

CFTC announces advisory on referrals to DOJ

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The CFTC issued an advisory on when it would refer cases to DOJ for criminal investigation and prosecution. The guidance is relatively brief and straightforward, and implements the President's Executive Order on *Fighting Overcriminalization in Federal Regulations*.

On July 9, 2025, the CFTC's Division of Enforcement (the Division) issued [an advisory](#) on how the Division will evaluate whether to refer alleged violations of criminal regulatory offenses to the Department of Justice (DOJ). The advisory implements the [Executive Order](#), issued May 9, 2025, on *Fighting Overcriminalization in Federal Regulations*. The Division outlined a nonexclusive list of six factors it will consider when making such a determination:

- 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, expertise, or was licensed in an industry related to the rule or regulation at issue;
- 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; and
- Whether the involvement of DOJ will provide additional meaningful protection to participants in the derivatives markets.

The Division also noted that by May 9, 2026, the CFTC must provide the Office of Management and Budget a report containing "(1) a list of all criminal regulatory offenses enforceable by [the CFTC or DOJ]; and (2) for each such criminal regulatory offense, the range of potential criminal penalties for a violation and the applicable mens rea standard for the criminal regulatory offense."

The advisory does not break new ground and outlines a list of commonsense principles for when the CFTC will refer matters to DOJ for investigation and prosecution. However, it is helpful to have a transparent list of factors the Division will consider, as it provides additional information for companies and defense counsel to assess when determining whether to voluntarily disclose a matter to the CFTC, including whether or not it is likely that the CFTC would refer the matter to DOJ. It also arms companies and defense counsel with additional factors to argue when advocating for more lenient treatment by the CFTC. What remains unclear is whether companies and individuals will have an opportunity to advocate to the CFTC regarding whether it should refer a matter to DOJ based on these factors, as this has generally been something that regulatory agencies decide without input from companies and individuals.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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