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CABINET NEWS

Research and commentary on regulatory and other financial services topics

Rules in Motion

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CFTC Staff Issues Interpretation Regarding U.S. Person Definitions

May 29, 2025

By Peter Y. Malyshev
Partner | Financial Regulation

By Nikita B. Cotton
Associate | Financial Regulation

On May 21, 2025, the Commodity Futures Trading Commission's (the "CFTC") Market Participants Division and Division of Market Oversight (the "Divisions") issued **an interpretative letter** (Staff Letter 25-14) clarifying the application of certain cross-border definitions of "U.S. persons" under the CFTC Regulations.

Following the controversial May 2024 enforcement action involving a drastically expanded definition of "U.S. person" in which the CFTC determined that a Seychelles-based digital assets platform was required to register with the CFTC as a futures commission merchant, last week's interpretative letter has settled some concerns across the industry regarding the scope of the CFTC's cross-border jurisdiction. The letter's narrower view of "U.S. Person" provides much-needed clarity for non-U.S. firms with nexuses to the United States.

The letter responds to a request for interpretation by a proprietary trading firm (the "Firm") which represented that it is headquartered in and directs its operational activities from the Bahamas. The Firm engages in trading various virtual currency futures, options and swaps contracts listed on non-U.S. exchanges, both directly and through non-U.S. brokers. However, the Firm represented that it also has the following U.S. nexuses:

- the Firm is indirectly owned by natural persons who are U.S. residents. Such persons are also co-owners and co-managers of a related U.S.-based prop trading firm, from which the Firm receives non-trading related IT, legal, compliance and administrative services;
- the Firm would like to license trading technology from the related firm;
- the Firm would like to engage U.S.-based traders, quantitative researchers and software developers, who would be employed by an affiliate of the Firm organized in the Bahamas; and
- the Firm would like to host trading technology on U.S.-located servers.

Relying on the foregoing representations by the Firm, the Division clarified that the Firm is <u>not</u> and would not be considered a "U.S. person" based on its current or proposed expanded operations, because, in line with its **2013 guidance** and § 23.23(a) of the CFTC Regulations, the Firm's "place of organization and principal place of business are the factors that are of relevance in determining its cross-border status." In addition, the Division also stated that the Firm is <u>not</u> a "person located in the United States" for purposes of the "foreign futures or foreign options customer" definition in Commission regulation **30.1(c)**; is <u>not</u> a "participant located in the United States" for purposes of Commission regulation **48.2(c)**; and is a "foreign located person" for purposes of Commission regulation **3.10(c)(1)(ii)**.

The CFTC also clarified that as a result of the above, the non-U.S. exchange and brokers through which the Firm trades in virtual currency derivatives are not subject to the CFTC's registration obligations that would otherwise apply if the Firm was deemed a "U.S. Person."

Staff Letter 25-14 reestablishes the guidance for offshore firms that was well-established prior to the controversial May 2024 enforcement action, clarifying that incidental ties in and of themselves do not trigger sweeping registration requirements.

Another Update on the CFPB

May 29, 2025

By Mercedes Kelley Tunstall
Partner | Financial Regulation

Since our **last report on what is happening with the Consumer Financial Protection Bureau ("CFPB")** during this administration, we have seen the Trump nominee for Director of the CFPB retracted from consideration in front of the Senate and an effective deadlock on the case brought by the National Treasury Employee Union ("NTEU") seeking to prevent CFPB Acting Director Russell Vought from firing up to 90% of CFPB staff.

Specifically, Jonathan McKernan, who had been chosen to be the Director of the CFPB, saw his nomination get out of the Senate Banking Committee quickly, and then it languished, mostly due to difficulty in getting floor time in front of the full Senate. In the meantime, word around Washington is that Secretary of the Treasury Scott Bessent really likes McKernan and has decided that he would like him to stay in Treasury, working as the Undersecretary of Domestic Finance. Treasury's website describes the Office of Domestic Finance as working, "to support equitable and sustainable economic growth and financial stability through policies to increase the resilience of financial institutions and markets, and to increase access to credit for small businesses and low-to-moderate income communities. It develops policies and guidance for Treasury Department activities in the areas of financial institutions, federal and municipal debt finance, financial regulation, and capital markets." In other words, McKernan will be heading up a much more policy-driven part of our financial regulation system that addresses everything from the Financial Stability Oversight Council, to Cybersecurity and Critical Infrastructure protection, to debt management and the forecasting of Treasury's "current and future cash and debt positions." For context, this role was held previously during the first Obama administration by Biden's head of the Securities & Exchange Commission, Gary Gensler. While this change may be something more in line with McKernan's future political ambitions, it leaves Russell Vought in place as Acting Director, who has exhibited no interest in maintaining a CFPB that is in a position to do anything to protect consumers.

Meanwhile, CFPB employees are still mostly not working at all. Instead, they are awaiting their fate via resolution of the NTEU's case. Also, the individuals who ARE working at the CFPB have commenced dismantling many of the CFPB's previous efforts. Not only have they withdrawn their stipulated consent order in the case against NCSLT, **as we reported previously**, but they have also indicated that they are turning away from all of the following, some of which are welcomed by the marketplace:

- **Enforcement actions focused upon Buy Now, Pay Later companies**;
- **Small business lending reporting under Section 1071** of the Consumer Financial Protection Act (CFPA);
- **Registry requirements for nonbanks** that are subject to certain public agency and court orders;
- **Enforcement of the rule** requiring payday lenders to ensure consumers have the ability to repay the loan, before making the loan;

Instead, each such announcement is accompanied by a variation of this statement of the CFPB's enforcement priorities – "The Bureau will instead keep its enforcement and supervision resources focused on pressing threats to consumers, particularly servicemen and veterans. The Bureau takes this step in the interest of focusing resources on supporting hard-working American taxpayers, servicemen, veterans, and small businesses."

Finally, the CFPB **has also withdrawn a wide swath of guidance materials**, including one bulletin that was put into place during the first Trump administration regarding supervisory and enforcement priorities related to the Real Estate Settlement Procedures Act and the Truth in Lending Act. These materials include: eight policy statements, including the policy statement on abusive acts and practices under the CFPA; seven interpretive rules, including one helping surviving family members better understand mortgage-lending rules; 13 advisory opinions, including the incredibly useful opinion regarding name-only matching procedures under the Fair Credit Reporting Act (seriously -- if you know, you know); and 39 other pieces of guidance, including the bulletin guiding the marketing of credit card add-on products from 2012 and guiding the marketing of credit card promotional APR offers from 2014, as well as the CFPB's circular addressing deceptive representations involving the FDIC's name or logo or deposit insurance.

As always, let me tell you what I think this means for the industry. It means – yes, there is a little more room to breathe during this administration. Yes, it is possible to move forward with new or updated products and services and marketing campaigns that are different and innovative without worrying overly much about a dreaded call, letter or exam finding from the CFPB. And, yes, it is unlikely that there will be much the CFPB does in terms of enforcement that will impact serious providers of consumer financial services and products. But, please take note when I say “during this administration.” Should Congress not succeed in doing away with the CFPB entirely, then the next time there is a Democratic administration, they will likely press forward with the CFPB as before, as much as they are able. Accordingly, IF any of the activities your organization wants to engage in would be contrary to the repealed guidance in particular, it is important to consider whether the activities are worthwhile enough to risk the CFPB investigating you under a future administration. In other words, just because the guidance was repealed, there is no guarantee that future reasonable minds will decide that such guidance should remain repealed. The repealed guidance has already shown us ways in which the CFPA and other consumer financial services laws have been interpreted and focused on activities that are deemed harmful to consumers.

In sum, during this administration at least, it is appropriate to be less concerned about the CFPB and more concerned about actions being brought by state attorneys general and state departments of banking and financial institutions, and, of course, consumer class action attorneys.

IOSCO Publishes Final Reports on Finfluencers, Online Imitative Trading Practices and Digital Engagement Practices

May 29, 2025

By Peter Y. Malyshev
Partner | Financial Regulation

By Nikita B. Cotton
Associate | Financial Regulation

On May 19, 2025, the International Organization of Securities Commissions ("IOSCO") published its **Final Reports** on Finfluencers, Online Imitative Trading Practices and Digital Engagement Practices (the "Reports"), as part of its **Roadmap for Retail Investor Online Safety**. The Reports identify the good practices that regulators should consider when managing potential risks to retail investors that may arise from the evolving securities and derivatives markets towards a trend of **"retailification" – *i.e.*, the significantly growing transaction volumes of retail participants in these markets**.

The Reports focus on three key areas:

1. the growing role of **financial influencers** (or "finfluencers") in shaping investment behavior;
2. the regulatory aspects and risks associated with **online imitative trading practices**; and
3. the gamification and other **digital engagement practices** of digital trading platforms.

First, the Final Report on Finfluencers acknowledges that there are many influencers on social media platforms (*e.g.*, X, Instagram, Discord, TikTok, Facebook and YouTube) who may not necessarily be employed by, affiliated with or even controlled by a regulated entity (such as a broker-dealer or commodity trading adviser), but who nevertheless may be promoting information that the public may not be able to distinguish from professional investment advice or otherwise influencing the public towards doing business with these regulated entities. IOSCO notes that both finfluencers and the market intermediaries who use them are subject to regulatory requirements, which generally involve the appropriate disclosure of advertisements and conflicts of interest.

To that end, we note that while this emerging category of finfluencers may not necessarily fall within the traditional definition of, *e.g.*, an associated person ("AP"), they nevertheless may serve some of the similar functions of an AP. Recently, the National Futures Association ("NFA"), a self-regulatory organization ("SRO"), **proposed an interpretive notice** setting for the first time minimum requirements for the supervision of APs, a designation that may take on new significance in light of the evolving retail landscape. The designation of APs is especially important as the NFA prepares to register new digital commodity market participants under **the draft federal digital asset legislation currently being considered in Congress**. However, the NFA withdrew the proposed guidance, which is indicative that the CFTC may not necessarily agree **with** the NFA's proposed expansion of requirements for AP supervision.

Second, the Final Report on Online Imitative Trading Practice also addresses new business models that are geared towards retail participants who may be interested in participating in forms of "copy" trading, which is a rapidly growing industry in the U.S. and overseas. The report addresses some of the risks to retail investors of engaging in copy trading and proposes certain good practices for both regulators and market intermediaries to address these risks, which primarily focus on monitoring trader and investor behavior, marketing, and assessing the provision of investment advice in the context of existing regulatory schemes to ensure compliance.

Third, the Final Report on Digital Engagement addresses the "gamification" of trading websites and apps, and other technologies that make it drastically easier for retail participants to participate in commodity derivatives and securities markets. In the new reality of 24/7/365 exchange trading and apps that attempt to capitalize on "gamification" features that offer investors instant gratification (e.g., badges, rewards, celebratory messages), there is a lot less regulated intermediary involvement. IOSCO notes that this "gamification" affects investors' evaluation of risk, thus potentially leading to worse outcomes.

In the traditional model where a trader must pick up the phone and call their broker (i.e., a futures commission merchant) to place a futures trade on an exchange, there is an intermediary or a professional participant who could mitigate risky behavior, or at least act as a buffer for the system. IOSCO set forth good practices to address these emerging risks, including investor education, disclosure, and risk management monitoring.

The overall theme of the Final Reports is that new technologies dramatically broaden access points for retail participants into commodity derivatives and securities markets, and SROs and regulators should stay vigilant in their efforts to assess and address emerging risks. Even if the CFTC or SROs do not immediately implement the recommendations provided in the Final Reports, it is certain that these recommendations will have an impact on retail markets, especially in the context of CFTC's expanded jurisdiction for crypto retail products.

U.S. Issues Broad Sanctions Relief for Syria

May 29, 2025

By Christian Larson
Special Counsel | White Collar Defense and Investigations

On May 23, 2025, the U.S. Treasury's Office of Foreign Assets Control ("OFAC") issued Syria **General License 25**, which provides broad authorization for U.S. persons to engage in dealings prohibited under the Syrian Sanctions Regulations.

Although GL 25 does not remove all U.S. sanctions on Syria, it generally authorizes dealings with persons ordinarily resident in Syria, dealings with the current Government of Syria, dealings involving Syrian petroleum products, and new investment in Syria.

GL 25 also authorizes dealings with blocked persons named in the Annex to GL 25, but notably does not unblock any property of those persons that was blocked prior to May 23, 2025.

Together with the release of GL 25, the U.S. Department of State certified a **180-day waiver to the Caesar Syria Civilian Protection Act**. The waiver effectively removes, on a temporary basis, the risk of the U.S. imposing sanctions on non-U.S. persons who engage in significant transactions with the current Government of Syria, or with Syria's construction, aviation, oil, or gas industries.

Also on May 23, 2025, the U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") issued **exceptive relief** to a USA PATRIOT Act Section 311 prohibition on maintaining a correspondent account for the Commercial Bank of Syria.

Finally, on May 28, 2025 OFAC issued **FAQs for GL 25**, stating, among other things, that OFAC will continue to enforce sanctions against former Syrian President Bashar al-Assad and other blocked persons not named in the Annex to GL 25.

As described in a May 23, 2025 **press release**, the sanctions relief for Syria "will enable new investment" in Syria, and is "one part of a broader U.S. government effort to remove the full architecture of sanctions imposed on Syria." Although the sanctions relief for Syria is not explicitly conditioned upon specific outcomes, the press release calls upon Syria to "continue to work towards becoming a stable country" and the U.S. government could withdraw the sanctions relief it granted to Syria as quickly as it was given.

In the more than 10 years that Syria has been comprehensively sanctioned, it has become common for credit, equity, and other agreements to include contractual restrictions on dealings with the country. Before engaging in dealings with Syria, U.S. persons may wish to review agreements to which they are a party, to confirm whether any contractual bar remains in place after the issuance of GL 25 and related sanctions relief.

Cadwalader Capital Corner

May 29, 2025

Check out this week's Capital Corner:

Grades Are Out: Q1 Call Reports Showed Higher Industry Net Revenue and Benign Credit Trends

Chris van Heerden, Director | Fund Finance

On an aggregate basis, banking industry net revenue improved in Q1 despite flattish NIM on near-record non-interest income and expense improvements. Funding mix made progress with a healthy gain in total deposits while loan loss provisions held stable.

These trends, of course, did not apply equally to all, and franchise momentum varied depending in part on investment banking and trading presence and participation in non-depository financial institution loan growth. While broader economic momentum slowed during the quarter, delinquencies improved in a number of loan categories.

We cover these trends in the latest update of our Quarterly Survey **here**.

Bank Leverage Capital Requirements to be Scaled Back

Nikita Cotton, Associate

It has been widely **reported** that the U.S. federal banking agencies are considering scaling back certain capital requirements applicable to large domestic and foreign banking organizations, with the most recent pronouncement coming from Treasury Secretary Scott Bessent last week at a House Financial Services Committee **hearing** in response to a question from Rep. Frank Lucas.

Secretary Bessent also mentioned in **remarks** to an American Bankers Association event in April that, through his role as head of the Financial Stability Oversight Council, he was engaged in discussions with the federal banking agencies to amend the supplementary leverage ratio ("SLR"), and possibly other leverage measures in the bank capital adequacy rules so that leverage ratios act as "an appropriate backstop" rather than a binding constraint.

Depending on their size, banks are subject to a combination of requirements relating to risk-based capital ratios (*i.e.*, a bank's capital holdings versus its risk-weighted assets), leverage capital ratios (*i.e.*, a bank's capital holdings versus its total assets), and capital buffers. The SLR, which has been the recent focus of reform discussions, is a leverage capital ratio applicable to banking organizations with at least $250 billion in total assets or $75 billion in nonbank assets.

Proponents of SLR reforms argue that, because the SLR requires banks to hold capital against all of their assets (at least 3% of total leverage exposure for large banks, and 5% for G-SIBs when factoring in the enhanced SLR buffer applicable to only them), banks are penalized for holding low-risk assets such as U.S. Treasuries. Federal Reserve Board ("FRB") Chairman Jerome Powell and FRB Governor Michelle Bowman (President Trump's nominee for FRB Vice Chair of Supervision) have also recently indicated the intent to amend the SLR, though it is not clear whether any reforms would target the SLR's applicability to Treasuries specifically or the overall calibration of the ratio.

Given that the SLR is only one of numerous capital requirements for banks, whether reforms to the SLR would meaningfully reduce banks' capital requirements in practice is highly specific to each bank—however, the banking system is not thought to be constrained by leverage capital in general. Analysts do expect SLR reform to have a different effect: one of bringing Treasury yields down and stabilizing the Treasury market in the near future by encouraging banks to buy more of the government debt.

Article 12 of the US UCC and the Draft English Property (Digital Assets etc) Bill 2024: Potential Impacts on Fund Finance Transactions

May 29, 2025

Cadwalader's **Chris McDermott**, **George Pelling**, **Eric Starr**, **John Donnelly**, **Alix Prentice** and **Trent Lindsay** have co-authored an article in *Butterworths Journal of International Banking and Financial Law*, "Article 12 of the US UCC and the Draft English Property (Digital Assets etc) Bill 2024: potential impacts on fund finance transactions" published on May 6.

In the article, the authors examine how recent legal developments in the U.S. and U.K. may impact the treatment of digital assets as collateral in fund finance transactions. They compare the U.S. Uniform Commercial Code's new Article 12—which introduces the concept of "controllable electronic records"—with the U.K.'s draft Property (Digital Assets etc) Bill 2024.

Read the full article **here**.

CFTC Rocked by Exits and Sanctions as Crypto Reform Awaits

May 29, 2025

Cadwalader partner **Peter Malyshev** was quoted in a recent *Bloomberg* article on the wave of departures at the U.S. Commodity Futures Trading Commission ("CFTC") and the implications for crypto regulation.

Peter commented on the agency's diminishing leadership at a critical time, saying "If there are no commissioners, if there's no quorum, how in the world are they going to do it?"

His remarks refer to the agency's ability to fulfill its mission—particularly if tasked with swiftly implementing new crypto market structure rules under pending legislation—despite a lack of confirmed leadership.

Read the full article **here** (subscription required).