

Confirming a Negative: CFTC Staff Issue an Advisory Clarifying When Foreign-Organized Entities Are Trading and Brokering Digital Asset Derivatives Outside of the Commission's Cross-Border Jurisdiction

June 11, 2025

Derivatives market participants and exchanges can breathe a little easier now that Staff of the Market Participants Division and the Division of Market Oversight of the Commodity Futures Trading Commission (CFTC or Commission) have jointly issued an [advisory letter](#) (the Advisory Letter) on May 21 clarifying Staff's interpretation of whether a person trading digital asset derivatives, which is organized and operating outside of the United States, is:

- A "non-U.S. person" as defined under the CFTC's cross-border regulations;
- Not a "U.S. person" as defined by the CFTC's 2013 Final Swaps Cross Border Interpretive Guidance;
- A "foreign located person" as defined for the purposes of determining whether such person is exempt from registration as a futures commission merchant (FCM) or introducing broker (under CFTC Regulation 3.10(c)(1)(ii));
- Not a "person located in the United States" for the purposes of determining whether a foreign intermediary must register as an FCM; and
- Not a "participant located in the United States" for the purposes of determining whether a foreign exchange must register with the Commission as a foreign board of trade.

If you are asking why CFTC Staff would have to issue such an interpretation, given that there is decades of CFTC precedent addressing many of these cross-border jurisdiction issues, you might be forgetting about the evolution of the previous Commission's approach to cross-border jurisdiction in digital asset enforcement actions. The CFTC first espoused this novel interpretive theory when it brought an enforcement action against a major offshore crypto exchange in early 2023.¹ In that case, the previous Commission advanced an expansive interpretation of "principal place of business" that went beyond the traditional "nerve center" test, focusing on where senior management makes strategic decisions,² instead looking to factors such as the location of ultimate beneficial owners, key personnel involved in trading operations, and other operational touchpoints with the United States. In response to that complaint and the previous Commission's expansive theories of US person status, a number of offshore crypto exchanges implemented aggressive onboarding questionnaires that went well beyond the statutory definition of US persons in an attempt to avoid potential CFTC jurisdiction.

¹ See *CFTC v. Changpeng Zhao et al.*, No. 1:23-cv-01887 (N.D. Ill. Mar. 27, 2023).

² *Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants*, 85 Fed. Reg. 56,924, 56,936-937 (Sept. 14, 2020) (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010)).

The Falcon Labs Enforcement Action: Cementing an Expansive Jurisdictional Test

The previous Commission cemented its expansive view of what constitutes a US person with its [enforcement action](#) in May 2024 against Seychelles-organized Falcon Labs, Ltd. (Falcon Labs) for failing to register as an FCM with the CFTC.³ In essence, the CFTC's enforcement action against Falcon Labs established a new test for the extraterritorial application of the Commodity Exchange Act (CEA) by asserting that Falcon Labs was brokering digital asset futures and swaps transactions with "persons located in the United States." Acting Chairman Caroline Pham — while a commissioner — noted in her [concurring statement](#) that the Commission's new test in the Falcon Labs case "could have the effect of requiring any non-U.S. legal entity that transacts in futures, options, or swaps that has a U.S. parent entity or beneficial owner, or has personnel located in the U.S. that 'control' . . . a non-U.S. prime broker sub-account, to be deemed 'located in the United States' even if its location of corporate organization is outside the United States and duly complies with the legal or regulatory obligations of the non-U.S. jurisdiction."⁴

Indeed, the CFTC's expansive interpretation of "U.S. person" had implications that extended far beyond the digital asset space, potentially affecting traditional derivatives market participants with any meaningful US operational nexus. The Advisory Letter was intended to reverse this novel interpretation espoused by the Commission in the Falcon Labs enforcement action, which some industry participants widely criticized for establishing "new regulation through enforcement."

CFTC's Extraterritorial Jurisdiction over Futures and Swaps

The CFTC's extraterritorial jurisdiction regarding futures and swaps is different and based on two separate sections of the CEA.

With respect to futures, Section 4(b) of the CEA grants the CFTC authority to regulate foreign futures activity of persons "located in the United States."⁵ To explain the scope of its foreign futures authority, the CFTC promulgated Part 30 of its regulations to address when foreign brokers provide US customers with access to foreign futures, and Part 48 of its regulations to address when foreign exchanges provide direct access to US customers. The key criteria used to determine when a customer is considered in scope for these purposes focuses on the customer's physical location (i.e., is the person "located in the United States, its territories or possessions who trades in foreign futures and options").⁶

Concerning swaps, Congress established the CFTC's extraterritorial jurisdiction under Section 2(i) of the CEA as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The Dodd-Frank Act establishes the CFTC's swap jurisdictional authority, which hinges on whether swaps activity occurring outside of the United States has "a direct and significant connection with activities in, or effect on, commerce of the United States."⁷ In explaining the scope of its swap jurisdiction, the CFTC first issued its *Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations* in 2013 (2013 Guidance), which defined a "U.S. person" to include, among others, entities "organized or incorporated under the laws of a state or other

³ The CFTC alleged that Falcon Labs facilitated access to digital asset exchanges to US-located customers to trade spot crypto as well as crypto derivatives, including futures and swaps. Falcon Labs neither admitted nor denied the allegations. Falcon Labs' CFTC settlement included a cease and desist from acting as an unregistered FCM, disgorgement of \$1,179,008 in fees earned from its activities and a civil monetary penalty of \$589,504. In short, the Commission found as the basis for Falcon's alleged violation of the FCM registration requirement that Falcon had customers "located in the United States," "such as non-U.S. incorporated entities operated and controlled by U.S.-based trading firms."

The Commission determined that Falcon Labs was offering FCM services to entities, which were "located in the United States" as a result of: (1) the location of entities' ultimate beneficial owners; (2) the location of entities' places of organization; (3) the principal place of business of each entity; and (4) the location of personnel controlling a non-US prime broker sub-account. None of these criteria, however, are set forth in the CEA's statutory language, and the CFTC has not issued an interpretation or adopted a regulation expanding its extraterritorial jurisdiction over futures or swaps to capture such activity.

⁴ Caroline D. Pham, Concurring Statement of Commissioner Caroline D. Pham on Novel U.S. Location Test and FCM Registration, CFTC (May 13, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement051424>.

⁵ 7 U.S.C. § 6(b).

⁶ See the definition of "foreign futures or foreign options customer" in CFTC Regulation 30.1(c).

⁷ 7 U.S.C. § 2(i).

jurisdiction in the United States or having its principal place of business in the United States.”⁸ Principal place of business was defined to include entities that are organized outside of the United States but have the “center of direction, control, and coordination” (i.e., the “nerve center”) of their business activities in the United States.⁹

In 2020, the CFTC adopted final rules in CFTC Regulation 23.23 to supersede, in part, the 2013 Guidance with respect to the extraterritorial application of the swap dealer *de minimis* threshold calculation. The CFTC adopted a similar US person definition, which for entities also focuses on whether such entity was “organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States.”¹⁰ CFTC Regulation 23.23 similarly defines “principal place of business” to mean the location of the legal person’s nerve center.

Notwithstanding the above, the CFTC in the Falcon Labs enforcement action found Falcon Labs to have violated FCM registration requirements when dealing with non-US organized entities with principal places of business outside of the United States, but with beneficial owners located in the United States.

The Requestor’s Specific Facts

The Advisory Letter addressed a request from a digital assets proprietary trading firm organized in the Bahamas. The Requestor’s main office and headquarters are located in the Bahamas, where its high-level officers (including its chief executive officer, chief operating officer, and chief compliance officer) primarily direct, control, and coordinate the firm’s activities. However, the Requestor is indirectly owned by a small number of closely associated natural persons who are residents of the United States, and these persons are also co-owners and co-managers of a separate, US-based proprietary trading firm.

The Requestor sought to expand its activities into the United States through several means: (1) engaging US-based traders, quantitative researchers and software developers (all of whom would be employed by a Bahamas-organized affiliate); (2) licensing trading technology from its related US firm; and (3) hosting trading technology on US-located servers. The Requestor requested a determination that it would nevertheless qualify as “located outside the United States” for purposes of the Commission’s futures regulations and as a “non-U.S. person” for purposes of the Commission’s swap regulations.

CFTC Staff’s Analysis and Conclusions

Based on the facts presented in the request for interpretation, specifically that the Requestor’s “place of organization and the location where its high-level officers primarily direct, control, and coordinate” the Requestor’s activities are outside the United States, the Advisory Letter concluded that the Requestor is (1) not “a person located in the United States” for the foreign futures or options analysis;¹¹ (2) not “a participant located in the United States” for CFTC Regulation 48.2(c); (3) a “foreign located person” for the foreign intermediary exemption in CFTC Regulation 3.10(c)(1)(ii); and (4) a non-US person for the CFTC’s swap cross border jurisdiction.

Significantly, CFTC Staff clarified that the Requestor’s proposed expansion activities—including engaging US-based personnel, licensing technology from a US firm, and hosting technology on US servers — would **not** impact the Requestor’s status. Notwithstanding this expansion, the Requestor would continue to not be “a participant located in the United States” for Commission Regulation 48.2(c), remain a “foreign located person” for the foreign intermediary exemption in CFTC Regulation 3.10(c)(1)(ii), and continue to be a non-US person for the CFTC’s swap cross border jurisdiction.

⁸ 2013 Guidance, 78 Fed. Reg. 45,292, 45,302 (July 26, 2013).

⁹ *Id.* at 45,309.

¹⁰ 17 C.F.R. § 23.23(23)(i)(B).

¹¹ Note that for futures analysis, the test is location-based (i.e., whether a person is “located in the United States”) rather than the “principal place of business” test used for swaps analysis.

Implications for the Digital Asset Industry and Beyond

The Advisory Letter represents a significant course correction for the CFTC's approach to cross-border jurisdiction, with implications that extend well beyond the digital asset space. By returning to the traditional "nerve center" test for determining principal place of business and rejecting the more expansive factors used in the Falcon Labs case, the Commission has provided much-needed clarity for market participants operating across jurisdictions.

The Advisory Letter's key takeaways for market participants include:

- **Offshore digital asset firms can now maintain non-US status while engaging meaningfully with the US market.** The letter's express approval of the Requestor's ability to employ US-based personnel, license technology from US firms, and host technology on US servers demonstrates that operational touchpoints with the United States do not automatically trigger CFTC jurisdiction.
- **Traditional derivatives market participants receive reassurance that routine US operational connections will not automatically trigger registration requirements.** The expansive interpretation rejected by Staff would have potentially captured any foreign entity with meaningful US operational connections — including foreign banks, asset managers, and commodity trading firms — but the Advisory Letter reaffirms the traditional jurisdictional tests that focus on place of organization and management control rather than broader operational touchpoints.
- **Market participants can return to relying on decades of established precedent rather than navigating novel enforcement theories.** This should reduce compliance costs and encourage legitimate market participation by removing the specter of unexpected jurisdictional exposure that had emerged from recent enforcement cases.

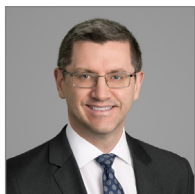
However, the Advisory Letter comes with important limitations that market participants should carefully consider:

- **The guidance addresses only the specific factual situation presented by the Requestor.** Firms with different fact patterns — particularly those with US-based senior management or where strategic decision-making occurs in the United States — may still face jurisdictional exposure under traditional tests.
- **Staff guidance, while generally respected, could theoretically be superseded by future enforcement actions or formal rulemaking.** The Advisory Letter represents Staff guidance rather than a formal Commission interpretation or binding regulation.
- **The Commission has not completely retreated from aggressive enforcement theories.** Market participants should not assume that all jurisdictional concerns have been resolved, particularly for firms with more extensive US connections than the Requestor.

Looking forward, the Advisory Letter suggests that the Commission may be stepping back from the more aggressive jurisdictional theories advanced in recent enforcement cases, potentially signaling a more measured approach to cross-border regulation. For an industry that has faced significant regulatory uncertainty, this return to established precedent and traditional jurisdictional tests should provide a more stable foundation for compliance planning and business development across international markets.

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