

PUBLISHED: APRIL 15, 2025

Acting CFTC Chairman Aligns Agency with New DOJ Policy Against Regulating Digital Assets Industry

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On April 8, acting Commodity Futures Trading Commission (CFTC) Chairman Caroline D. Pham showed support for a new Department of Justice (DOJ) policy ending “regulation by prosecution” in the digital assets industry. Acting Chairman Pham issued several directives in conformance with the policy that will likely narrow the CFTC’s enforcement of laws related to digital assets.

The DOJ policy

Deputy Attorney General Todd Blanche released the new DOJ policy memorandum, titled “Ending Regulation by Prosecution,” on April 7. The policy seeks to prevent prosecutors from playing a regulatory role in the digital assets space by prohibiting certain types of litigation and investigations. For example, DOJ prosecutors are now prohibited from “target[ing] virtual currency exchanges, mixing and tumbling services, and offline wallets for the acts of their end users or unwitting violations of regulations.”

Blanche also issued new charging considerations preventing prosecutions of any regulatory violations in cases involving digital assets under the Bank Secrecy Act, the Commodity Exchange Act, and other statutes absent evidence of a willful violation of a licensing or registration requirement. Prosecutors also may not prosecute cases under the Commodity Exchange Act, the federal securities statutes, and other laws if doing so would require them to argue that a given digital asset is a “security” or “commodity” and an “adequate alternative criminal charge” exists, such as mail or wire fraud.

According to the policy, the DOJ will still prosecute violations of digital asset regulations when the use of digital assets has a nexus to other types of crimes.

This includes charges against individuals for using digital assets (or defrauding others of their digital assets) to fund terrorism, narcotics or human trafficking, organized crime or gang financing, or hacking.

The policy shift comports with the Trump administration's Executive Order 14178, which directs the DOJ and other agencies to facilitate "access and use for lawful purposes open public blockchain networks for persecution." The order also calls for "fair and open access to banking services for all law-abiding individual citizens and private-sector entities alike."

Impact on the CFTC

As described above, the April 7 policy memorandum provides specific guidance on the enforcement of the Commodity Exchange Act. In her April 8 statement, Acting Chairman Pham stated that the CFTC would be taking certain action in compliance with the new policy:

Future enforcement. Pham confirmed that the CFTC would no longer charge regulatory violations in digital asset cases, including violations of Commodity Exchange Act registration requirements. An exception exists for cases where there is evidence that the defendant was aware of the registration requirement and violated it willfully.

Existing cases. Acting Chairman Pham acknowledged that she cannot unilaterally terminate pending cases that do not comport with the policy change. Administrative law requires a majority vote by the CFTC to dismiss a case or enter into a settlement consent order, and neither party presently holds a majority on the Commission. Instead, Pham directed CFTC staff and the director of enforcement to "deprioritize" enforcement actions involving Commodity Exchange Act registration requirements in order to "preserve [the CFTC's] limited enforcement resources."

In issuing this directive, Acting Chairman Pham cited Executive Order 14219, another Trump administration order directing agency heads to terminate all enforcement proceedings that run contrary to "the Constitution, laws, or administration policy."

This policy shift is not the first time the CFTC has narrowed its focus under acting Chairman Pham. In February, she reorganized the CFTC's Division of Enforcement to focus on fraud and issued an advisory aimed at boosting self-reporting and cooperation, with the ultimate goal of freeing up agency resources for high-profile investigations. In March, Chairman Pham released an initiative to clear up the CFTC's backlog of noncompliance cases to allow the agency to prioritize investigations involving serious misconduct and consumer harm.

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If you have any questions about the CFTC directives, please contact Kip Randall, Sydney Sznajder, or your Husch Blackwell attorney.