations and guidance have existed long before 2010 and the passage of the Dodd-Frank Act (and remain unmodified thereby, as discussed herein).

The CFTC's roll-out of its cross-border guidance and regulations has been marked by piecemeal evolution, having been released in bits and pieces over time (both prior to and after the Dodd-Frank Act), rather than as a single overarching rule. For example, one of the earlier efforts to provide guidance was an interpretive letter issued by the CFTC's Division of Trading and Markets in 1992[2] which defined "United States person" and was later codified into a regulation.[3] This regulation was then later removed, and is now superseded, in part, by the current definition of "Non-United States person" under CFTC Regulation 4.7, which preserves, to a large extent (but not completely), much of the same scope as the earlier regulation.[4] More recently, the CFTC's swap regulations issued under the Dodd-Frank Act have added a separate definition of "U.S. person." Thus, as of November 2025 there are multiple overlapping variations of the same concept, and potentially confusing and complex answers to the following questions: *Who is a U.S. person? When are derivatives transactions or market participants subject to CFTC regulations, such as registration, business conduct standards, margin, reporting, clearing, and trading-venue access rules?*

In response to this evolving complexity, and in an effort to provide the market with some clarity as to these issues, in 2025 various divisions of the CFTC issued three new no-action letters: CFTC Letter No. 25-14, CFTC Letter No. 25-27 and CFTC Letter No. 25-42 (collectively, the "2025 Cross-Border Advisory Letters"). Collectively, the 2025 Cross-Border Advisory Letters have recalibrated how market participants must assess U.S.

nexus, counterparty status, and the circumstances under which CFTC requirements may apply to offshore activities, entities, and transactions. Overall, these letters provided the market with a welcome dose of clarity and simplification of the CFTC's cross-border rules.

Unfortunately, however, it is still not quite the case that there is "one regulation to rule them all" when it comes to the question of what constitutes a U.S. person for derivatives regulatory purposes. Instead, as discussed in greater detail in this article, assessment of these issues must still take into consideration the applicable product type (swaps and/or futures) and the applicable entity types. For example, a party acting in the role of a dealer will need to consider definitions and terms that differ from those applicable to a hedge fund, which will in turn be different from those relevant to a clearing broker, and all of which are also different for a trading venue.

2. Swaps—Regulation of Cross-Border Activities

The CFTC's regulation of cross-border swaps activities has been largely covered by the 2013 ET Guidance,[5] the 2016 Cross-Border Uncleared Margin Rule[6] and the 2020 Cross-Border Rule[7] (collectively, the "Pre-2025 Guidance"). Each of these rules articulated a multi-factor approach to determining U.S. person status. In all three, the CFTC sought to delineate when a sufficient U.S. nexus existed to warrant the application of certain CFTC swap regulations. The analysis of the applicable U.S. nexus focused on the relevant definitions of "U.S. person" and "guarantee" but, confusingly for market participants, each of the three regulations uses the same terminology but in slightly different ways and independently of (and in some ways inconsistently with) the other regulations.

As a result, the Pre-2025 Guidance required market participants who were being asked to complete onboarding certifications (such as the ISDA U.S. Self-Disclosure Letter, published on January 15, 2021) to effectively answer the questions "Are you a U.S. person" and "Do you have any guarantees from any U.S. person" three times, each in a slightly different way.[8]

With the issuance of CFTC Letter No. 25-42, the CFTC provided no-action relief to address these inconsistent/different interpretations or definitions of "U.S. person" and "guarantee." Going forward, market participants may rely on representations based solely on the "U.S. person" and "guarantee" definitions set forth in the 2020 Cross-Border Rule when considering the application of those concepts to all of the CFTC regulations addressed by the Pre-2025 Guidance. In short, the 2020 Cross-Border Rule becomes the controlling and default standard for such determinations across the CFTC's cross-border swap regulations. Additionally, the relief in CFTC Letter No. 25-42 supersedes prior CFTC no-action letters to the extent those letters cross-referenced the 2013 ET Guidance or the Cross-Border Uncleared Margin Rule in a manner inconsistent with the positions articulated in CFTC Letter No. 25-42.[9]

Furthermore, to the extent any market participant has already obtained representations regarding "U.S. person" status or guarantees from a U.S. person, based on either the 2013 ET Guidance or the Cross-Border Uncleared Margin Rule's guidance prior to the 2020 Cross-Border Rule's effective date, parties may continue to rely on those existing representations (rather than seek new representations based on the 2020 Cross-Border Rule).

The relief provided by CFTC Letter No. 25-42 will continue until the CFTC addresses, in a rulemaking, the disparate treatment of "U.S. person" and "guarantee" concepts across the Pre-2025 Guidance.

2.1. Why do the U.S. Person and Guarantee Definitions Matter?

It is important to shed some light on why market participants need to determine (1) whether or not a counterparty is a U.S. person and/or (2) does the same counterparty, if it is not a U.S. person, have any guarantees from a U.S. person.

One key reason for the distinction is to determine whether a liquidity provider or dealer on a swap will need to "count" such swap activity towards its $8 billion Swap Dealer De Minimis Exemption threshold.[10] This exemption generally provides that, if the aggregate gross notional amount of swaps which are executed as part of a "Swap Dealing Activity" with U.S. persons and/or persons guaranteed by a U.S. person (collectively, "In-Scope Counterparties") during the preceding 12 months exceeds $8 billion, then such liquidity provider or dealer will be required to register with the CFTC

as a swap dealer (a "Swap Dealer," and the analysis required to determine applicability of such exemption, the "SD De Minimis Analysis").

For liquidity providers or dealers with multiple affiliates, there is an additional complication in that the $8 billion threshold requires aggregation of Swap Dealing Activity with In-Scope Counterparties across commonly controlled affiliates. Although certain nuances in the SD De Minimis Analysis permit certain swaps with In-Scope Counterparties to be exempted from the calculation (e.g., if executed on an exchange and cleared), non-U.S. entities typically arrange their swap dealing activity to avoid the necessity for detailed consideration of these nuances. Instead, such non-U.S. entities will often either (i) avoid any swap activities with In-Scope Counterparties (other than swaps conducted through and booked to a non-U.S. branch of a U.S. bank) or (ii) actively manage their trades to ensure they stay below the $8 billion threshold.

As a result, whether an entity is a U.S. person or has any guarantees from a U.S. person will (in practice) have a material impact on the number of potential swap counterparties with whom it can trade while remaining outside the requirement to register as a Swap Dealer.

Questions also arise as to what additional CFTC swap regulations may or may not apply based on the status of a party being a U.S. person or having any guarantees from a U.S. person. Pursuant to the 2013 ET Guidance and the Cross-Border Uncleared Margin Rule (and inconveniently, in many cases), if one party to a swap transaction was a registered Swap Dealer, then either party (either the Swap Dealer or the counterparty) being a U.S. person or having guarantees from a U.S. person would require the Swap Dealer to comply with several additional CFTC regulations.

2.2. Benefits provided by the 2020 Cross-Border Rule?

The 2020 Cross-Border Rule provides a narrower and simpler definition of "U.S. person"[11] in the now-expanded set of applicable scenarios, which should therefore make the analysis somewhat easier for both U.S. and non-U.S. market participants. This definition, summarized in the table below, is "narrower" in that it eliminates certain prongs of the "U.S. person" definition found in 2013 ET Guidance and/or the Cross-Border Uncleared Margin Rule, notably: removing the U.S. majority-owned fund prong; removing the unlimited U.S. responsibility prong; modifying the principal place of business test for collective investment vehicles ("CIVs"); removing specific prongs for pension plans and trusts; including an exception for international financial institutions; and removing the 2013 ET Guidance's catchall provision indicating that its definition of "U.S. person" is not exclusive and that certain additional persons may also qualify as a "U.S. person," an open-ended catchall that had left a troubling degree of ambiguity regarding the complete reach of the 2013 ET Guidance.

A "U.S. person" under the 2020 Cross-Border Rule is
(A) A natural person resident in the United States
(B) A legal entity organized, incorporated, or established under the laws of the United States
(C) A legal entity having its principal place of business in the United States
(D) An account (whether discretionary or non-discretionary) of a U.S. person
(E) An estate of a decedent who was a resident of the United States at the time of death
General Exemption: Notwithstanding the above, certain international financial institutions are exempt from the term "U.S. person".[12]

2.3. "Guarantees" and the U.S. Person definition

As noted above, there are regulatory implications for a Swap Dealer that enters into swaps with a counterparty whose swap obligations are guaranteed by a U.S. person. The 2020 Cross-Border Rule provides a statutory definition of "Guarantee" for such purpose that is consistent with how such term is also defined in the Cross-Border Uncleared Margin Rule. Under the 2013 ET Guidance, however, the term "guarantee" was more ambiguously defined to include "financial support arrangements" under which one party commits to provide a financial backstop or funding against potential losses that may be incurred by the other party" in connection with a swap.[13]

As such, another significant benefit of CFTC Letter No. 25-42 is that parties can now disregard the 2013 ET Guidance's ambiguity with respect to interpreting "financial support arrangements," and focus on the clearer definition under the 2020 Cross-Border Rule and the Cross-Border Uncleared Margin Rule.

Under the 2020 Cross-Border Rule, a "guarantee" is defined as "an arrangement pursuant to which one party to a swap has rights of recourse against a guarantor, with respect to its counterparty's obligations under the swap."[14] For purposes of this definition, "rights of recourse against a guarantor" are deemed to exist when the beneficiary of the guarantee has a "conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from the guarantor with respect to its counterparty's obligations under the swap."[15] The guarantee itself need not be in writing, as it only matters that such rights of recourse exist.

The 2020 Cross-Border Rule also addresses the implication of any daisy-chain guarantee—i.e., a situation where a string of guarantees exists which ultimately result in a U.S. person potentially having to guarantee the performance of a swap obligation. One such scenario would be where a non-U.S. person's swap obligations are guaranteed by a group of affiliates, one of whom is a U.S. person. With respect to a swap between two non-U.S. persons ("Party A" and "Party B"), Party B's obligations thereunder could be guaranteed by its immediate parent ("Non-U.S. Parent Entity"). While Party B's obligations could be described as "not guaranteed by a U.S. person," that would not be the case if the Non-U.S. Parent Entity *itself* has a guarantee from a U.S. person ("U.S. HoldCo"), pursuant to which the Non-U.S. Parent Entity has rights of recourse against U.S. HoldCo for obligations paid by the Non-U.S. Parent Entity on the swap between Party A and Party B. In this situation, the 2020 Cross-Border Rule's definition of "guarantee" deems a guarantee to exist between Party B and U.S. HoldCo with respect to Party B's swap obligations owed to Party A.[16] If Party A is a Swap Dealer, this would require Party A to comply with those CFTC regulations applicable where its counterparty's swap obligations are guaranteed by a U.S. person.

A "Guarantee" under the 2020 Cross-Border Rule:	
Final Rule's Definition	An arrangement pursuant to which one party to a swap has rights of recourse against a guarantor, with respect to its counterparty's obligations under the swap. For these purposes, a party to a swap has rights of recourse against a guarantor if the party has a conditional or unconditional legally enforceable right to receive or otherwise collect, in whole or in part, payments from the guarantor with respect to its counterparty's obligations under the swap
Unwritten Guarantees	It is not required that the guarantee be a term included within the swap documentation or even otherwise reduced to writing, provided that, under the laws of the relevant jurisdiction, a swap counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. person in connection with the non-U.S. person's obligations under the swap.
Group & Daisy-Chain Guarantees	The term ''Guarantee'' also encompasses a situation where a string of guarantees exists, which *ultimately* result in a U.S. person potentially being obligated to guarantee a non-U.S. person's performance of a swap obligation.
Back-to-Back Swaps or Other Payment Relationships	Having a ''collection right'' is critical for any determination whether a payment obligation/right qualifies as a ''Guarantee''. It is not enough that the non-U.S. person (''Party X'') has a contract with a U.S. person (''Party USA''), wherein Party USA commits to paying Party X enough to perform on Party X's swap with a Swap Entity, an arrangement commonly achieved through the use of a back-to-back swap, whereby Party X effectively remains ''flat'' passing through payments made and received on the underlying swap with the Swap Entity. In such an arrangement, a guarantee does not exist because the Swap Entity **does not** have a right to collect payments from Party USA with respect to Party X's obligations under the swap.

2.4. Treatment of "Affiliate Conduits" under the 2013 ET Guidance

Market participants may recall that the 2013 ET Guidance also included a novel concept which described certain entities as "Affiliate Conduits" which generally would have captured non-U.S. persons that are engaged in the business of transacting in swaps with other non-U.S. persons, but where the economics/risks are ultimately held by a U.S. person. The analysis was fact-specific such that there was no brightline definition, but instead an identification of facts the CFTC would consider relevant to the analysis. Although not described in such terms, this was a concept intended to capture U.S. persons trying to avoid or evade CFTC regulations by creating offshore shell entities or other structures to ultimately facilitate U.S. swap activities via off-shore conduits.

Pursuant to the CFTC Letter No. 25-42, parties no longer need to request confirmation of whether or not a party is an "Affiliate Conduit" to determine how to apply certain CFTC swap regulations whose application is still subject to the 2013 ET Guidance.[17] This is not to say, however, parties can now freely utilize the structures described as Affiliate Conduits in order to evade CFTC swap regulations. The CFTC's powers associated with evasion still apply, and are codified in the CEA.[18]

2.5. What about Swap Dealers that are also Banks?

The CFTC can only grant no-action relief with respect to the application of the CFTC's swap regulations. For Swap Dealers that are also subject to the oversight and regulations of U.S. bank regulators[19] (the "Prudential Regulators"), the 2025 Cross-Border Advisory Letters cannot provide relief from the applicable Prudential Regulators' regulations. Thus, for example, Prudentially Regulated Swap Dealers will need to continue obtaining cross-border representations under the applicable Prudential Regulator's margin rules for non-cleared swaps.

3. All Derivatives—The Regulation of Foreign Activities with U.S. Customers

The 2020 Cross-Border Rule can now be thought of as providing the definitions of "U.S. person" and "guarantee" that will apply by default to most CFTC swap regulations. However, it is important to keep in mind that this harmonization does not extend to derivatives regulations applicable to other types of transactions such as futures or options, or to intermediary registration regimes other than for Swap Dealers.[20]

While CFTC Letter No. 25-42 helps to greatly simplify the analysis regarding the cross-border applications of most swap regulations, it does not cover all CFTC regulations. At the core of the swap regulations addressed by CFTC Letter No. 25-42 were the questions of: (i) what swaps count for purposes of the SD De Minimis Analysis and (ii) if one party to a swap is a Swap Dealer, then what regulations do or do not apply if either party lacks a significant nexus with the United States.

There remain many other CFTC regulations that apply to cross-border activities for transactions other than swaps. These CFTC regulations address the broader scope of the CFTC's historical regulation of the derivatives markets, namely its regulation of futures and options, as well as that of intermediaries and market infrastructure providers for futures, options as well as listed or cleared swaps. The regulation of cross-border derivatives activity can generally be divided into two categories:

- **Foreign Futures, Foreign Options & Foreign Exchanges**. Registration requirements for entities and persons (1) whose customers are a "person located in the United States, its territories or possessions" and (2) who are facilitating such customers' transactions in futures and/or options that are executed on a foreign board of trade ("FBOT").[21]

- **Foreign Located Persons/Entities**. Registration requirements for non-U.S. entities which qualify as a "foreign located person" but are facilitating transactions in futures, options or swaps that are executed bilaterally or made on or subject to the rules of any designated contract market ("DCM") or registered swap execution facility ("SEF").[22]

A common theme runs through both such categories, requiring parties to answer the following question: *What does it mean when the CFTC regulations say "located [in/outside] the United States"?*

4. Overview: CPOs, CTAs, IBs and FCMs

In connection with the activities described above, the CFTC's regulations provide the path forward for market participants to register as, or claim an exemption from registration as, a Commodity Trading Advisor[23] ("CTA"), Commodity Pool Operators[24] ("CPO"), Introducing Brokers[25] ("IB") or Futures Commissions Merchants[26] ("FCM"). While such registered entities may be unfamiliar to many, and in some cases the name of the entity-type does not provide an obvious indication as to the registrant's regulated activity (unlike the category of a Swap Dealer being intuitively applicable to intermediaries regulated for dealing in swaps), these entity types can be described in simple terms as follows:

- CTA and CPO status and registration requirements are generally relevant for persons or entities that are engaged in (or advising on) trading derivatives for others, such as investment managers of hedge funds and other CIVs; and
- FCM and IB status and registration requirements are generally relevant for intermediaries engaged in brokering, exchange trading and/or derivatives clearing activities.

Moreover, depending on the nature of the derivatives activity, entities holding funds of U.S. customers must generally consider the applicability of CPO or FCM registration; entities that do not hold U.S. customer funds but may advise on or control the execution of derivatives must generally consider the applicability of IB or CTA registration.

5. Foreign Futures, Foreign Options & Foreign Exchanges

The CFTC's cross-border futures and options regulations are largely found in the CFTC's regulations at Part 30 (Foreign Futures and Foreign Options Transactions) (the "Part 30 Regulations") and Part 48 (Registration of Foreign Boards of Trade) (the "Part 48 Regulations"). The Part 30 Regulations govern futures and options contract executed on any FBOT on behalf of any person located in the U.S., its territories or possessions (a "Part 30 U.S. Customer").[27] CFTC Regulation 30.3, for example, prohibits the offer and sale of any foreign futures/options contract for or on behalf of a Part 30 U.S. Customer, except in accordance with Part 30, which includes a registration provision and business operations/conduct requirements.

With respect to registration, CFTC Regulation 30.4 addresses the registration of FCMs, IBs, CPOs and CTAs, and requires registration when any such entity engages with a Part 30 U.S. Customer for purposes of transacting in foreign futures/options. These registration requirements are also subject to their own limited exemptions set forth therein.[28] Understanding the CFTC's guidance and interpretation as to when a person is "located in the U.S.," and being able to identify an FBOT, are critical to understanding the registration requirements of Part 30.

5.1. FBOTs & the Part 48 Regulations

CFTC Letter No. 25-27 reaffirms the application of the CFTC's FBOT registration framework and the Part 48 Regulations, and corrects some confusion that existed in the market regarding the registration of non-U.S. futures exchanges as DCMs. Being aware of this confusion, the Division of Market Oversight in CFTC Letter No. 25-27 made clear the intended distinction between FBOTs and DCMs in the futures markets: FBOTs are for foreign exchanges or other foreign trading facilities and DCMs are for domestic exchanges or other domestic trading facilities.[29]

Pursuant to the Part 48 Regulations, FBOTs are foreign exchanges which provide their members or other participants "located in the United States" (a "Part 48 U.S. Customer") authority to enter trades directly into the trade matching system of such exchange.[30] Therefore, a potential FBOT must confirm:

(i) **Geographic Test**: The exchange is "located outside the United States"[31]; and

(ii) **U.S Customer Test**: Part 48 U.S. Customers enter trades on such exchange.

If FBOT registration is thus warranted, then the scope of the Part 48 U.S. Customers that may be given direct access to trading on the FBOT is limited, pursuant to the Part 48 Regulations, to include only: (1) Part 48 U.S. Customers entering orders for proprietary accounts; (2) Part 48 U.S. Customers that are registered as FCMs; (3) Part 48 U.S.

Customers that are CPOs, CTAs, or are exempt from such registration, and are submitting orders for execution on behalf of a U.S. pool that the member or other participant operates, or an account of a U.S. customer for which the member or other participant has discretionary authority, respectively; or (4) Part 48 U.S. Customers who are registered IBs.[32]

5.2. Non-U.S. SEFs—Alternatives to SEF Registration

It should be noted that the requirement that DCMs must be geographically located in the U.S. is unique to the context of DCMs. With respect to SEFs,[33] the implications of geographic location are less certain since there is no formal CFTC regulation addressing the registration of a non-U.S. SEF which is akin to the FBOT-regime. Instead, relevant guidance is provided through a series of CFTC letters and the ability thereunder and under the applicable SEF regulations to request an exemption or other relief from SEF registration. Taken together, that guidance supports the proposition that a SEF may be located either inside or outside the United States.

A question that has been far less extensively analyzed, however, is whether (and under what circumstances) a non-U.S. SEF is, or should instead be, registered as an FBOT. An FBOT is permitted to provide trading or processing of swaps (in addition to foreign futures and foreign options), but only where those swaps are cleared swaps.[34] By contrast, an exchange located outside the United States that provides execution solely for swaps that remain non-cleared would seemingly be ineligible to register as an FBOT.[35] Instead, such an exchange would presumably be required to register as a SEF pursuant to CEA Section 5h(a)(1) and CFTC Regulation 37.3(a)(1), a conclusion supported by the CFTC's 2025 Cross-Border Advisory Letter, CFTC Letter No. 25-14,[36] or to otherwise engage with CFTC staff to seek an exemption from SEF registration.

Notably, however, CFTC Letter No. 25-14 does not expressly distinguish between cleared and non-cleared swaps. This nuance may not be obvious at first, because CFTC Letter No. 25-14 also addresses FCM registration risk for those brokers engaged in executing swaps on non-U.S. exchanges. Typically, the presence of an FCM on an exchange is associated with a cleared derivative contract because the FCM can do what the IB cannot: facilitate clearing and related margin requirements for its customer.

Swaps, however, can be executed on an exchange and the post-execution trade remain bilateral—i.e., not cleared. There are both U.S. and non-U.S. exchanges that operate under this model, many of which require members to post margin. Some exchanges go a step further and offer services similar to a clearinghouse—such as guaranty funds that serve as backstops for payment failures on the exchange—yet the executed trades still remain bilateral between the original parties. On such exchanges, a broker holding customer margin or posting margin on behalf of its customers would be, in effect, acting as an FCM due to those margining activities. We highlight this nuance to illustrate how FCM status could be implicated even when no services related to clearing a trade are provided.

Ultimately, CFTC Letter No. 25-14 also does not address the implications of non-U.S. exchanges that do not register as a SEF, leaving these exchanges to consider whether to seek either: (a) FBOT registration or (b) exemption from SEF registration.

Thus, whether it is "worthwhile" for a swap exchange to register as an FBOT remains a difficult question to answer. For example, consider a cleared swap on an FBOT that is both subject to a CFTC clearing requirement and designated as "made available to trade." In such circumstances, it is unclear whether the FBOT could continue offering that cleared swap to Part 48 U.S. Customers, although existing guidance suggests that it should be permitted to do so.[37] Additionally, an FBOT that permits retail participation must carefully consider how to prevent retail customers from entering into swaps with U.S. customers, absent specific regulatory relief addressing that interaction.

By contrast, where an exchange seeks an exemption from SEF registration, a principal advantage is regulatory simplicity: the exchange may focus primarily on compliance with its home-country regulator while still permitting access by U.S. customers, subject to the terms and conditions of the applicable relief.[38] That said, for parties seeking to establish an exchange focused on institutional participants—i.e., "eligible contract participants"[39]—registration as a SEF may represent the more appropriate and flexible regulatory category.

5.3. SEF Registration by Non-U.S. Swap Exchange

Operating as a *registered* SEF, as opposed to an exempt SEF, offers meaningful advantages for an exchange designed to serve (i) institutional customers, (ii) a global customer-liquidity pool and (iii) more bespoke credit and collateral arrangements for traded contracts (including bilateral CSAs or arrangements involving an affiliated clearinghouse). While an exempt SEF may be able to support items (i) and (iii), it is generally less well-positioned to attract global liquidity.

Registered SEFs may also leverage potentially broader existing (and potential future) regulatory recognition and substituted-compliance determinations between the CFTC and other major jurisdictions. This framework allows, for example, market participants from Europe and Japan to access a registered SEF that also has full access to U.S. customers. By contrast, an exempt SEF's liquidity pool is typically limited to (x) U.S. customers that fall within the scope of the exemption and (y) non-U.S. customers located in the exempt SEF's home jurisdiction (e.g., in the case of a SEF located and regulated within the EU, only its EU customers, but not any Japanese customers, who a registered SEF could potentially access via substituted-compliance determinations between the U.S. and Japan by virtue of a U.S. SEF registration).

Additionally, a registered SEF may provide margin-related services, facilitating more customized collateral arrangements for executed swaps. Registered SEFs may also offer multiple execution methods, including central limit order books and request-for-quote protocols, whereas FBOT execution methods may be constrained by applicable local regulatory requirements. Ultimately, while the SEF may seem like something of an overlooked options in the cross-border regulation of swap trading venues, and most efforts to-date have been around DCMs, FBOTS and non-U.S. exchanges obtaining registration exemptions or other relief, full SEF registration may, in certain cases, offer benefits that materially outweigh its associated costs.[40]

Critical to any cost-benefit analysis of SEF registration is the location of the exchange. Despite the advantages of the registered SEF structure, a foreign-domiciled trading platform would subject itself to dual and overlapping regulation. This would be due to the fact that registration with the CFTC does not eliminate the need to register with the platform's domestic regulator. Although a domestic regulator and the CFTC could, in theory, enter into a Memorandum of Understanding to delineate regulatory responsibilities and establish a substituted-compliance framework, negotiating such an arrangement would require additional time and resources, potentially delaying registration and increasing costs.

As a result, non-U.S. entrepreneurs and businesses seeking to build a global dealer-to-dealer or institutional-to-institutional swaps market, whether for cleared or uncleared products, may consider whether modern decentralized-finance ("DeFi") trading platforms, which lack any physical trading floor, could claim U.S. domicile (or whether acquiring an existing U.S.-domiciled SEF is a more efficient path forward).

A U.S.-domiciled SEF has but one regulator, and enjoys access to the global marketplace.

5.4. DeFi and the Current Path Forward

The label "non-U.S." presents analytical challenges in light of the increasing prevalence of fully electronic exchanges that exist primarily as software code and utilizing distributed ledger technology, rather than as physical venues. In such cases, determining the "location" of the exchange becomes inherently difficult. Existing guidance on this issue is itself ambiguous: some interpretations suggest that location should not turn on the residence of management, but instead on the exchange's formally designated geographic situs.[41]

Even if the location for exchanges lacking any physical presence were determined by reference to the location of the exchange's management, that approach becomes difficult to apply when considering exchanges structured as decentralized autonomous organizations (a "DAO"), where traditional concepts of management, control, and situs are diffuse or undefined.[42]

Ultimately, an exchange offering swap execution services operates against a backdrop of limited and evolving guidance. Historically, trading by a "U.S. person" on such a

platform—as that term was defined in the 2013 ET Guidance—created registration risk.[43] Following the issuance of CFTC Letter No. 25-42, however, the 2013 ET Guidance can effectively be disregarded, leaving registration risk to be assessed solely with respect to "U.S. persons" as defined in the 2020 Cross-Border Rule.[44] Although this framework remains incomplete, it does provide a clearer path forward, albeit one that departs meaningfully from the traditional DCM-versus-FBOT paradigm.

6. Foreign Located Persons/Entities

CFTC Regulation 3.10(c) provides exemptions for certain "foreign located persons" facilitating transactions in futures, options or swaps that are executed bilaterally or made on or subject to the rules of any DCM or SEF (the "3.10(c) Exemptions"). Two critical and defined terms within the 3.10(c) Exemptions are:

- "**Covered Transaction**" which generally means a futures, option or swap contract executed bilaterally or executed on either a DCM or a SEF.[45] This important concept captures the types of derivatives transactions that the CFTC generally wants to regulate—i.e., bilateral derivatives or any derivatives executed on a DCM or SEF.

- "**Foreign Located Person**" which means "a person located outside the United States, its territories, or possessions."[46]

The essence of the 3.10(c) Exemption is that the CFTC does not want to regulate via its registration regime the activities of a non-U.S. entity providing the services of an FCM, IB, CTA or CPO to their non-U.S. customers, but that have no nexus to the United States other than that they are engaging in these activities on registered DCMs, SEFs or with U.S. counterparties.[47]

6.1. Non-U.S. Exempt FCMs/IBs/CTAs

When considering an entity providing the services of an FCM,[48] IB,[49] or CTA[50] with respect to Covered Transactions, it is exempt from registering if:

(i) The entity itself qualifies as a Foreign Located Person;

(ii) The entity's customers are all Foreign Located Persons, with respect to Covered Transactions; and

(iii) Covered Transaction that are cleared through a derivatives clearing organization, are cleared via a registered FCM.[51]

Furthermore, IBs and CTAs that are Foreign Located Persons, but potentially subject to registration due to their activities with respect to Part 30 U.S. Customers, should also consider whether an application for a registration exemption is warranted pursuant to CFTC Regulation 30.5 and making the appropriate filings for such exemption.[52]

6.2. Non-U.S. Exempt CPO

The 3.10(c) Exemption for non-U.S. entities acting as CPOs[53] is broadly similar to that for the FCMs, IBs and CTAs described above. When considering an entity providing the services of a CPO with respect to Covered Transactions, it is exempt from registering if:

(i) The entity itself qualifies as a Foreign Located Person;

(ii) The entity's investors are all Foreign Located Persons; and

(a) With respect to any initial capital contributed by an affiliate[54] of the CPO, the affiliate can be disregarded for this analysis if (a) the affiliate is not a natural person, (b) the affiliate and its principals are not barred or suspended from participating in commodity interest markets in the United States, its territories or possessions and (c) interests in the affiliate are not marketed as providing access to trading in commodity interest markets in the United States, its territories or possessions.[55]

(iii) When entering into a Covered Transaction that is cleared through a derivatives clearing organization, such transaction is cleared via a registered FCM.

While the above exemption is largely the same as that for exempt IBs, FCMs and CTAs, the 3.10(c) Exemptions also provide a safe harbor at CFTC Regulation 3.10(c)(5)(iii),

which provides specific requirements for the non-U.S. CIV/pool's offering materials, constitutional documents and processes for determining the non-U.S. status of its investors. It also requires the non-U.S. exempt CPO "exclusively" use "non-U.S. intermediaries" as its underwriters and brokers distributing the interests in the CIV/pool.[56]

7. Interpreting "in" or "outside" The United States

Notably lacking from the CFTC's regulations (and, therefore, from the summaries above) is any definition of what it means for an individual or entity to be "located in the United States" or "located outside the United States" for purposes of the Part 30 Regulations, the Part 48 Regulations, and the 3.10(c) Exemptions. The solution to that gap is, likely, based on a defined term in CFTC Regulation 4.7. We say "likely" because the express language of CFTC Regulation 4.7 states that the definitions at CFTC Regulation 4.7(a) are definitions "for the purposes of § 4.7," which should mean they do not apply for purposes outside CFTC Regulation 4.7, unless expressly incorporated elsewhere.

Notwithstanding that limitation, market participants often rely on the definition of "Non-United States person" in CFTC Regulation 4.7 to describe a person "located outside the United States" or a "non-U.S. customer."[57] This is also a common investor restriction in non-U.S. offerings of asset-backed securities that may use swaps to hedge risks associated with the ABS notes, where sponsors and investors may want assurance that the ABS issuer is not required to have a registered CPO.

Despite this market practice, and despite language in various CFTC letters, there is no explicit CFTC guidance linking the concepts of being "located in" or "located outside" the United States with the definition of "Non-United States person" under CFTC Regulation 4.7 for purposes of the Part 30 Regulations, the Part 48 Regulations, or the 3.10(c) Exemptions. This remains the case even after the 2025 Cross-Border Advisory Letters, which suggests that parties may not need to adhere strictly to the CFTC Regulation 4.7 definition of "Non-United States person" in these contexts.

7.1. CFTC Letter No. 25-14

CFTC Letter No. 25-14 was issued in response to a request for interpretation regarding whether a digital assets proprietary trading firm organized in the Bahamas, and with its principal place of business being in the Bahamas, would qualify (1) as an entity "located outside the United States" for purposes of the Part 30 Regulations, the Part 48 Regulations and the 3.10(c) Exemptions and (2) as a "non-U.S. person" for purposes of the CFTC's swap regulations.[58] The facts which created some concern for the Bahamian trading firm were the following:

- The Bahamian entity is indirectly owned by a small number of closely associated natural persons who are residents in the United States (the "U.S. Owners");
- The U.S. Owners are also co-owners and co-managers of a U.S.-based proprietary trading firm (the "Related Firm") and the Bahamian entity has contracted with this Related Firm "to receive information technology, legal, compliance, and administrative services but the [Related Firm] does not provide trading services to [the Bahamian entity]";
- the Bahamian entity intends to expand this relationship with the Related Firm by further engaging the Related Firm's employees and licensing certain trading technology from the Related Firm; and
- The Bahamian entity will host trading technology on servers located in the United States.

Despite these additional facts, which created a closer U.S. nexus for the Bahamian entity, the CFTC confirmed that the Bahamian entity would still be considered to be "located outside the United States" for purposes of the Part 30 Regulations, the Part 48 Regulations and the 3.10(c) Exemptions, and not a "U.S. person" for purposes of swap regulations under the 2013 ET Guidance and 2020 Cross-Border Rule.

This analysis and conclusion is not particularly surprising. The "principal place of business" analysis is derived from the U.S. Supreme Court's 2010 decision in *Hertz Corp. v. Friend* (the "Hertz Case").[59] and in this regard indicated that the principal place of business of a corporation "should normally be where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control and coordination,

i.e., the 'nerve center,' and not simply an office where the corporation holds its board meetings."[60] Based on the facts described in CFTC Letter No. 25-14, none of the additional U.S. connections should have changed any prior conclusions under a *Hertz* analysis.

That said, the point here is not to minimize the significance of CFTC Letter No. 25-14. One noteworthy takeaway is that this letter provides potentially highly relevant guidance for a number of non-U.S. entities which may be considering offices, operational relationships or other forms of entry into the United States, but have been concerned that such activities could trigger material regulatory consequences through inadvertent U.S. person status. With the guidance set forth in this letter, the market has some further reassurance as to the parameters governing how non-U.S. entities may enter the U.S. market without inadvertently altering their regulatory status. More broadly, however, CFTC Letter No. 25-14 could lead to reconsideration of the analysis that currently prohibits CIVs from having investors that do not qualify as a "Non-United States person" under CFTC Regulation 4.7.

7.2. Non-U.S. CIVs & U.S. Investors

As noted earlier, something of a market practice existed prior to the 2025 Cross-Border Advisory Letters in which the definition of "Non-United States person" under CFTC Regulation 4.7 was used as a guiding principle for analyzing entities under the Part 30 Regulations, the Part 48 Regulations, and the 3.10(c) Exemptions. CFTC Letter No. 25-14 does not endorse this approach. Instead, it only highlights that the CFTC has generally reviewed (i) an entity's place of formation and (ii) its principal place of business, when considering the "location" of a corporation or other legal entity.[61] Furthermore, at Footnote 21 of CFTC Letter No. 25-14, the Division of Market Oversight expressly notes how the principal place of business test has been applied to CIVs. In a very real sense, CFTC Letter No. 25-14's silence regarding the parameters of what constitutes a "Non-United States person" could be described as deafening, and potentially deliberate.

The definition of "Non-United States person" under CFTC Regulation 4.7, when applied to CIVs, has traditionally been interpreted to impose a threshold under which a CIV would fail to qualify as a non-U.S. person if 10% or more of its investors did not themselves qualify as "Non-United States persons."[62] However, over the years of crafting a definition for "U.S. person" under the CFTC's swap regulations, the analysis applicable to CIVs has evolved. As summarized below, the current framework focuses solely on (i) location of incorporation and (ii) the principal place of business. There is no consideration of the nationality or residency of the CIV's investors, nor of the identity or location of the CIV's promoters.

Pre-2025 Guidance	Does this make your CIV vehicle a "U.S. person"?			
	U.S. Incorporation	Majority Owned by U.S. persons	Principal Place of Business: Location of Promoters	Principal Place of Business: Location of Senior Managers
2013 ET Guidance	Yes	Yes	Yes	Yes
Cross-Border Uncleared Margin Rule	Yes	**NO**	Yes	Yes
2020 Cross-Border Rule	Yes	**NO**	**NO**	Yes

This evolution in the analysis leaves open an important question for a CIV that accepts an investment from another CIV (this fund of funds, the "Investor-CIV"). For example, if 100% of the Investor-CIV's investors were U.S. residents, but the Investor-CIV itself were incorporated and had its principal place of business outside the United States, should it be permitted to invest in a CIV intending to rely on CFTC Regulation 3.10(c)(5) for non-U.S. CIVs? In practice, the Investor-CIV would likely identify issues in the underlying CIV's constitutional documents and offering materials that could make such an investment undesirable, or even impermissible, despite the current regulatory focus on place of incorporation and principal place of business.[63] If or when the CFTC does elect to further take up the interpretation of

"U.S. person" under additional rulemaking, further clarity on the definition of "Non-United States person" under CFTC Regulation 4.7 and/or the 3.10(c) Exemptions would be welcomed.

8. Conclusion

Although the 2025 Cross-Border Advisory Letters provide the market with a great deal of clarification and guidance, the CFTC has not yet adopted a single, uniform definition of "U.S. person" applicable across all of its derivatives regulations. Such a unified definition could, ideally, describe in definitive terms who is considered to be "located in the United States," with the inverse (those who do not meet the definition) constituting persons "located outside the United States." Concerns associated with clever structuring or other concerted efforts to avoid being a "U.S. person" could be adequately addressed with such additional clarity and pursuant to general CFTC antifraud and anti-evasion authorities, concepts which have been extended and applied to the misuse/abuse of exemptions.[64]

A unified definition would also help clarify the identification of potential FBOTs, inform the extent to which the Part 48 Regulations' Geographic Test should incorporate a "principal place of business" analysis,[65] and otherwise assist in identifying exchanges which may or may not register as FBOTs.

Until such time, while the 2025 Cross-Border Advisory Letters offer some welcome clarity and simplification in the CFTC's application of its rules to non-U.S. entities, they do not quite resolve all outstanding issues regarding the scope of the U.S. person categories. There is still more work to be done. Hopefully, incoming CFTC Chairman Michael S. Selig is up to the task, and this issue will find its way to the top of his considerably crowded agenda.

ENDNOTES:

[1]7 U.S.C.A. § 2(i).

[2]*See* CFTC Interpretative Letter 92-3 (January 29, 1992) (Here, the term "United States person" was defined to include: (1) a natural person who is a resident of the United States; (2) a partnership, corporation or other entity organized under the laws of the United States or which has its principal place of business in the United States; (3) any estate or trust, the income of which is subject to United States income tax regardless of source; or (4) any entity organized principally for passive investment such as a commodity pool, investment company or other similar entity (other than a pension plan for the employees, officers or principals of an entity organized and with its principal place of business outside the United States): (x) in which United States persons hold units of participation representing in the aggregate 10% or more of the beneficial interest in the entity; or (y) which has as a principal purpose the facilitating of investment by a United States person in a commodity pool with respect to which the operator is exempt from certain requirements of Part 4 of the Commission's regulations by virtue of its participants being non-United States persons.).

[3]Superseded CFTC Regulation 4.7(a)(1)(ii)(C).

[4]CFTC Regulation 4.7(a)(4) defines "Non-United States person" to include: (1) a natural person who is not a resident of the United States; (2) a partnership, corporation or other entity, other than an entity organized principally for passive investment, organized under the laws of a foreign jurisdiction and which has its principal place of business in a foreign jurisdiction; (3) any estate or trust, the income of which is not subject to United States income tax regardless of source; (4) an entity organized principally for passive investment such as a pool, investment company or other similar entity; Provided, that units of participation in the entity held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10% of the beneficial interest in the entity, and that such entity was not formed principally for the purpose of facilitating investment by persons who do not qualify as Non-United States persons in a pool with respect to which the operator is exempt from certain requirements of this part by virtue of its participants being Non-United States persons; and (5) a pension plan for the employees, officers or principals of an entity organized and with its principal place of business outside the United States. *See also, Exemption from Certain Part 4 Requirements for Commodity Pool Operators With Respect to Offerings to Qualified Eligible Persons and for Commodity Trading Advisors With Respect to Advising Qualified Eligible Persons*, 65 FR 47848, 47850 (Aug. 4, 2000) (Guidance from the CFTC in the final rule codifying the term "Non-United States person").

[5]*Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations* (the "2013 ET Guidance"), 78 FR 45292 (July 26, 2013).

[6]17 CFR § 23.160(a) contains definitions of "U.S. person" and "guarantee" for purposes of the cross-border application of certain uncleared swap margin requirements for Swap Dealers and Major Swap Participants specified in 17 CFR § 23.160 (the "Cross-Border Uncleared Margin Rule"). *See also, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements*, 81 FR 34818 (May 31, 2016).

[7]*Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants* ("2020 Cross-Border Rule") 85 FR 56924 (September 14, 2020).

[8]The ISDA U.S. Self-Disclosure Letter is available at: https://www.isda.org/book/isda-us-self-disclosure-letter/.

[9] Specific examples provided for in CFTC Letter No. 25-42 were CFTC Letter Nos. 20-18 (pertaining to certain listed warrants), 20-21 (addressing the withdrawal of Staff Advisory 13-69), 21-09 (Brexit-related relief), and 25-16 (pertaining to the cross-border application of Parts 45 and 46).

[10]*See* 17 CFR § 1.3, Swap dealer, paragraph (4)(i)(A). While there are also concerns associated with registration as a "Major Swap Participant," since no such entities are registered and that seems unlikely to change even with these regulatory developments, this article intentionally does not discuss Major Swap Participant registration concerns.

[11]*See* 17 CFR § 23.23(a)(23).

[12]Specifically, CFTC Regulation 23.23 included an exception from the term "U.S. person" for the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, and their agencies and pension plans. 17 CFR § 23.23(a)(23)(iii).

[13]2013 ET Guidance at Footnote 267. The 2013 ET Guidance also created a general misunderstanding in the market about whether the guarantee, and its guarantor, had to be connected in some way to a U.S. affiliate of the non-U.S. entity. The 2020 Cross-Border Rule is clear that no affiliate relationship is part of the guarantee analysis.

[14]17 CFR § 23.23(a)(9).

[15]*Id.*

[16]*Id.*

[17]In CFTC Letter No. 25-42, the relevant swap regulations were collectively referred to as the "Unaddressed Requirements" and included the swap clearing requirement, trade execution requirement, real-time reporting and swap data reporting requirements.

[18]*See, e.g.*, 7 U.S.C.A. § 2(i)(2) (Providing that the CFTC's swap regulations "shall not apply to activities outside the United States unless those activities—contravene such rules or regulations as the [CFTC] may prescribe or promulgate as are necessary or appropriate to prevent the evasion of [the CFTC's swap regulations].").

[19]Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, the Federal Reserve Board, the Farm Credit Administration or the Federal Housing Finance Agency.

[20]*Supra*, Footnote 10 (the lack of any discussion or consideration as to the implications for Major Swap Participants in this article are intentional).

[21]*See* 17 CFR § 30 *et seq.*; *see also*, 17 CFR § 30.1 (see the definitions for "foreign futures," "foreign options" and "foreign futures or foreign options customer") and 17 CFR § 30.4 (registration requirements for certain market intermediaries). CFTC Letter No. 25-38 (Nov. 25, 2025) is also noteworthy for understanding the application of the Part 30 Regulations as well, because it provides interpretive guidance for how customer property should be handled when pledged in jurisdictions where collateral is pledged via title transfer (as opposed to a security interest) and the secured party-transferee has a right of re-use and rehypothecation.

[22]*See* 17 CFR § 3.10(c).

[23]Roughly analogous to a registered investment advisor under the Investment Advisers Act of 1940 in the securities trading world, generally, a CTA is a person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in futures, options or swaps. However, it is a term that also would capture someone in the business of issuing analysis or reports as to the value of or the advisability of trading in futures, options or swaps. 7 U.S.C.A. § 1a(12).

[24]Perhaps confusingly named, a CPO is often the party acting as the investment manager (e.g., the General Partner of a Limited Partnership) and/or promoter for a CIV, where such CIV is trading in derivatives. More precisely (tracking the relevant terms used in the applicable CEA provisions), a CPO is a person who operates a CIV and solicits, accepts, or receives funds for the purpose of trading in futures, options or swaps. *See* 7 U.S.C.A. § 1a(11).

[25]Generally, a person that is engaged in soliciting or in accepting orders for futures, options or swaps and (in or in connection with such activity) does not hold collateral or otherwise extend credit in lieu thereof to margin, guarantee, or secure any such derivative transaction. 7 U.S.C.A. § 1a(31). IBs are often associated with "give-up agreements" or other arrangements whereby the IB enters into derivatives transactions on behalf of the IB's customer for a fee, and the resulting trade is only between the IB-customer and the counterparty to the derivative transaction (often a Swap Dealer or FCM to execute the trade for clearing).

[26]Generally, a person engaged in soliciting or in accepting orders for futures, options or swaps and that also (in or in connection with such activity) holds collateral to margin, guarantee, or secure any such derivative transaction. 7 U.S.C.A. § 1a(28).

[27]17 CFR § 30.1 (see the definitions therein for "foreign futures," "foreign options" and "foreign futures or foreign options customer").

[28]There are too many such exemptions to summarize in this article, but some of note include the following: Regarding CPOs: Commodity pools "located outside the United States" that are registered or exempt from registering under

the Investment Company Act of 1940 and for which not more than 10% of the participants in, and the value of the assets of, such commodity pool are held by or on behalf of Part 30 U.S. Customers; Regarding CTAs: Various types of otherwise registered or regulated entities are exempt, as well as persons whose commodity advice is solely incidental to the conduct of their business or profession; Regarding FCMs: Entities acting as foreign futures or options brokers are not required to register as FCMs if they only carry the following types of U.S.-related accounts that trade on or subject to the rules of non-U.S. exchanges: (i) omnibus accounts of a U.S. FCM in respect of the U.S. FCM's Part 30 U.S. Customers, (ii) its (and its affiliates) own proprietary accounts; and/or (iii) proprietary accounts of a U.S. FCM. Furthermore, CFTC Regulation 30.10 provides means for the CFTC to issues an exemption from FCM registration to persons located outside the United States and are subject to a comparable regulatory scheme in their home country; Regarding IBs: A person can act as an IB, and be exempt from registering as such, provided such person is a registered associated person of an FCM. *See* 17 CFR § 30.4.

[29]*See* CFTC Letter No. 25-27 ("A 'foreign board of trade' is defined for this purpose as 'any board of trade, exchange, or market located outside the United States, its territories or possessions. . .' A board of trade located inside the United States ('domestic board of trade') is subject to the designation framework for a [DCM]. . .").

[30]*See* 17 CFR § 48.3(a) (requiring FBOT registration on the basis of "direct access") and 17 CFR § 48.2(c) (defining "direct access" by reference to members or participants "located in the United States"). The authors also note that we refer herein to an FBOT as an "exchange" rather than as a "board of trade" because use of the terminology "board of trade" is relatively uncommon in current usage. Moreover, the term "board of trade" is ultimately defined as "any organized exchange or other trading facility," and such terms may be less confusing to contemporary readers. See 7 U.S.C.A. §§ 1a(6) (definition of "Board of Trade"); 1a(37) (definition of "Organized Exchange"); and 1a(51)(A) (definition of "Trading Facility").

[31]The Geographic Test does not strictly apply a "principal place of business" test but focuses instead on the physical location of an exchange (assuming such a physical location exists, rather than an electronic exchange existing entirely online and among hosting servers). The importance of the exchange's geographic location is highlighted in CFTC Letter No. 25-27 which notes a 2006 policy statement from the CFTC which "emphasized that an exchange's management, ownership structure, or U.S.-based offices, marketing, or technology presence was insufficient to establish that it is 'located in the United States.' " *Boards of Trade Located Outside of the United States and No-Action Relief from the Requirement to Become a Designated Contract Market or Derivatives Transaction Execution Facility*, 71 FR 64443, 64448 (November 2, 2006).

[32]*See* 17 CFR § 48.4(b).

[33]A "swap execution facility" is defined as a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility that—(A) facilitates the execution of swaps between persons, and (B) is not a DCM. 7 U.S.C.A. § 1a(50). No person may operate a facility for the trading or processing of swaps unless the facility is registered with the CFTC as a SEF or as a DCM. 7 U.S.C.A. § 7b-3(a)(1). The CFTC may exempt, conditionally or unconditionally, a SEF from registration if the CFTC finds that the facility is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the appropriate governmental authorities in the home country of the facility. 7 U.S.C.A. § 7b-3(g). A registered FBOT satisfies this requirement. *See*, *Division of Market Oversight, Staff Guidance on Application of Certain Commission Regulations to Swap Execution Facilities* n.5 (Commodity Futures Trading Comm'n Nov. 15, 2013) (Footnote 5 states that with respect to the language at 7 U.S.C.A. § 7b-3(a)(1) being limited to SEFs and DCM, a registered FBOT "satisfies this requirement").

[34]See, e.g., *Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 FR 45291,45352 (July 26, 2013) (the "2013 ET SEF Guidance") (noting that a "registered FBOT is analogous to a DCM and is subject to comprehensive supervision and regulation in its home country that is comparable to that exercised over a DCM by the Commission.").

[35]*See* 17 CFR § 48.7(c)(1)(ii) (requiring that the contracts to be made available in the United States "must be cleared").

[36]*See* the discussion in CFTC Letter No. 25-14 regarding the application of the CFTC's swap regulation to the non-U.S. entity and the CFTC's confirmation that, due to the relevant entity being a "Non-U.S. person" under the ET Guidance and the 2020 Cross-Border Rule, non-U.S. exchanges on which the entity executed swaps "would not. . .be subject to registration as a SEF."

[37]*See* CFTC Letter No. 14-16 (Feb. 12, 2014) (discusses the 2013 ET SEF Guidance and the implication for non-U.S. swap exchanges offering swaps subject to the trade execution mandate of CEA section 2(h)(8), but does not indicate that the trade execution mandate can be satisfied via trade execution on an FBOT akin to how the 2013 ET SEF Guidance addressed a similar issue at Footnote 5 therein. There is no clear reason that similar logic would not also apply to this analysis where the CEA references DCMs but not FBOTs). *See also, supra*, Footnote 33.

[38]*Infra*, Footnote 43.

[39]7 U.S.C.A. 1a(18).

[40]For example, if an EU-registered exchange enters the U.S. market via an exemption from SEF registration, then it can access U.S. customers and EU customers, but would not automatically have the ability to access customers in other jurisdictions such as the UK, Singapore and/or Japan. A non-

U.S. registered SEF, by contrast, could have the benefit of local recognition in those jurisdictions through substituted-compliance determinations via the U.S. registration.

[41]Supra, Footnote 31 and related text (language indicating that the location of management was not to be considered); *but see infra* Footnote 42 (the discussion in *In re bZeroX, LLC* appears to only focus on management, since the "exchange" was a protocol).

[42]If a DAO were to be eligible for registration as an FBOT, the CFTC would also need to consider how a DAO fits within the existing requirements for an FBOT, notably the requirement that the exchange "[p]ossesses the attributes of an established, organized exchange." 17 CFR 48.2(b)(1). While worthy of a more detailed discussion than is feasible within the scope of this note, the CFTC has addressed the registration requirement of a DAO in CFTC v. Ooki DAO (Case No. 3:22-cv-05416-WHO) (the "Ooki DAO Case"). Here, the CFTC saw the functionality of the technology as constituting an exchange for commodity derivative transactions that was acting as an FCM. The specific type of exchange was never clearly identified. However, prior to the transfer of the protocol at issue in the Ooki DAO Case to the Ooki DAO, such protocol was owned by bZeroX, LLC, and CFTC identified bZeroX, LLC, when it formed and owned the protocol, as a DCM at such time. *See* In re bZeroX, LLC, CFTC Dkt. No. 22-31 (Sept. 22, 2022).

[43]*See,* the 2013 ET SEF Guidance, CFTC Letter No. 14-16 (Feb. 12, 2014), CFTC Letter No. 15-29 (May 15, 2015) and CFTC Letter No. 25-14. *See also,* the CFTC's website providing information regarding exchanges which have been exempt from SEF registration, at https://www.cftc.gov/International/ForeignMarketsandProducts/ExemptSEFs

[44]CFTC Letter No. 25-42 notes on page 8 that "The Divisions also hereby confirm that the foregoing no-action positions supersede any prior no-action letters issued by any of the Divisions to the extent that those prior letters cross-referenced the 2013 ET Guidance or the Cross-Border Uncleared Margin Rule in ways that would be inconsistent with the no-action positions set forth above."

[45]17 CFR § 3.10(c)(1)(i).

[46]17 CFR § 3.10(c)(1)(ii). We also note that the 3.10(c) Exemption contains the defined term "international financial institutions" which broadly captures international financial institutions (and their agencies and pension plans) such as the International Monetary Fund, the International Bank for Reconstruction and Development, the United Nations and the European Stability Mechanism. This concept is included and often paired with Foreign Located Person when describing the type of customers with which non-U.S. exempt entities may engage and still be eligible for the 3.10(c) Exemption.

[47]*See also*, *Exemption From Registration for Certain Foreign Persons*, 72 FR 63976 (Nov. 14, 2007) (the final rule codifying the 3.10(c) Exemptions) and CFTC Letter No. 76-21 (August 15, 1976) (CFTC's position in the 1970s to not require the registration of certain non-U.S. CPOs and CTAs).

[48]*Supra*, Footnote 26.

[49]*Supra*, Footnote 25.

[50]*Supra*, Footnote 23.

[51]17 CFR § 3.10(c)(2)(ii) (FCM exemption) 3.10(c)(3)(i)(A) (IB exemption) and 3.10(c)(4)(i) (CTA exemption). The Part 30 Regulations are also implicated in the exemption provided at CFTC Regulation 3.10(c)(3)(ii), which provides that FCMs that are exempt from registration pursuant to relief under CFTC Regulation 30.10, are also exempt from IB registration requirements, subject to certain requirements (including that the exempt IB+FCM entity (1) is affiliated with a registered FCM, (2) is introducing its Foreign Located Person-customers to the FCM for DCM-executed trades and (3) certain notices have been filed). *See* 17 CFR § 3.10(c)(3)(ii).

[52]17 CFR § 30.5.

[53]*Supra*, Footnote 24.

[54]*See* 17 CFR § 4.7(a)(1) ("Affiliate of, or a person affiliated with, a specified person means a person that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with the specified person.").

[55]*See* 17 CFR § 3.10(c)(5)(ii).

[56]*See* 17 CFR § 3.10(c)(5)(iii)(D).

[57]*See, e.g.*, CFTC Letter No. 01-62 (June 13, 2001), CFTC Letter No. 05-02 (Dec. 10, 2005); *see also*, Footnote 2 (today's definition of "Non-United States person" at CFTC Regulation 4.7 is largely based on CFTC Letter No. 92-3 (Jan. 29, 1992)) and CFTC Letter No. 98-80 (Nov. 25, 1998) (description of the fund's lack of nexus to the U.S. is consistent, though not verbatim, with CFTC Regulation 4.7's definition of "Non-United States person").

[58]CFTC Letter No. 25-14 was published prior to CFTC Letter No. 25-42, and therefore CFTC Letter No. 25-14 addresses the 2013 ET Guidance and 2020 Cross-Border Rule.

[59]*See* the 2013 ET Guidance, 78 FR at 45309 and 2020 Cross-Border Rule, 85 FR at 56936-37 (both citing the interpretation's consistency with *Hertz Corp. v. Friend* and the SEC in its rule addressing the regulation of cross-border securities-based swap activities). *See also* Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010); *Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities*; Republication, 79 FR 47278 at 47310-47311 (Aug. 12, 2014); and CFTC Letter No. 25-14 at FN. 21 (highlights how this analysis could apply to a CIV).

[60]*Id.*

[61]*See* Footnote 15 of CFTC Letter No. 25-14.

[62]*See* 17 CFR § 4.7(a)(4)(iv) (there is also an exception

here, which is intended to note that the 10% threshold does not "count" persons that (i) do not qualify as a Non-United States person but (ii) do qualify as a Qualified Eligible Person under CFTC Regulation 4.7).

[63]*See* 17 CFR § 3.10(c)(5)(iii)(c) (the documentation requirements here could be read to apply to investors in a fund-of-funds, such that the Investor-CIV's own U.S. investors may not be able to indirectly participate in the non-U.S. CIV, so the prohibition may be expressly stated or the Investor-CIV's investment manager may believe that, even without an express prohibition, there are concerns about how existing language in the documents could be ambiguous on this point and therefore introduce uncertainty as to the impact of the Investor-CIV's own investors).

[64]*See, e.g.,* 17 CFR § 50.10.

[65]*Supra*, Footnotes 31, 41 and 42.