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Market Participants Division

Division of Market Oversight

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RE: Staff Interpretation Regarding Certain Cross-Border Definitions

Ladies and Gentlemen:

The Market Participants Division ("**MPD**") and the Division of Market Oversight ("**DMO**" and together with MPD, the "**Divisions**") of the Commodity Futures Trading Commission ("**CFTC**" or "**Commission**") are issuing this letter in response to a request from SCB Limited ("**SCB**" or "**Susquehanna Crypto**") that the Divisions issue an interpretative letter pursuant to 17 CFR 140.99 providing guidance confirming that, under the facts and circumstances summarized below, SCB would qualify as a "non-U.S. person" as defined by Commission regulation 23.23(a)(10), not a "U.S. person" as defined by the 2013 Guidance (as defined below), a "foreign located person" as defined by Commission regulation 3.10(c)(1)(ii), not a "person located in the United States" for purposes of Commission regulation 30.1(c), and not a "participant located in the United States" for purposes of Commission regulation 48.2(c) (the "**Request for Interpretation**").[1]

I. Regulatory Background

Section 4(b) of the Commodity Exchange Act ("**CEA**")[2] grants the Commission the authority to regulate the foreign futures activity of persons "located in the United States."[3] The Commission has implemented this statutory authority with respect to foreign brokers who provide domestic customers access to foreign futures through its Part 30 regulations and with respect to foreign exchanges who provide direct access to domestic customers through its Part 48 regulations.[4]

[1] Commission regulations referred to herein may be found at 17 CFR CH I (2024).

[2] 7 U.S.C. 1 et. seq.

[3] 7 U.S.C. 6(b).

[4] 17 CFR Part 30, 17 CFR Part 48.

Commission regulation 30.4(a) establishes the requirement that any foreign broker that solicits or accepts orders from a foreign futures or foreign options customer and, in connection therewith, accepts any money, securities or property (or extends credit in lieu thereof) to margin, guarantee or secure any trades or contracts that may result therefrom, must register with the Commission as a futures commission merchant ("**FCM**").[5] For purposes of this requirement, Commission regulation 30.1(c) defines "foreign futures or foreign options customer" to mean, in relevant part, "any person located in the United States, its territories or possessions who trades in foreign futures or foreign options."[6] This registration requirement is subject to limited exemptions.[7]

With respect to foreign exchanges, Commission regulation 48.3(a) provides that any foreign board of trade ("**FBOT**") that permits direct access to its electronic trading and order matching system must register with the Commission as an FBOT.[8] Similarly, for purposes of this requirement, Commission regulation 48.2(c) defines "direct access" to mean, in relevant part, "an explicit grant of authority by a foreign board of trade to an identified member or other participant located in the United States to enter trades directly into the trade matching system of the foreign board of trade."[9]

Relatedly, the Commission has expressed its view that customer protection efforts be left to local authorities in areas where neither domestic customers or intermediaries are involved.[10] Specifically, pursuant to Commission regulation 3.10(c)(2)(ii), a foreign located person engaging in the activity of an FCM only on behalf of foreign located persons is not required to register with the Commission as an FCM.[11] For purposes of this regulation, the Commission defines "foreign located person" as "a person located outside the United States, its territories, or possessions."[12] This exemption is afforded regardless of whether the transactions engaged in are executed on a registered designated contract market or swap execution facility ("**SEF**"), FBOT, or executed

[5] 17 CFR 30.4(a).

[6] *See* 17 CFR 30.1 (defining "foreign futures or foreign options customer").

[7] *See* 17 CFR 30.4(a) (providing exemptions from registration as an FCM for a foreign futures and options broker ("FFOB") who (1) accepts orders from or carries a U.S. futures commission merchant's foreign futures and options customer omnibus account; (2) accepts orders from or carries a U.S. futures commission merchant's proprietary account; or (3) accepts orders from or carries a U.S. affiliate account which is proprietary to the FFOB); see also 17 CFR 30.10 (providing any person adversely affected by any Part 30 requirement the ability to petition the Commission for an exemption that the Commission may, in its discretion, grant according to regulation 30.10).

[8] 17 CFR 48.3(a).

[9] *See* 17 CFR 48.2(c) (defining "direct access").

[10] *See Exemption From Registration for Certain Foreign Persons: Notice of proposed rulemaking*, 72 FR 15637 at 15638 (April 2, 2007) (proposing the formalization of the "foreign broker exemption," discussing the Commission's historical approach, and quoting Administrative Determination No. 51 (March 17, 1938)).

[11] 17 CFR 3.10(c)(2)(ii).

[12] *See* 17 CFR 3.10(c)(1)(ii) (defining "foreign located person").

over-the-counter, provided that all transactions required to be cleared on a registered derivatives clearing organization are submitted for clearing through a registered FCM.[13]

Parts 30 and 48 of the Commission's regulations do not expressly define what it means for an individual or entity who trades in foreign futures contracts to be "located in the United States" or "located outside the United States" for purposes of Commission regulations 30.1(c), 48.2(c), and 3.10(c)(1)(ii). However, the Commission has equated "location" with the customer's domicile.[14] In the case of a legal person, such as a proprietary trading firm, the Divisions have taken the view that domicile is ascertained by looking to an entity's place of formation, as well as its principal place of business.[15] Further, the Commission has determined in other contexts that, consistent with the view of the Securities and Exchange Commission and federal case law, "principal place of business" means "the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person."[16]

While the Commission's extraterritorial jurisdiction over futures activities focuses on physical location, its extraterritorial jurisdiction over swaps activity implements a different framework that focuses on whether foreign swaps activity has a connection to U.S. commerce. Specifically, section 2(i) of the CEA, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**"), grants the Commission extraterritorial jurisdiction over swaps activity outside of the U.S. when, "those activities… have a direct and significant connection with activities in, or effect on, commerce of the United States…"[17]

In 2013, the Commission issued its *Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations* (the "**2013 Guidance**") to further clarify the Commission's cross-border swaps jurisdiction.[18] Specifically, for purposes of applicable

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[13] 17 CFR 3.10(c)(2)(ii).

[14] *See Foreign Futures and Foreign Options Transactions*, 52 F.R. 28980 (August 5, 1987) ("With the development of international futures markets, and increasing public awareness of such markets, these regulations will add to the Commission's existing customer protection regulatory scheme coverage of foreign futures and options transactions undertaken by U.S. domiciliaries").

[15] *See, e.g.*, CFTC Staff Letter 05-02, Comm. Fut. L. Rep. (CCH) ¶ 30,016 (Dec. 10, 2005) (citing 17 CFR 4.7, which defines the term "non-United States person" to include, in part, a "corporation . . . organized under the laws of a foreign jurisdiction which has its principal place of business in a foreign jurisdiction").

[16] *See Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants* ("**Swap Dealer Cross-Border Rule**") 85 FR 56924, 56936-37 (September 14, 2020) (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).

[17] 7 U.S.C. 2(i)

[18] *Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations (*the "**2013 Guidance**"), 78 FR 45292 (July 26, 2013). The 2013 Guidance provided the Commission's interpretation of the application of CEA section 2(i) to many of the Commission's swap regulations, including ones related to calculating

Commission regulations, the 2013 Guidance defined a "U.S. person" as including but not limited to, in relevant part, "any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing … in each case that is organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States."[19] The 2013 Guidance also interpreted the phrase "principal place of business" to generally include entities that are organized outside the United States but have the "center of direction, control, and coordination" of their business activities in the United States, i.e., the "nerve center."[20] The Commission also provided clarity regarding its interpretation of "principal place of business" by providing a non-comprehensive list of hypothetical examples of particularly structured entities whereby the Commission provided its analysis.[21]

In 2020, the Commission subsequently adopted Commission regulation 23.23, which supersedes the 2013 Guidance with respect to the extraterritoriality application of the swap dealer ("**SD**") de minimis threshold calculation.[22] Similar to the definition of "U.S. person" in the 2013 Guidance, Commission regulation 23.23 defines "U.S. person," in relevant part, as "a partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States."[23] Commission regulation 23.23 further defines "principal place of business" in part as "the location from which the officers, partners, or managers of the legal person primarily direct, control, and

the notional amounts of swap transactions for purposes of the de minimis threshold, SD registration requirements, real-time public reporting, swap data repository reporting, large trader reporting, mandatory clearing, and mandatory execution.

[19] *Id*. at 45316.

[20] *Id*. at 45309.

[21] *Id.* at 45310-45311. Of particular relevance, the Commission provided the example of an asset management firm located outside the United States that establishes a collective investment vehicle located outside the United States whereby personnel of the asset management who are located outside the United States would be responsible for implementing the investment and trading strategy but personnel located in the United States would be involved in managing the investment portfolio. The Commission held that the collective investment vehicle would not be within the interpretation of the term "U.S. person" even if personnel in the U.S. office may act autonomously on a day-to-day basis because they would be under the direction of senior personnel in the non-U.S. office regarding how they are implementing the investment objectives and would report to personnel in the non-U.S. office, who generally hold higher positions within the firm.

[22] 17 CFR 23.23; *see generally* Swap Dealer Cross-Border Rule, see note 16, *supra*. In addition to superseding the 2013 Guidance with respect to the SD de minimis threshold calculation, Commission regulation 23.23 supersedes the 2013 guidance with respect to many, but not all, of the requirements applicable to SDs under Title VII of the Dodd-Frank Act. Several SD requirements (mandatory clearing, mandatory trade execution, real-time public reporting, swap data repository reporting, large trader reporting) remain subject to the 2013 Guidance.

[23] 17 CFR 23.23(23)(i)(B).

coordinate the activities of the legal person."[24] Commission regulation 23.23 also defines "non-U.S. person" to mean "any person that is not a U.S. person."[25]

II. Summary of the Request for Interpretation

Based on the representations made in the Request for Interpretation, we understand the relevant facts to be as follows. SCB is a digital assets proprietary trading firm organized in the Bahamas and licensed as a digital assets business with the Securities Commission of the Bahamas. SCB engages in market-making and other trading activity in spot and derivatives markets for virtual currencies and other digital assets and trades both over-the-counter and on exchanges (either directly or through brokers). SCB's derivatives activity consists of futures, options, and perpetual contracts, and SCB trades primarily using automated trading algorithms based on input from its qualitative research staff. SCB's algorithms are overseen by a team of traders, who may sometime trade on a manual basis.

SCB's main office and headquarters are in the Bahamas and its high-level officers (such as its chief executive officer, chief operating officer, and chief compliance officer) primarily direct, control, and coordinate activities from the Bahamas. SCB operates additional offices in other non-U.S. locations and does not currently have offices in the United States. SCB is indirectly owned by a small number of closely associated natural persons who are residents in the United States. These persons are also co-owners and co-managers of a separate, U.S.-based proprietary trading firm (the "**related firm**"). SCB contracts with the related firm to receive information technology, legal, compliance, and administrative services but the related firm does not provide trading services to SCB and SCB does not have access to the related firm's trading algorithms.

SCB would like to expand its activities into the United States, particularly through the engagement of U.S.-based traders, quantitative researchers and software developers, all of whom would be employed by an affiliate, SCB Advisors Limited ("**SCBA**"), a company organized in the Bahamas. SCB would also like to license trading technology from the related firm and host trading technology on U.S.-located servers. In the event that SCB engages U.S.-based traders from SCBA and invests resources in the growing U.S. digital assets market, it requests 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.

SCB trades in virtual currency futures contracts listed on non-U.S. exchanges both directly and through the use of non-U.S. brokers, which constitute "foreign futures" for purposes of the CEA and Commission regulations. As such, if SCB were deemed to be "located in the United States," the non-U.S. exchanges that provide direct access to SCB to transact in foreign futures would be

[24] 17 CFR 23.23(23)(ii).

[25] 17 CFR 23.23(10).

required to register with the Commission as FBOTs pursuant to Commission regulation 48.3(a).[26] Similarly, if SCB was considered to be "located in the United States," the non-U.S. brokers that SCB uses to transact in foreign futures on non-U.S. exchanges would be required to register with the Commission as FCMs pursuant to Commission regulation 30.4(a).[27]

SCB also trades in virtual currency options and perpetual contracts, which SCB states the Commission has determined are subject to regulation as swaps under the CEA and Commission regulations.[28] According to SCB, in the event SCB was considered a "U.S. person" for purposes of swaps regulations, then SCB's swap transactions would count towards the SD de minimis threshold and could subject SCB to SD registration, pursuant to Commission regulation 23.23(b)(1).[29] Further, any non-U.S. exchanges on which SCB trades swaps would be subject to registration as SEFs pursuant to Commission regulation 37.3(a)(1).[30] Additionally, the non-U.S. exchanges on which SCB transacts in swaps, as well as any non-U.S. brokers utilized by SCB to engage in these transactions, would be subject to registration requirements as FCMs.[31] Finally, if SCB were considered a "U.S. person" for purposes of the Commission's swaps regulations, SCB's swap transactions would be subject to the reporting requirements in Parts 43 and 45 of the Commission's regulations.[32]

III. Staff Interpretation

As described above, SCB trades virtual currency futures contracts listed on non-U.S. exchanges both directly and through the use of non-U.S. brokers. Based on the facts presented in the Request for Interpretation, specifically that SCB's place of organization and the location where its high-level officers primarily direct, control, and coordinate SCB's activities are outside the United States, the Divisions confirm that:

(1) SCB is not a "person located in the United States" for purposes of the "foreign futures or foreign options customer" definition in Commission regulation 30.1(c);

(2) SCB is not a "participant located in the United States" for purposes of Commission regulation 48.2(c); and

[26] 17 CFR 48.3(a).

[27] 17 CFR 30.4(a).

[28] With respect to options, pursuant to section 4c(b) of the CEA, 7 U.S.C. 6c(b), and 17 CFR 32.2, options are generally regulated by the Commission as swaps. With respect to perpetual contracts, *see* CFTC Staff Request for Comment on the Trading and Clearing of "Perpetual" Style Derivatives, CFTC Release Number 9069-25 (Apr. 21, 2025), available on the Commission's website, CFTC.gov.

[29] 17 CFR 23.23(b)(1).

[30] 17 CFR 37.3(a)(1).

[31] 7 U.S.C. 6d(a), 7 U.S.C. 6d(f), 7 U.S.C. 1a(28), 17 CFR 1.3, 17 CFR 3.10.

[32] 17 CFR Part 43, 17 CFR Part 45.

(3) SCB is a "foreign located person" for purposes of Commission regulation 3.10(c)(1)(ii).

Thus, any non-U.S. exchanges that provide direct access to SCB would not, solely on the basis of the provision of such direct access to SCB, be required to register with the Commission as FBOTs pursuant to Commission regulation 48.3(a). Similarly, any non-U.S. brokers through which SCB engages in futures would, solely with respect to the provision of such services to SCB, be exempt from registration as an FCM pursuant to Commission regulations 3.10(c)(2)(ii) and 30.4(a).

As described above, SCB also trades in virtual currency options and perpetual contracts, and states that such transactions are subject to regulation as swaps[33] under the CEA and Commission regulations. Based upon the facts presented in the Request for Interpretation, specifically that SCB's place of organization and "principal place of business" (i.e., the location where its high-level officers primarily direct, control, and coordinate SCB's activities) are outside the United States, the Divisions confirm that SCB is a "non-U.S. person" and not a "U.S. person" as defined by Commission regulation 23.23(a) and the 2013 Guidance. Thus, in the context of SCB's swaps activity, (1) SCB's swap dealing activity would not count towards the SD de minimis threshold pursuant to Commission regulation 23.23(b)(1), and (2) SCB's swap transactions would not be subject to the reporting requirements in Parts 43 and 45 of the Commission's regulations. Additionally, by virtue of SCB being a "non-U.S. person:"

(1) The non-U.S. exchanges on which SCB trades would not, solely on the basis of such trading by SCB, be subject to registration as a SEF pursuant to CEA section 5h(a)(1) and Commission regulation 37.3(a)(1); and

(2) The non-U.S. exchanges and brokers through which SCB trades would not, solely on the basis of the provision of such services to SCB, be subject to registration as an FCM pursuant to CEA Section 4d.

Finally, the Divisions note that, as described in the Request for Interpretation, SCB's desire to expand its activities into the United States through: (1) the engagement of U.S.-based traders, quantitative researchers and software developers employed by SCBA; (2) the licensing of certain trading technology from the related firm; and (3) the hosting of trading technology on U.S.-located servers, would not impact SCB's status as a "non-U.S. person," a person that is not "located in the United States," and a "foreign located person" for purposes of the related Commission regulations. Regardless of SCB's proposed expansion activities, the Divisions are of the view that, taking into consideration the requirements in Parts 30 and 48 and Commission regulations 3.10(c), 23.23, and the 2013 Guidance, SCB's place of organization and principal place of business are the factors that are of relevance in determining its cross-border status.

This interpretation represents the position of the Divisions and does not necessarily represent the views of the Commission. This letter and the interpretation set forth herein, are based upon the

[33] *See* supra note 28.

facts and circumstances represented to the staff of the Divisions. Any different, changed, or omitted material facts or circumstances may require a different position or render this letter void. As with all interpretative letters, the Divisions retain the authority to condition further, modify, suspend, terminate, or otherwise restrict the interpretation provided herein, in their discretion.

If you have any questions concerning this correspondence, please contact Fern Simmons, Senior Special Counsel, MPD, at fsimmons@cftc.gov; Matthew Boylan, Special Counsel, MPD, at mboylan@cftc.gov; or Rahul Varma, DMO, at rvarma@cftc.gov.

Sincerely,

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