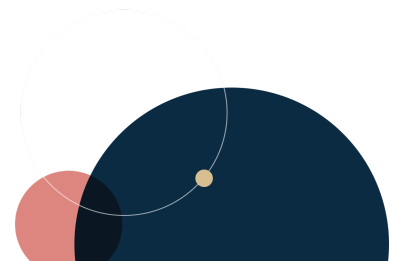


Deputy Attorney General Memorandum: "Ending Regulation by Prosecution"

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Overview

On April 7, 2025, Deputy Attorney General Todd Blanche issued a memorandum entitled "Ending Regulation by Prosecution" (the Memo), instructing prosecutors of the US Department of Justice (DOJ) to cease "litigation or enforcement actions that have the effect of superimposing regulatory frameworks on digital assets." The Memo includes staunch criticism of the prior administration's "reckless strategy of regulation by prosecution, which was ill conceived and poorly executed." The Memo directs DOJ personnel to defer questions about the regulatory framework, including what constitutes securities or commodities, to regulators, emphasizing that the DOJ "is not a digital assets regulator."

Key Takeaways You Should Know

- The DOJ identifies new enforcement priorities in the digital asset space, rebuking the prior administration's "regulation by prosecution" approach and disbanding its digital asset enforcement unit (NCET).
- The DOJ will focus on crimes harming digital asset investors and use of digital assets in furtherance of certain priority criminal offenses, including terrorism, organized crime, and hacking, and will no longer target providers of virtual currency exchanges, mixing and tumbling services, and "offline wallets" for the actions of their users (excepting instances in which those providers may be involved in the same priority criminal offenses).

- The Memo specifically directs prosecutors not to charge regulatory violations in cases involving digital assets, including, without limitation, unlicensed money transmitting, violations of the Bank Secrecy Act, unregistered securities offering violations, unregistered broker-dealer violations, and other violations of registration requirements under the Commodity Exchange Act, "unless there is evidence that the defendant knew of the licensing or registration requirement at issue and violated such a requirement willfully."
- Prosecutors may not bring charges under federal securities or commodities laws in cases where the DOJ would be required to litigate whether a digital asset is a security or commodity or where an adequate alternative charge is available.
- Ongoing investigations deemed inconsistent with the Memo will be closed and any inconsistent policies will be rescinded.

The Memo

Enforcement Priorities

Citing Executive Order 14178 and its underlying policy, the Memo places stringent parameters on enforcement in the digital asset space. Specifically, the Memo requires that DOJ "no longer target virtual currency exchanges, mixing and tumbling services, and offline wallets for the acts of their end users or unwitting violations of regulations," with the exceptions of investigations and prosecutions of "individuals who victimize digital asset investors, or those who use digital assets in furtherance of criminal offenses such as terrorism, narcotics and human trafficking, organized crime, hacking, and cartel and gang financing." The Memo also directs ongoing investigations deemed inconsistent with the Memo by the Deputy Attorney General, Criminal Division, and Executive Office for United States Attorneys to be closed, and any inconsistent policies rescinded.

Charging Considerations

When deciding whether to pursue criminal charges involving digital assets, federal prosecutors are directed to consider:

- Prioritizing cases that hold accountable individuals who (a) cause financial harm to digital asset investors and consumers and/or (b) use digital assets in furtherance of other criminal conduct.
- Not charging regulatory violations, including but not limited to failure to meet licensing or registration requirements under various federal statutes, in the absence of evidence that the defendant violated the requirement willfully.
- Not charging violations of federal securities and/or commodities statutes or regulations promulgated thereunder, where (a) the charge would require DOJ to litigate whether a digital asset is a security or commodity,¹ and (b) there is an adequate alternative criminal charge available, such as mail or wire fraud.

Disbanding of the Crypto Enforcement Team

Consistent with the significant policy and resource allocation changes described above, the Memo disbands the DOJ National Cryptocurrency Enforcement Team (NCET), launched under the prior administration in February 2022 with the goal of targeting fraud and illicit finance on digital asset exchanges and mixers. The Market Integrity and Major Frauds Unit is relatedly directed to "cease cryptocurrency enforcement" to focus on other priorities.

Engagement with Legislative & Regulatory Proposals

Consistent with the prioritization of enforcement against those who victimize digital asset investors, the Memo directs the Office of Legal Policy and the Office of Legislative Affairs to propose legislative and regulatory changes with the aim of improving asset forfeiture in the digital asset space to better compensate victim investor losses. The Memo additionally provides that DOJ senior leadership will designate attorneys within the DOJ to participate in President Trump's Working Group on Digital Asset Markets. DOJ will also participate in the preparation of a report recommending regulatory and legislative proposals to advance the priorities of Executive Order 14178, as well as implementation of any recommendations adopted by President Trump.

Industry Implications

The Memo aligns DOJ priorities with the Trump administration's mandate to end "the regulatory weaponization against digital assets" and reflects broader support of the digital asset industry. The new enforcement priorities promise a fundamental shift away from investigating and prosecuting market participants, such as exchanges and mixers, for "the acts of their end users or unwitting violations of regulations," which deeply troubled the industry under the prior administration. This approach appears in line with industry arguments that the law should be enforced upon individual bad actors using digital asset technologies unlawfully rather than those who develop and host the technology.

AML Statutes: The Bank Secrecy Act and 18 U.S.C. § 1960

The Memo directs prosecutors to cease bringing charges for certain "regulatory" violations, which it defines to include certain charges under the Bank Secrecy Act and charges of unlicensed money transmission. Each of these statutory schemes has formed the basis for several prominent prosecutions in the digital asset space. But here, the Memo's import may be more of a signal of priority than a substantive shift in policy or practice. As to the Bank Secrecy Act, the Memo declares that only willful violations of that anti-money laundering statute should form the basis for criminal investigation and prosecution. However, the Bank Secrecy Act's criminal provisions *already* expressly impose a willfulness standard on criminal prosecutions. See 31 U.S.C. § 5322.

The Memo imposes the same *mens rea* prerequisite on charges under the money transmission statute set forth in 18 U.S.C. § 1960(b)(1)(A) and (B) in digital asset cases, which may not be pursued unless prosecutors can prove the defendant violated the requirement "willfully." The focus on sub-sections (A) and (B) (each focused on licensure and registration requirements), rather than sub-section (C) (criminalizing unlicensed money transmitters engaged in the transmission of criminally derived funds), represents a specific example of a shift away from charges that the DOJ paints as "regulatory."

Whether this directive amounts to more than a rhetorical nod will depend on implementation in the coming months. The Memo does not bar prosecutions under subsections (A) and (B) but imposes a "willfulness" standard on prosecutors considering charges solely under those provisions – a standard that, in practice, may provide little difference compared to the statutorily required "knowing" standard of criminal intent. The Memo's carve-out of sub-section (C), moreover, is a fairly significant exclusion – the principal cases charging § 1960 in the digital asset space have included and indeed focused on the movement of illicit funds, rather than simple "regulatory" failures, whether knowing or willful. Ultimately, it is precisely the work

of the regulatory agencies to which the Memo defers that will determine the impact of the Memo's approach – if the definitions relevant to defining who is or is not participating in "money transmission" remain unsettled, the Memo may provide some degree of comfort to companies operating in a truly grey zone of the law; but as regulators provide clarity, the line between "knowing" and "willful" becomes less relevant as a bar on prosecution.

The Financial Crimes Enforcement Network (FinCEN) has published detailed guidance on what digital asset-related activity constitutes money transmission and, therefore, requires registration with FinCEN as a money services business. However, that guidance did not fully address a number of key questions and has not been updated since 2019. The industry has dramatically changed since that time, with a number of new blockchain technologies and business models gaining prominence only in the last few years. Therefore, many actors in the digital asset industry have struggled to apply the guidance and understand its contours, particularly in the decentralized finance or "DeFi" space.

Securities & Commodities Enforcement

The Memo significantly narrows the scope of charges that the DOJ may bring under federal securities and commodities statutes and regulations promulgated thereunder. Notably, prosecutors may not bring charges where the DOJ would be required to litigate whether a digital asset falls under the federal statutes' definition of "security" or "commodity," a topic of significant contention in the past few years. Paired with the requirement that prosecutors turn to alternative criminal charges, such as mail or wire fraud, where adequate and available, DOJ promises a heavily pared back presence. Similar to those under 18 U.S.C. § 1960, the degree to which prosecutions of securities or commodities law violations involving digital assets are limited by the Memo will depend in part on when and how legislative and regulatory efforts provide clarity on the framework for digital assets, including whether certain assets are properly classified as securities or commodities. While such legislative and regulatory efforts develop, the Memo's bar on litigating whether a digital asset is a security or commodity will decline in relevance. The Memo also requires the defendant to have known the conduct was illegal and engaged in a willful violation.

Federal regulators in this realm have already shown their support for and alignment with DOJ's new priorities and policy approach.

On April 8, 2025, Commodity Futures Trading Commission (CFTC) Acting Chair, Caroline Pham, lauded the Memo, directing CFTC staff and the Director of Enforcement to "adhere to the Justice Department's policy on digital assets enforcement priorities and digital assets charging considerations set forth in the [Memo]." Specifically, Commissioner Pham instructed the Division of Enforcement to "not take any litigating position or arguments that do not comply with the President's executive orders, Administration policy, or DOJ policy on digital assets enforcement priorities and digital assets charging considerations." Notably, unlike cases brought by the DOJ, the CFTC cannot dismiss ongoing federal litigation nor enter into a settlement consent order to terminate an enforcement proceeding without action requiring a majority vote by commissioners. As neither party holds the CFTC majority at this time, Acting Chair Pham directed CFTC staff to "de-prioritize" actions involving violations of registration requirements under the Commodity Exchange Act in the absence of evidence of willful violation of the licensing or registration requirement at issue. Under previous CFTC Chair Behnam, the CFTC entered multiple settlement orders involving failure to register violations against digital asset trading platforms and other market participants under the Commodity Exchange Act.

Relatedly, the Securities and Exchange Commission (SEC), under former Acting Chair Mark Uyeda, has seen unprecedented rollbacks in digital asset-related enforcement, including dismissal or pause of a number of high-profile cases. Then-Acting Chair Uyeda has professed a goal of setting the SEC "on a sensible regulatory path that respects the bounds of the law." Similarly, Commissioner Peirce, a longstanding industry ally and leader of the newly established SEC Crypto Task Force, expressed that the Task Force's hope "to travel to a destination where people have great freedom to experiment and build interesting things, and which will not be a haven for fraudsters."

For additional information on this and related policy developments, please contact a member of Steptoe's Blockchain and Cryptocurrency Practice.

¹ Prosecutors may take the position that bitcoin or ether is a "commodity" under the Commodity Exchange Act, and may file securities fraud charges where the "security" at issue is the equity or stock in a digital asset company.

Practices

Blockchain & Cryptocurrency

Financial Regulatory Compliance & Policy

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Financial Services Litigation

Government & Regulatory Litigation

Independent & Internal Investigations

Securities Enforcement

White-Collar Defense