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CFTC Enforcement Division Issues Framework for DOJ Criminal Referrals

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On July 9, 2025, the Commodity Futures Trading Commission (CFTC) Division of Enforcement (DOE), acting pursuant to a recent executive order (EO), issued an advisory letter outlining its new policy for referring criminally liable regulatory offenses to the Department of Justice (DOJ). The advisory letter serves as the CFTC's response to a recent EO aimed at curbing overcriminalization of regulatory violations. It also continues the agency's recent trend of publishing guidance on enforcement policies and procedures from its Division of Enforcement.

The executive order

On May 9, 2025, the White House issued EO 14294, titled "Fighting Overcriminalization in Federal Regulations." The advisory letter's stated goals include "eas[ing] the regulatory burden on everyday Americans" and "ensur[ing] no American is transformed into a criminal for violating a regulation they have no reason to know exists." Accordingly, Section 7 of the EO imposed the following transparency requirements on federal agencies:

Publish, within 45 days, guidance in the Federal Register describing their plans "to address criminally liable regulatory offenses."

Publish, within 365 days, a report containing (1) a list of all criminal regulatory offenses enforceable by the agency or DOJ; (2) the range of potential criminal penalties; and (3) the applicable mens rea standard for the criminal regulatory offense.

Husch Blackwell attorneys Matthew P. Diehr and Rebecca Furdek analyzed the EO in full—including its implications for individuals and businesses—in a prior legal update.

The CFTC advisory

Acting DOE Director Paul Hayeck released the advisory letter in compliance with Section 7 of the EO. The letter indicates that, “subject to appropriate exceptions and to the extent consistent with law,”

DOE staff will consider the following factors when deciding whether to refer an alleged violation to DOJ:

The harm or risk of harm, pecuniary or otherwise, caused by the potential offense.

The potential gain to the putative defendant that could result from the offense.

Whether the putative defendant held specialized knowledge or expertise or was licensed in an industry related to the rule or regulation.

Evidence, if any is available, of the putative defendant’s general awareness of the unlawfulness of his conduct, as well as his knowledge or lack thereof of the regulation at issue.

Whether the putative defendant is a recidivist or has otherwise engaged in a pattern of misconduct.

Whether the involvement of the DOJ will provide additional meaningful protection to participants in the derivatives markets.

Director Hayeck confirmed that the CFTC will comply with the second EO requirement and issue a report listing all criminal regulatory offenses that the agency will enforce, as well as the applicable mens rea and range of criminal penalties for each offense, by **May 9, 2026**.

What this means to you

The advisory letter offers some clarity to the industry on how the CFTC will further the administration’s efforts at curbing “overcriminalization” of federal regulatory offenses. Several of the factors included in the letter, such as the defendant’s knowledge of the industry and “general awareness of the unlawfulness of his conduct,” confirm that the CFTC has fallen in line with the Trump administration’s directive to criminally pursue only “willful” violations of the law, particularly in the digital assets space. Industry participants should remain mindful, however, that the CFTC can use its civil enforcement authority to address a regulatory violation that it decides not to refer to DOJ. As such, it is essential for industry players to maintain strong compliance programs and have procedures for responding to government investigations when they do occur.

Contact us

If you have questions about this advisory letter or CFTC guidance, please contact Kip Randall, Sydney Sznajder, or your Husch Blackwell attorney.

Special thanks to Husch Blackwell summer associate Brett Mordecai for his assistance drafting this Legal Update. Brett is currently a student at the University of Missouri – Kansas City School of Law.