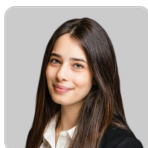


## CFTC Staff Issue Broad No-Action Relief Harmonizing Cross-Border “U.S. Person” and “Guarantee” Definitions

December 18, 2025



By Peter Y. Malyshev  
Partner | Financial Regulation



By Christina Mille  
Associate | Financial Services

On December 9, 2025, the Market Participants Division, the Division of Clearing and Risk, and the Division of Market Oversight (the “**Divisions**”) of the U.S. Commodity Futures Trading Commission (“**CFTC**”) issued Staff Letter No. 25-42 (the “**No-Action Letter**”), providing significant cross-border relief to swap market participants.<sup>[1]</sup> The No-Action Letter addresses long-standing inconsistencies among the CFTC’s various definitions of “U.S. person” and “guarantee” applicable to different swap regulatory requirements and permits market participants, subject to conditions, to rely on a single set of definitions across the CFTC’s cross-border framework promulgated by the CFTC in 2020.<sup>[2]</sup> The concept of “U.S. person” is key to the CFTC’s cross-border regime and, accordingly, has been subject to much interpretation, enforcement and litigation<sup>[3]</sup> since the enactment of the Wall Street Transparency and Accountability Act of 2010 (the “**Dodd Frank Act**”) in 2010.

The relief is intended to reduce operational burden, mitigate counterparty confusion, and promote harmonization with the Securities and Exchange Commission’s (“**SEC**”) parallel cross-border regime.

### Background: A Fragmented Cross-Border Framework

Section 2(i) of the Commodity Exchange Act (“**CEA**”)<sup>[4]</sup> was enacted under the and extends CFTC’s jurisdictional reach to swap-related activities outside the United States that have a “direct and significant connection with activities in, or effect on, commerce of the United States.” Rather than adopting a single, comprehensive cross-border rule at the outset, the CFTC implemented Section 2(i) incrementally through a combination of interpretive guidance and rulemakings (“**CFTC Regulations**”)<sup>[5]</sup> adopted over a period of more than a decade. As a result, materially similar concepts—most notably “U.S. person” and “guarantee”—came to be defined differently depending on the particular requirement at issue.

**A. 2013 Cross-Border Guidance.** In July 2013, the CFTC issued interpretive guidance addressing the cross-border application of a broad set of swap requirements, including clearing, execution, reporting, and data reporting (the “**2013 Cross-Border Guidance**”).<sup>[6]</sup> The guidance adopted an expansive, principles-based definition of “U.S. person,” including certain U.S.-majority-owned collective investment vehicles and entities bearing unlimited U.S. responsibility, and defined “guarantee” broadly to capture arrangements providing a financial backstop against swap-related losses. The guidance also introduced the concept of a non-U.S. “conduit affiliate,” which could be treated as a U.S. person based on its relationship to a U.S. affiliate and the manner in which it conducted swap activity.

**B. 2016 Cross-Border Uncleared Margin Rule.** When the CFTC adopted margin requirements for uncleared swaps (the “**2016 Cross-Border Uncleared Margin Rule**”),<sup>[7]</sup> it elected to move away from the interpretive approach taken in 2013. The Cross-Border Uncleared Margin Rule adopted narrower, rule-based definitions of “U.S. person” and “guarantee,” eliminated the U.S.-majority-owned fund prong, treated the enumerated categories as exclusive rather than illustrative and omitted the conduit affiliate concept entirely. These definitions apply solely for purposes of determining whether uncleared swap margin requirements apply on a cross-border basis.

**C. 2020 Cross-Border Rule.** In September 2020, the CFTC adopted a comprehensive cross-border rule Governing swap dealer and major swap participant registration thresholds and related business conduct requirements (the “**2020**

**Cross-Border Rule**").<sup>[8]</sup> The rule adopted a streamlined definition of "U.S. person" closely aligned with the SEC's parallel framework and further narrowed the definition of "guarantee." While the 2020 Cross-Border Rule superseded the 2013 Guidance for registration and related requirements, it expressly did not address the swap clearing requirement, trade execution requirement, real-time reporting, or swap data reporting requirements (the "**Unaddressed Requirements**"), which continued to rely on the 2013 Guidance. The CFTC also permitted temporary reliance on pre-2020 counterparty representations, but only through December 31, 2027.

The cumulative effect was a patchwork regime under which swap dealers often were required to classify the same counterparty in different ways for different regulatory purposes (e.g., a fund), collect multiple representations, and periodically refresh documentation solely due to changes in cross-border definitions.

### Industry Request for Relief

In a joint request submitted by the Institute of International Bankers, the International Swaps and Derivatives Association, and the Securities Industry and Financial Markets Association (the "**Associations**"), the Associations argued that this patchwork framework imposed unnecessary compliance costs and competitive disadvantages without a clear regulatory justification. Among other things, the Associations noted that:

- The same statutory provision—CEA Section 2(i)—was being interpreted differently depending on the specific swap requirement;
- Non-U.S. counterparties frequently struggle to understand why multiple representations are required;
- Swap dealers have been forced to re-paper counterparties multiple times as new cross-border rules were adopted; and
- The scheduled expiration of the 2020 Cross-Border Rule's representation safe harbor in 2027 would require yet another round of outreach and documentation.

The Associations therefore requested no-action relief allowing market participants to elect to apply the 2020 Cross-Border Rule's definitions of "U.S. person" and "guarantee" across the CFTC's cross-border regime and to continue relying on legacy representations collected prior to November 2020.

### Scope of the No-Action Relief

In Staff Letter No. 25-42, the Divisions expressly acknowledged that the coexistence of multiple cross-border definitions creates undue operational and compliance burdens and lacks a clear policy justification. The Divisions confirmed that, both before and after December 31, 2027, they will not recommend enforcement action solely because a market participant elects to apply a more uniform approach to counterparty classification, as described below.

The Divisions stated that a market participant may elect to classify counterparties using the definitions of "U.S. person" and "guarantee" set forth in § 23.23 of CFTC Regulations,<sup>[9]</sup> as adopted in the 2020 Cross-Border Rule, for purposes of determining the applicability of requirements that historically have relied on the 2013 Guidance or the Cross-Border Uncleared Margin Rule. This includes the mandatory clearing requirement, the trade execution requirement for swaps subject to mandatory clearing, real-time public reporting, swap data reporting under Parts 45<sup>[10]</sup> and 46<sup>[11]</sup> of CFTC Regulations and the application of margin requirements for uncleared swaps. Although the earlier guidance and rules technically remain in effect, the staff position allows firms, as a practical matter, to treat the 2020 Cross-Border Rule's definitions as a single default classification standard across the CFTC's cross-border swap regime.

The Divisions also addressed the operational consequences of repeatedly changing cross-border definitions by confirming that market participants may continue to rely on counterparty representations obtained prior to the effective date of the 2020 Cross-Border Rule when determining the applicability of the Group B and Group C requirements.<sup>[12]</sup> Representations made pursuant to either the Cross-Border Uncleared Margin Rule or the 2013 Guidance may continue to be relied upon, notwithstanding the Commission's earlier statement that such reliance would sunset at the end of 2027.

The Divisions further stated that they will not recommend enforcement action if a market participant does not treat a non-U.S. counterparty as a U.S. person solely because that counterparty would have been characterized as a conduit affiliate under the 2013 Guidance. This position removes a fact-intensive and subjective analysis that has long been a source of uncertainty in cross-border compliance assessments.

Finally, the Divisions confirmed that the no-action positions set forth in Staff Letter No. 25-42 supersede prior staff no-action letters to the extent those letters relied on the 2013 Guidance or the Cross-Border Uncleared Margin Rule in a

manner inconsistent with the new approach.

## **Application of 2020 Cross-Border Definitions to Unaddressed Requirements**

Market participants may elect to classify counterparties using the definitions of “U.S. person” and “guarantee” set forth in the 2020 Cross-Border Rule) for purposes of determining the applicability of requirements that historically have relied on the 2013 Guidance or the Cross-Border Uncleared Margin Rule. These include:

- the mandatory clearing requirement under Section 2(h)(1) of the CEA;
- the trade execution requirement for swaps subject to mandatory clearing;
- real-time public reporting requirements;
- swap data reporting requirements under Parts 45 and 46; and
- margin requirements for uncleared swaps.

As a practical matter, this relief permits firms to treat the 2020 Cross-Border Rule’s definitions as a single, default classification standard across the CFTC’s cross-border swap framework, notwithstanding the continued formal applicability of earlier guidance and rules.

### ***A. Continued Reliance on Legacy Counterparty Representations***

For purposes of determining the applicability of the Group B and Group C requirements under the 2020 Cross-Border Rule, the Divisions will not recommend enforcement action if a market participant continues to rely on counterparty representations that were obtained prior to the effective date of the 2020 Cross-Border Rule, including representations made pursuant to:

- the definitions of “U.S. person” and “guarantee” in the Cross-Border Uncleared Margin Rule; or
- the interpretations of “U.S. person” and “guarantee” set forth in the 2013 Guidance. B.

### ***B. Treatment of Conduit Affiliates***

The Divisions further stated that, for purposes of determining the cross-border application of clearing, execution and reporting requirements, they will not recommend enforcement action if a market participant does not treat a non-U.S. counterparty as a U.S. person solely because that counterparty would have been characterized as a “conduit affiliate” under the 2013 Guidance. This position represents a meaningful departure from the guidance-era framework and removes a fact-intensive and often subjective classification analysis.

### ***C. Supersession of Prior Staff Relief***

The Divisions confirmed that the No-Action Letter supersedes prior staff no-action letters to the extent those letters cross-referenced the 2013 Guidance or the Cross-Border Uncleared Margin Rule in a manner inconsistent with the positions articulated in Staff Letter No. 25-42, including prior relief addressing listed warrants, Brexit-related issues, and cross-border swap data reporting.

Given that Staff Letter No. 25-42 is only a Divisions’ Staff No-Action Letter and not a CFTC Regulation enacted by the Commission, it is likely that the CFTC will address these issues and specifically the Unaddressed Requirements by amending CFTC Regulations in the near future and codifying this relief in an amended cross-border rule.

[1] Available at: <https://www.cftc.gov/PressRoom/PressReleases/9149-25>

[2] Available at: <https://www.cftc.gov/csl/25-42/download>

[3] See, e.g., *Int’l Swaps & Derivatives Ass’n, Inc. v. CFTC*, 887 F.3d 1133 (D.C. Cir. 2018) (challenging the CFTC’s 2013 cross-border interpretive guidance as exceeding the Commission’s authority and improperly adopted without notice-and-comment); see also *In re Falcon Labs, Ltd.* (May 13, 2024) (addressing the application of FCM registration and cross-border requirements to digital asset swap activity). Cf. Commissioner Caroline D. Pham, Concurring Statement on Novel U.S. Location Test and FCM Registration (May 13, 2024) (stating she was “astounded that the Commission would simply pretend these recent cross-border rulemakings did not exist” and that the action created a “novel U.S. location test” for non-U.S. entities that could have broad implications for the global derivatives

market), available at: <https://www.cftc.gov/PressRoom/PressReleases/8909-24>; Acting Chairman Caroline D. Pham, 100 Days: Keynote Address at the 39th ISDA Annual General Meeting (May 15, 2025) (noting that the Division of Market Participants would soon issue an interpretive letter addressing cross-border issues to harmonize the various "U.S. person" definitions under the Dodd-Frank Act swap framework), available at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham15>.

[4] See 7 USC § 2(i).

[5] 17 C.F.R. § 1.1 *et seq.*

[6] *Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations*, 78 FR 45292 (July 26, 2013). Available at: <https://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2013-17958.html>

[7] *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). Available at: <https://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2016-12612.html>

[8] *Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants*, 85 FR 56924 (Sep. 14, 2020). Available at: <https://www.cftc.gov/LawRegulation/FederalRegister/finalrules/2020-16489.html>

[9] 17 CFR § 23.23. Available at: <https://www.ecfr.gov/current/title-17/chapter-I/part-23/subpart-B/section-23.23>

[10] 17 CFR § Part 45. Available at: <https://www.ecfr.gov/current/title-17/chapter-I/part-45>

[11] 17 CFR § Part 46. Available at: <https://www.ecfr.gov/current/title-17/chapter-I/part-46>

[12] Group B means the requirements set forth in CFTC Regulation 23.202 and CFTC Regulations 23.501 through 23.504. Group C requirements are external business conduct rules as set forth in CFTC Regulation 23.23.(a)(8), with the requirements set forth in CFTC Regulation 23.400 through 23.451 and CFTC Regulations 23.700 through 23.704.