Crypto Politics & the Regulation of Swaps
Christine Parker, Partner at Reed Smith LLP

Eric: Hi, this is Eric Hess with The Encrypted Economy. This week, we had Christine Parker, who is a partner at Reed Smith, on the podcast. She also recently testified June 30th before the House Financial Services Subcommittee on oversight and investigation and a hearing entitled America On "FIRE": Will the Crypto Frenzy Lead to Financial Independence and Early Retirement or Financial Ruin?

Quite the loaded question. On this podcast, we talk a little bit about that testimony, as well as trying to break down all the things that Chairman Gensler or the SEC is saying this podcast is going to have a lot to keep up, because he's saying a lot this past week. Even Chairman Gensler piled on criticism on DeFi saying that it's generally not decentralized calling the term and he missed.

Thus, sending a clear message to the SEC staff assume that all DeFi projects are centralized in the same way that every single ICO in 2017 and 2018 was deemed to be a securities offering. And before you can say, wasn't it, you might want to listen to my experience, which I share on the podcast. He went further stating for DeFi,

there's still a core group of folks that are not only writing the software. Like the open source software, but they often have governance and fees. There is some incentive structure for those promoters and sponsors in the middle of this. So, with this statement, Chairman Gensler is clearly picking up a very wide brush.

Some incentive structure doesn't leave a lot of wiggle room. It's very similar to his probabilistic statements of securities being on any platform that he made an Aspen. So, the staff enters a box, no wonder he is seeking broad plenary powers from Congress because of course court interpretations of the federal law can be such a nuisance.

Now, Chairman Gensler was a driving force behind swap execution facilities when he was at the CFTC. And he's looking to implement the same for securities based swaps a decade later, and we ask was a successful, did the market needed then that to benefit the market? Maybe we don't care about that, but do we need it now?

It's no secret that SEFs aren't approached that the chairman is looking to embrace for all SWAPS and crypto markets, as well. Is the U S facing a crypto regulatory crisis that requires new regulatory frameworks allow Chairman Gensler to corral it in, to stamp out a lot of early projects and increased burdens, or should we be taking a step back and asking some broader policy questions and ask whether or not our existing system can accommodate this? What guidance needs to be given and how do we foster new and innovative technologies? So, if you enjoy this podcast, please engage with us, comment on it and share it with others who might also enjoy it.

So, with that, I think you're going to enjoy the episode today. We're going to have more episodes trying to unpack what regulation is going to look like in the U S possibly impacting the rest of the world for digital assets. With that, I give you Christine Parker, Partner at Reed Smith.

Welcome to The Encrypted Economy, a weekly podcast featuring discussions exploring the business laws, regulation, security, and technologies relating to digital assets in data.

I am Eric Hess, founder of Hess legal counsel. I've spent decades representing regulated exchanges, broker dealers, investment advisors in all matter of FinTech companies for all things touching electronic trading with a focus on new and developing technologies.

So, this is Eric, with The Encrypted Economy, and today we are lucky to have Christine Parker, a partner at Reed Smith whose practice spans regulatory enforcement, transactional matters related to commodities, derivatives, and cryptocurrencies, including advice on relevant legislative and regulatory proposals.

In fact, Christine was recently before he gave testimony to the House Committee on Financial Services. That was last month or the end of June. Now this is you got to go two months now, but recently before

the House Committee on Financial Services. So, Christine with that welcome to The Encrypted Economy.
Christine: Hey, thanks for having me. I'm excited to be here.
Eric: So why don't you, I gave you a little, I gave a little bit of background, but there's certainly more to your story. Do you want to fill in a little bit of how you got into the space, your work on the hill? Yeah, and how you got here?
Yeah, so,
Christine: so, I worked for Chuck Schumer.
I did two tours of duty, one before law school, one after law school as a legislative staffer. And the second round I focused on energy defensive foreign policy. And in the summer of 2008, members of Congress were really scratching their heads around the dramatic increase of crude oil and the impact on retail customers who wants to buy gasoline for.
Summer vacations getting to work on the lake. So that was the first time I got exposed to the commodity markets. And I remember jostling with my coworker who was the banking staffer. I was like, oh, it's commodity markets. That's all you, it's not energy. He's no, these are the energy markets.
It's all you fast forward. About six months I joined Sullivan and Cromwell and one of my first I went to a practice group lunch. It was for the commodities futures and derivatives group, and they were talking about legislative proposals that came out of that summer the previous year. Spiking gasoline prices and crude oil markets.
And they were talking about the legislative proposal, and I said, oh, I actually, I know the gossip on that. And I know, which members were supportive and why, and it's not, it's interesting, it's not bipartisan. The lawyers of the group looked at me and they're like, fantastic.
Great. So that's really how I got my start was advising our clients at Sullivan Cromwell on the legislative proposals that eventually made up title seven of Dodd-Frank. A lot of them had big Washington. That we're focused on Dodd Frank as a whole, but weren't focused on the particulars of title seven, which focused on commodities and derivatives.
So that's why I got my start advising clients on a title seven and the implications for their activities in the commodities with Rhoda's markets. And then once it passed in 2010 and rolled over to the CTC I advise clients on the regulatory rulemakings that the CTC and some of the other regulators put out in written as a result of the passage of Dodd-Frank.
Uh, really focused a lot on treaty and FinTech and product characterization, a lot of is this a swap versus not a swap. And then at about 2015, we had our first client that rolled up and said, oh, I've got this interesting new product. I want to treat. It's called a bit. We really scratched your heads around it, but, by that point in time, the CTC said Bitcoin is a commodity.
And so, I had the pleasure of explaining to clients. Yeah, this is a great new, innovative product. It's subject to the regulation of the commodity exchange act of 1936. And you're welcome. And so, from there, that's how I got exposed to crypto. Really through Bitcoin, obviously 2017, 2018, a lot of clients were interested in doing ICO's.
So, I learned about the Howey test. Wasn't particularly active in that space, did a lot of advisory work and could never really get comfortable with the characterization of these parties. Likely not securities. And so just from there, I've been involved in advising clients on, CTC regulated matters.
SEC obviously the state banking regulators, particularly in New York DFS and the OCC, there's just multiple levels of regulation, which makes it hard to navigate. But my job has really been, just give clients a roadmap forward in the space. Help them launch their products in a way that's commercially viable, but legally safe and sound
Eric: right.

And certainly, the pathway for trading commodities or the CFTC for things like Bitcoin and futures is a little clearer than it is at the SEC where you're basically so looking at the Howey test on the lake and then making guesses from there. And it's interesting, your, your experience with Senator Schumer. I actually had the experience when I was at direct edge also working with his staff and on obviously more traditional finance equities markets matters. But, and I found that of all the senators, the hill, Senator Schumer was probably more versed from, uh, with regards to the Democrats, at least on financial services matters that isn't necessarily that kind of, understanding isn't necessarily shared across a lot of other Democrats on the hill. Would you agree?

Christine: I completely agree. I, he was always very comfortable advocating on behalf of financial services, just because it's obviously so important to New York city's economy and New York state's economy, and frankly, the U S economy, he was an outlier in that space and that he very comfortably embraced financial services.

There were not, there were other Democrats on the banking committee, they were interested in housing. They were interested in certain aspects of financial services, but I think the w was a champion for financial services, which is not a typical position within the county.

Eric: That's great.

And giving his understanding of it. And I'm asking you to speculate, what do you think his views are on, digital assets? Because it seems like in the infrastructure bill, you soar more Republican support for it. But the hope is that this isn't, this doesn't become a partisan issue because it's, it's the future and you don't want one party's sort of claiming the future. On party lines, it's, you within the digital asset space, there's a lot of different things and it shouldn't be labeled one way or the other. So, I guess what's your thoughts? And I know, listen.

Christine: Yeah, no, totally agree. Totally agree. We don't want to get lumped in with one side or the other, because I think there are aspects of digital assets that would resonate and appeal to both sides of the aisle. And so, we don't want, on one hand, I think we've got some great supporters and we want to maintain their support. But I think on the other hand because we'd done a great job reaching out to the other side of the aisle, particularly the Democrats.

And leaning into their concerns, try to understand them and address them directly. And I think one thing to remember is that the financial services firms have been, present before Congress for years and years, decades and have really built up relationships with offices and have taken the time to educate staffers in particularly.

So, I think the ones that need to remember, it's going to take us some time to really reach that level of saturation with members because they're very busy. They have a lot of things on their plate that they're focusing on. And it's a little bit, this is complicated. I've been, in the weeds of the space for a number of years and I learn something new every day.

So, I think we just have to remember our audience, their staffers, their members. They've got a lot on their plate. It's our job to educate them. It's our job to understand their concerns and speak directly to them. But this is hearts and minds champion. It's going to be a long term effort on our part, but it's, it's crucial that we do that because we want to have a seat at the table.

When, there are legislative proposals. That address crypto that are being considered. And we want members to turn to us and their staff to turn to us and use us as a resource. But it's a campaign, it's a long term canteen. You've got to be talking to folks who, are not supportive and don't understand us and say things that we don't like, it's our job to be effective advocates on behalf of the crypto community and to be talking directly to those people. And not sort a one-off thing, it really is a sustained engagement with members on both the Republican and democratic side and their staff. And just recognizing again, they're overworked or underpaid has got a ton of stuff on their plate. This is pretty complicated.

They're not going to get it right the first, second or third time. So that's why we had to keep going back and engaging with them and sort of, and bringing them along with us as we innovate in the space.
So, they understand the better. That up digital assets and, something comes up or they've got a question, or they're worried about something.
They've got someone that they can turn to who can, understand their concerns, but advocate on behalf of this community.
Eric: So, I wanted to touch on that point, even though I, we're going to be talking about regulation, but, with everything having gone on the last few weeks with regards to both Gary Gensler statements, a little back and forth between the CFTC and the SEC, as well as of course, The Infrastructure Bill that really brought this all front and center, it was important to pause there.
And I think, this, this podcast for sure has a lot of unpacking to do in the weeks to come with our guests, to try to break out all the different components of it, because it certainly. In a matter of a few weeks, wow. Did we get a ton of material going forward to cut through and sort through and try to figure out what are the implications?
But I took it I went off on a path cause usually my, the way that I do this, as I say, what's your background. And then tell me about a personal experience that shaped your values and who you are. But I violated that I went right into the political stuff and all of a sudden I find myself swimming along.
You're like, oh God, I got to go back, but it's going to be a segway. Cause we still got to break out some of your testimony before the house and how it got updated. But before we get to that, let me get back to the beginning. So, a personal experience that shaped you, Christine Parker, please share.
Christine: I'm really I'm digging the vault here. Terminator Two was my favorite, favorite movie. And nobody would expect that, but I love Terminator Two. That's my favorite movie. I loved it. It was a great
movie.
I actually wrote my college application essay about Terminator Two. What's my favorite movie?
And it worked, I got into to college. Kudos to my parents. They looked at it inside and they were like, oh Jesus. They let me do it. They let me write this essay about why Terminator two was the best movie ever. And I think I even had this allegory about like how or why I want it to be like a Terminator when I grew up, but it worked.
But I saw this in some of freaky and it really stuck with me. I mean, I'm not just saying oh, I really liked it. It really resonated with me. So that is, that's a personal quirk of mine. I haven't shared with a lot of people in my sort of grown-up professional space, but my friends from school remember.
Eric: Are you still striving to achieve a Terminator Two like status?
Christine: No, I'm totally giving up. I've got three kids and a husband I'm just trying to survive.
Eric: Do you find yourself ever on the street against your traffic accident? And you want to say F you a-hole
Christine: for sure.
I live in Brooklyn, so there is a little bit of that.
Eric: Okay. Yeah. No, but I'll say the, the Terminator series was brilliant, so I, I, I give you a kudos and yeah. That's not one I've heard before.
Christine: No,
it's not, but I had a lot of Terminator, two posters up in my room growing up. I mean, I really leave.
Eric: Wow. So, the funny thing is on that.
I actually think that if we had 15 minutes and a very focused audience on it, we could totally unpack the parallels of Terminator two to your practice and what you do today. I'm sure we can find analogies, maybe a college course, maybe a college, just like one college session, whatever, but.
Okay.

Terminator Two. I like it. I was actually born on the same day as Arnold Schwarzenegger. So, I don't know what that means. I really don't know what it's got to mean. Something. I think it means that I'm like Terminator to myself. I don't know where to go with that one.
But I like it. I like it. It was definitely out of left field. I wasn't expecting it. So, you threw me, I don't even know what the site podcast is over. No, just kidding. Just kidding. Anyway, so you testified before the house committee on financial services to summarize, because I'm going to ask for your update, right? So, you, you talked about the confusion that exists in the marketplace and security. Is it a commodity it's a both, and the need for more unity? Whether it be through a unified regulatory framework, one that's consistent. You aren't always bouncing back and forth. And then also the need to minimize state and national regulatory regimes.
I mean like MSB, we had Felix Shipkevich from Shipkevich Law a number of podcasts ago, we were talking, he focuses on MSBs among other things. And that whole regulatory framework is I mean, it's crazy. That could totally use a federal regime. So, you don't have to go state by state, by state.
But with all of that and I encourage people listening to the podcast. That was a very interesting house, financial house committee on financial services. And Christine did a phenomenal job and a little secret for people who say, wow, that's a really long hearing and I don't have time put it on two X and you can say, listen to it in half the time, it's something a little more attention. I do this for all my podcasts. I do it for everything. Sometimes I go up to 2.5, 2.75, but then it's I have to drink a lot of coffee and I'm really jittery for the rest of the day. So, choose probably a safe place to put it. But Christine,
given where we are today. How do you think you would update your testimony or what you spoke about at the end?
Christine: Yeah,
no, that's a great question. And to your point, it wasn't that long ago, but yeah, it feels like so much has changed. I think my point to one of my main points, I think still I still stand by it, which is, Congress please empower the regulator is to offer commercial products that retail customers want under that provides the con the customer protections that we're used to and the fully regulated exchanges, such as the Chicago mercantile exchange or New York stock exchange and power, the regulators offer those so that us customers are going overseas to get them and, exposing them to lesser customer protection, regimes, and other types of fraud and market misconduct.
The regulators are not offering their products because Congress has clearly, let's say ambivalent about crypto. I knew that in the, there are some very strong supporters and there some folks that are not quite there yet, so that's still my main thesis, but I would also say, this to the, to the crypto community and to the advocates and supporters, we see what happens.
We, we are a powerful force, we, we connected with, lots of numbers during the Senate Infrastructure Bill. But it's really important that we have a seat at the table to begin with so that we're not fighting, a rear guard defense that we are sitting at the table and we're saying, here's what we need.
Here's what you need. Here's the legislative proposal that's appropriate for this type of legislation.
So, it's a tax piece that goes into the Infrastructure Bill, but we need to see that the table we need to have. Yeah, credibility. And we need to have members trust us that we're advocating along the same lines as what they are looking for in this space.
So, there'll be, you got to see the table. We've got, we're not, we don't have the pen, but we're speaking to the person with the pen as opposed to scrambling to fix bad legislation. That's in on the bus package that has their high likelihood of success of being passed. Us having a real chance to offer amendments.
So, I think it just, it goes back to our initial conversation, Eric, and the original point that you raised, which was, Democrats haven't fully embraced financial services. I think that's a proxy for crypto. I would just say, look, we are a strong, savvy advocacy community of advocates for crypto, Turn on the charm and get to work I'm in Congress and reach out to members, particularly those that are not supporters of

crypto and those that are worried about crypto and really lean in there and engage with them and bring them along the sort of crypto journey.

And they're not all going to turn into, crypto advocates overnight. But at least we will create relationships with their staff and with the members. And when they have questions, they'll come to us. And when they're contemplating legislation, they'll come to us and they'll say, what should we do? Here's what we're trying to achieve. How does this work? How do these definitions work in reality, as opposed to fighting that fact that after finding those issues after the fact? So, I would just lean on that point more, now's a perfect time to start engaging with house members, either going to take up the infrastructure.

What are the crypto provisions look like in the house Infrastructure Bill, who were the members who are the committees that are going to be shepherding that legislation let's figure that out? Let's start talking to their staff and, the, the trade associations have done a very good job, but we need to bolster them, support them and to work, sort of leverage all of, the, the members of this community who are crypto advocates that can also be speaking to staff and developing credible relationships.

Eric: I've heard anecdotally that even within the last month, the regulators, and maybe, maybe even isn't the right word, maybe it's particularly in the last month that regulators, the staff members, following Gensler's comments, following, what appears to be a more enforcement focused regime that staff members are struggling that despite, Gensler saying, or Chairman Gensler, I should say, is saying, come into, you have to come into our rubric, you have to come into our framework. And it's not one of accommodating, it's saying that, come in. And so, I've heard that in efforts to get no action clarity or even preliminary discussions are met with effectively, what would appear to be like a deer in headlights?

Approach, wait, there's no rush. There's no urgency. There's a desire to please let this decision pass me by. I'm not going to give you anything because I don't feel empowered to do anything. And I guess that sort of aligns with what you're saying, but even on a specific by specific no action approach and a no action letter is saying, Hey, I think this fits the definition of the statues for the listeners and.

Basically, a ruling very specifically to this. And you would think that if it's properly framed, That a no action letter, shouldn't be a cumbersome process, but from what I hear, it is anything but

Christine: No, that, that's a perfect example. I think of what I'm talking about because it's not even, I'm, I'm begging for the regulators to move forward with products and your point, I think, is very well taken that the staff starting to feel a power to author, no action letters which to your point, you know, if it's well-reasoned and well thought out and narrow.

That should be, I don't want to say a no brainer, but that’s certainly, a path forward in the interim while we're waiting for more regulatory clarity. And it gives staff opportunity to let you know a new product develop and flourish and see what's working and what's not.

So, we'll have, that no-action authority that they can go back to and say, okay, we've watched it. And, from a permanent basis, you were going to say yes or no, but to your point, they're not even, they don't even feel empowered to do that. And I think it goes back to your original plate and that the SEC in particular is really doing sort of an enforcement by regulation approach here.

And, very, that's really difficult and problematic, and I'm not sure that's going to end up well for them. And it's certainly going to be harmful, I think, to, to retail consumers in this space and to innovators who are trying to launch a product. Absolutely no clarity is to, what is actually a security in that space.

The enforcement orders don't clarify, then they all say, in this particular offering, what's the security for these reasons, they're, they're pretty generic and they're not helpful in creating a path forward. I frankly think that's intentional because again, I think the regulators are looking over their shoulder at what Congress has ticketed into them.

And when you have Senator Warren, her, her views in this space are very clear. I don't see, savvy regulators going to take cues from her absent. Any other Senator speaking out forcefully in sport or crypto that has her stature in this. So, it's been a tough spot.
Eric: Right. And then it doesn't get assisted by Poloniex. I think Poloniex, first of all, before the podcast, I said, Christine, I said, we should we talk about Polynesia X? And she said, I think gets Poloniex. So, if either of us are pronouncing it correctly no. If either of us it's we've only read it.
So, if somebody wants to sign us the proper pronunciation of Poloniex or Poloniex, but in any event, the recent order, by the SEC, or the settlement, I should say with Poloniex, it goes back to a period where they were offering crypto assets on their platform between 2007 to 2019, has her purse even noted in her dissent that this was a period where there was a lot of a lack of regulatory clarity.
So, some of the, the, the way that the action was pursued and settled is curious because the uncertainty was certainly, understandable. It was not. So, and there were efforts to try to grapple with this. And what's also interesting about the settlement and I just want to get your reaction of course, is that Chairman Gensler in his recent speech to the, to Aspen the Aspen speech, I should say said, well, if you've got 50 to a hundred crypto assets on your platform, the chances are, I'm a statistics guy.
I'm not going to make five. Cause that's, they're not going to get in trouble later on. People were like, you're the guy, but he basically made this point. The odds are, if you've got 50 to a hundred digital assets, the odds are that you have a security and curiously Poloniex comes out and they don't even state what the security is.
All right. It's almost like it just feeds into, we have a settlement order because the odds are then in 2017 to 2019. Yeah. Odds are that we were probably trading security. Probably. Yep. So, we accepted and I'm sure there's more to it, but that's the settlement. That's the message. The odds are that we were doing this, it's not really important what it was that we were doing, but the odds are that we were doing it.
So thus, we're making this, the settlement and trying to move on. What are your thoughts on that?
Christine: Yeah, no, I just, it's so problematic. I, look from poorly so's perspective. I absolutely get that. They just want the settlement. They want a chance to move forward. With a, with a clean slate, if they want to be an ongoing business, I absolutely understand, that the, the pressure, the need to settle with the SEC, but, from, you uh, a broader sort of market perspective, it would have been great if they could have challenged the SEC in court and said, okay, let's.
You let's, let's, get into the details here, which exactly, of our offerings was the security. And how do you determine that? And does that rationale make sense? Is that reasonable? And in, 50, 50 hindsight at me may suggest me in my we have the SEC to believe that their case is stronger.
Then it actually was, but for the industry will be really helpful if, someone could challenge that and say, okay let's put some meat on these bones, that's all we've seen really this sort of generic, um, you were offering securities and you weren't.
Duly registered to DSO, blah, blah, blah. And that's just that again, I think goes along this line of regulators who are wary of frankly providing any guidance or sort of path forward in the space while Congress, while leaders in Congress are not being are not supportive of crypto. And so. We see this on the regulatory side, we see this with the staff and the actions.
We see this with the lack of commercial offerings. And we absolutely see this only enforcement side. And then, it's interesting Poloniex, we're sort dabbling over on the CTC side earlier a few years before trying to figure out okay, is what I'm offering subject to the CTCs regulation, because it's just not clear.
So, uh, I think it's just unfortunate all around. They got started got caught in this trap. They had, to, uh, very chairman cancerous formulas, they had more than 50 offerings. So therefore, one of them is enemy security. So, they're caught, but, absent or showing what that security is and why, I think.
Very problematic.
Eric: And I'll say even back in 2017, 2018, I was associated with an ICO. And w when I got involved, I actually stripped it of, I basically said, we, we, we got on board and we said, we are going to create a

prepaid call. It's not going to be a security under any circumstance. We're going to call an ICO, but it is not going to meet a definition.
Nevertheless, we attracted the attention of enforcement. Nevertheless, it was a very difficult battle. Oh, it's terrible. And when we finally only pulled it, I spoke to one of the heads of enforcement and I said, this offering was designed. Not to be a security. It was designed. And the response was every single one of these things that we've seen so far has been a security and to insert the probabilities are, is not the word to use, but the odds are, yeah.
This was two. Yeah. And so, we got regulated based on, or the troubles that we encountered was based on the odds, our approach, versus the fact that what it stood for. It was designed, anybody could have said you know what, if you just did this, it wouldn't be a security, a prepaid call.
With no appreciation potential. Yeah.
Christine: Yeah, no. I mean, I mean point that members of the staff of Congress they're overworked and underpaid, but you would expect the staff at the regulators to have a little more bandwidth to do the hard work and be thoughtful about what they're looking at and, you know, not just see everything as a nail.
I mean, there's supposed to be much savvier, that approach, but frankly, they keep them from chairman Clayton. That was, again, that was sort came right from the top. And if you're staff, w what's a long-term benefit to you of, going against what your chairman is,
Eric: 100%.
So, with that, we're going to start off. Oftentimes in this podcast we go horizontal and then we go a bit vertical. And with that, we're going to go back to the ABA speech and Chairman Gensler's discussion regarding security based swap execution facilities. Now for a lot of participants, they're going to be like this one's sort of a new animal.
Like I get a registered stock exchange. I get, maybe you get an irregulated alternative trading system in the equities markets, but the SEFs there, a Dodd-Frank creation, maybe you re maybe I'll leave. I'll flip this one to you. What did Chairman Gensler say about SEFs? And maybe we start off with what's a swap and what is the SEF?
Christine: Yeah, no those are great questions. I mean, the sets are very much a Dodd Frank creation. Interestingly, the stuff, the swap execution facility is actually very much a Chairman Gensler creation when he was at the CFTC. I think the intention. Yeah. When they, when Congress was drafting Dodd-Frank was to create sort of an alternative market or trading platform facility for what we call the CFTC side eligible contract participants, which are sophisticated and investors.
And the idea was to create sort of an exchange. That has fewer regulatory requirements and was really designed for sophisticated traders. So, no retail customers. And so, the Seth swap execution facility was intended to be, that type of exchange. Training platform.
In reality, the regulatory after chairman counselor was finished with the definition of Seth, the regulatory obligations are largely the same as those as a fully regulated CCC exchange, designated contract market. So, lots of regulatory and compliance obligations associated with the Seth. Not sure that's what Congress intended, but that's where we are today.
Designed only for non-retail customers on the CFTC side. The one of the big benefits is that you can do bilateral settlement. So, you don't have to have the contracts clear through a central clearing counterparty or a clearing house. So, you can allow bilateral settlement, which creates a more opportunities for trading relatively illiquid.
So, the idea, when they were drafting Dodd-Frank title seven, is that everything that happened on the swap side, the CTC side would happen on the security based swap side the STC side. So, a security based swap execution facility is going to meet essentially the same thing, a training platform for security based swaps that is designed for institutional customers and not retail customers.

And you don't need the sort of central clearing that you have with, an exchange because it's designed for a really uh, uh, just nonretail customers, sophisticated traders that are looking for price transparency. So, that's what we have on the SES of the CTC side right now.
It's really just for interest rate swaps and broad based indices on a CDSS. So, there's not a ton of trading. Steps other than what's required right now by revelation. So, they're not the sort of flourishing marketplace for price discovery for all different types of swaps. It's absolutely, uh, there are sets that are offering training Bitcoin.
Products, but it's, it's not the sort of, you don't have the liquidity and volume and treating that you have on the spot exchanges for crypto. So presumably in chairman, Gensler's mine, the security based swap platforms are places where you can go to trade, crypto for, product under tokens that have single name security, underlying hers.
And that's where you would go to, to trade those. There, there are a couple issues with that one. They're not available to retail customers. Second, there's not a huge amount of treating volume where liquidity third, no one's ever actually set one of these up and forth. It's not clear that you could buy a single name security token with Bitcoin on a security based swap exchange.
So, the market is totally bifurcated. It's unclear, so, so I think that's a big challenge in the space, but he did throw that out there in his speech before the ABA.
And it seems like he's certainly embracing the swaps security
and swap space.
He now is, has authority over the SEC and the security swap execution facilities.
So that's totally, par for course, that he would embrace these as a, an opportunity to further regulate the crypto.
Eric: Right. And he today, basically an MOU, a memorandum of understanding, was announced what European regulators with regards to the regulation of swap space dealers and participants, was it the single statutory?
Was it the SSM? It's in the MOU, but basically the notion of a single statutory framework for compliance and recognize compliance and listen, I think you told, before this call, you said, listen, this is a sign that's been long overdue, and it's, it shows that he's serious about it, but it also shows you serious about the whole swap space infrastructure.
And he really wants to bring that into for the swaps. A regulation was proposed in 2011. 21 to now it's 2021 and 10 years later, by the SEC, not the CFTC has had it because he was there. But yeah, 10 years he's dusting it off and saying, let's take it off the shelf. I note in his, I think it was his ABA speech.
He said something. He was, it was a sort of an off to the side comment when he was talking about credit default swaps, which is where they implemented the steps. And he said the market was about what 68 billion is what he said. Is that correct?
I looked at those numbers. Yeah, something like that. 63 trillion.
Was it a trillion? Okay. All right. But what I noted I'm in terms of market size
Christine: which is just notional the underlying risk, it's just the notional amount of activity, which was significant.
Eric: So, I should have, firmed up that number, but so it was 68 trillion, but what I noticed is, yeah, And it's considerably smaller today.
It's 6 trillion. It was basically, he quoted, it was one 10th the size of it was, and yet we saw nothing wrong with it. It just moved on. It was like evidence of a successful market that worked. And one might ask, well, did the regulation facilitate it or did it restrain it clearly it restrained it.
Maybe it restrained it in a way that was. Proper, but yet it still had a 90% hit on the amount of notional transactional volume. And if that's what's being proposed for cryptocurrencies, one, one has to wonder whether 90% is okay by his

Christine: it's a wonder, one has to wonder. Look, I just, again, I just think there are members of Congress that, have Chairman Gensler's ears and they're alive than that, they're, they are of the view. More is bad and less is better because these are for better or for worse sort of robber barons out there, stealing from the little guy and the more you can do to shut them down, the better off we are. That is really their narrative and it's a solely focused on the bad actors. And so, there's no sort of attention given to any sort of benefits to the retail customer or to the institutional customer.
The focus is solely on. The bad actors. And so that's what leads to these types of problematic outcomes where you've got these sort of broad based enforcement orders. You've got staff that won't issue uh, no Ashlyn or you've got staff that will, basically not allow you to certify products that are within their authority that are perfectly reasonable, in relation to the core principles, you've got the, the loudest voices in this space.
Are focusing just on the bad outcomes of the potential bad outcomes. And so that sets up all the oxygen to talk about, Hey, look, we want to offer these products. Here's how we want to do it. We're thoughtful, we're reasonable. Like we've got a prepaid card. That's, it's not a security, just listen, don't, you just, let's all just sit down and talk rationally, like adults.
There's just no space for that right now. Because you have people that are sort of, focusing on, again, that actor's ethics, pensive, literally everything else that the, these products have to have.
Eric: Right. And certainly, for one other thing that The Encrypted Economy has to unpack is, he did make reference to additional plenary authority, Chairman Gensler.
The question is without specifying what that was. But if it is to summarily determine what is, and isn't a security w provide more insulation from judicial, bringing it before the, you know, the court system, that's obviously problematic on a number of fronts because then it doesn't have, it's a singular pathway for determining it and the chances of getting it wrong.
Just go up and measurably and these things we're talking about, a very innovative asset class that is going to be with us here, to stay, uh, assuming that I think it's going to be here with irrespective and how we deal with it is going to determine whether or not we have a piece of that marketplace or not, or whether it just moves offshore and it sees elsewhere.
Christine: I think the regulators members of Congress, I think don't understand quite how easy it is to access these markets offshore. And so, the focus in the U S of the bad actor, as opposed to, how do we make this product safe and commercially attractive to us investors? It just harms the U S investors because it drives them, offshore.
It's not hard to access a website with the VPN. And so, the, the focus on bad actors I think is problematic. And I also, I think, we've got to be, chairman counselors out there, like making a lot of pronouncements and a lot of things. And I think it goes back to our initial thing of our conversation, where we're talking about the regulatory framework here.
It's a little complicated because. Unlike other economies. We've got to market regulators on the security side and the derivative side. And I think when people hear chairman, counselor speak, they are, it sounds like he is the sole regulator, but in fact, the CFTC has authority over the predominant market share of crypto products that are treated and offered in terms of market share, that are available in the U S and so would he, what he's talking about, frankly, is kind of an outlier. He's talking about tokens that, um, don't have a, on a consolidated basis, don't have the market share that like Bitcoin and ether do. And so, I think people get confused members of Congress, they hear Chairman Gensler speak.
And I think it's confusing because he's he doesn't acknowledge that reality that the CTC has the lion's share. Of the crypto markets under its specific jurisdiction. So, I think that's also confusing to members of staff who are listening to him talk and they're like, oh it sounds like the easy thing to do is give the SEC just broader authority starting with determining what's the security and what's not.
And, To your point, having that, having the SEC have that sort of sole authority, I think it's going to be problematic, whether they take a narrow or broad approach because you still have the bulk of the

market under the CTCs jurisdiction. And despite what we've heard, I can't imagine that the, those committees are going to approve legislation that gives the authority back to the SEC over.
They couldn't either. And it just, it doesn't make sense for a number of reasons, but again, I think it is confusing when you hear German counselor speak. Cause you're like, oh he's the cop on the beat. The SEC has authority over digital assets and that's just, that's really not the case. Frankly, they probably have less experience actually regulating digital assets.
Then the OCC, the CFTC. The New York department of financial services, Wyoming. They just, they're just an enforcement road. They haven't actually even regulated these assets. So, uh, I do think there's a lot of confusion when you hear him speak. But when you remember that he's really speaking to, an audience with one or maybe two people, it makes sense, I think it's not necessarily helpful for the average listener I'm trying to get up.
Eric: And they don't truly regulate it. They just prevent it.
Christine: No, right there, literally I do not have experience regulating these assets again. I think in my mind, the New York department of financial services has, the, the, the team of lawyers who are the best regulators in the space. Cause they've been doing this the longest.
They are regulating a wide variety of market participants. And they've been doing this for, five or six years, which is a lifetime in this space. Yeah. The CTC is also actively regulating and not just by enforcement, but actively regulating these products. The SEC is not doing that. So, it just, again, it goes back to this narrative, the focus here has to be on.
Preventing the bad actor and that's what the SEC is doing. And that's, a part of the story. It's definitely not the whole story.
Eric: So, and now if you're a Coinbase or a cracking, an exchange trading, the 50 to a hundred digital assets or more that Chairman Gensler refers to, it seems pretty clear that he's suggesting a few different.
Registrations more than just even one. But I mean, listen, as an exchange, I was a general counsel of an exchange. We were, we had a routing broker dealer. We had an exchange. We actually had two exchanges are regulated twice over there's overlap. It's not like you're doing something completely different, but still like a cracking or a Coinbase presumably would have to register as a.
Securities exchange for the securities that are probabilistically on their marketplace, then they might have to. Register as a staff if they permitted what was
Christine: Like the perpetuals with a single name, security under liar with, the perpetual products, which, it's not clear if they're a future, which I don't know what that would be the security space or a swap, but yeah, they're definitely popular products out there that likely would be securities.
Again, he, I don't know, you can't buy them with Bitcoin and ether. It just, the bifurcation just doesn't make sense, but it's challenging space, but yeah, it's, there's potential that they'd have to be regulated as to security based swap execution facility. But that being said, if I'm cracking on Coinbase, I've got my team of lawyers, I've got some capital, I think.
It's not a fight, but I think it's worth drawing a line in the sand and saying, we're interested in working with you SEC to better understand what the security is, but you can't just come in and say, you've got 125 tokens. And so therefore at least one of those, the security, or we're going to come and shut you down or, make you deal with something without some due process, frankly.
So, I'm not cracking on Coinbase, but if I were them, I would want to hope that they're not going to go down without a fight. W what's if, if the SEC finds that there's one, does that mean that they have to do lists? One of the SEC takes the same approach. It doesn't say, okay, these five tokens we think are security.
So, they just say, you're offering securities and you've got to register with us or shut down, registering with the sec. I think Frank would kill the boom liquidity in a lot of, in these markets. And so. I, my, my hope is that they draw a line in the sand, and they say, where tell us which one is a security and we'll do

it, but we're not going to take the blanket approach that we have to just wholesale register with the SEC, because you think through, we're probably offering some securities.

Eric: But it, that approach would also eliminate a lot of stable coins that are used to purchase since by his definition, they're either funds or they're securities based offerings as well. That's where it gets difficult. If you even start to, you can do it all with USD on cracking and Coinbase.

So, I guess that's what it pushes it to. So, what happens to the SEF? Now like the, the, the swap dealers, the whole regulatory regime for securities based swap. Is an area that against the chairman against seems very focused on what do you predict happens in terms of the participants in the marketplace and they backed on the

Christine: crypto markets?

Yeah, no, that's a great question. As you pointed out, The SEC is security based. Swap regime has language suffering. Beth. They're finally getting around to registering dealers, which starts this fall. Chairman Gensler said he expressed like 40 to 50 and these registered as dealers, I think that's, that seems like a high number to me.

I could be wrong. I think it would be more like 20 or 30, just because a number of participants in the space have already registered as a swap dealer. There's not sort of a, there's not like a, you're building a whole new regime to become a security based swap dealer for a lot of them, the head is just may not be worth it.

So, they just may shift that business in a way since they don't have to register. They're going to start registering as dealers and. Someone may come along and set up a security swap execution facility. I don't see in a short term, anyone, I don't know. It would be really interesting to see if somebody does it for crypto under liars, but I think the real challenge is going to be, is there enough interest to set up a whole trading platform for security, B swap digital asset products, X, Bitcoin ether, is there a.

Interest in that space to have that kind of market where you can't have Bitcoin, it'll be a good test. It'll be, interesting test and, maybe, maybe people are using stable coins and, I don't know, like a Bitcoin best backed stable coin or something like that. But I think it's challenging because the liquidity.

There'll be two different liquidity pools. And I just don't know if there's enough institutional interest in security based swap digital assets at this point in time. And maybe that people go to the dealers for them dealers to offer them. So, it may be that one or two of the securities swap dealers set up a trading desk for digital ads.

But then it's also a lot of work, their capital requirements. There's likely to be margin requirements who knows what those are. You've got to report them. So, there's, there's transparency around it. That just may not be appealing or attractive. I think frankly, if you're an institutional or a trader in this space, you're not looking at gaging the U S security based swap dealers, gene, you're going to be going overseas.

So, it's like Singapore and Hong Kong to get the liquidity that you want. Why deal with this mess?

Eric: Why would you go on a tour boat? If the captain's throwing over the passengers, as you're floating out to water, like, why would you invest in that boat? It's like, you bring on, maybe there's a better analogy.

I'm sure. But why. Yeah, it's a market. That's contracting like the very forces you have to get regulated to offer the service, but yet the same regulator is also very active in enforcing against whatever you bring onto your platform. So

Christine: it's a challenge inactive. Why, why deal with that? Mess? My deal with that.

Hassle just, train out of Singapore, trained out of Hong Kong, just why, why deal with that? At least leaky, probably not supposed to meet you as person, but

Eric: yeah, probably a leaky bucket would have been a better analogy. Right. Every time punching holes and leaking, what Do these analogies aren't working this may or may not stay in the podcast if it stays in just for comedic effect.

But
Christine: It's like you're taking a jungle. And you pay all this money to get on the boat. And then the rock is just throwing you out to the crocodiles left and right. And you're that's not what I signed up for. I signed up to be on the jungle cruise. I paid good money to be here.
Why are you throwing, the fun people off the?
boats?
Eric: Yeah. That's a really bad ad campaign. The people who come out of our crews love it.
Christine: Right. If you make it, but
anyway Nope. It's, it's a tough, it's a tough place to be. And again, I think we have this reality where the regulators are looking over their shoulders and they're a couple of loud voices coming out of them from Congress.
And these are the voices that they listen to, right, they are their constituents. These are the voices that matter to them because they've got to go before them, on an annual basis or quarterly basis, or whenever they're called up to Congress to testify before Congress. And who wants to spend their time explaining justifying why they offer it a product that somebody, a member of Congress just clearly doesn't understand what it does, but they think it's.
Why, why, why waste your political capital on that?
And so, it touches on another, your point, which is what falls, what would fall to a security based swap dealer versus what would fall to a CFTC regulated swap dealer. If I want to be a swap dealer, In, particularly with regard to crypto, probably hell of a lot smarter for me to do it underneath the CFTC regime.
And it's probably going to, it's probably going to be hard to make the case that if serum isn't a commodity at this point, it's sort established, I don't know. Do you know, maybe chairman Gensler would like to grab that too, if he's chairman?
Oh my God. Would like to, I'm sure he started, that's a hard one to undo that's a hard goal to see him. I don't see that happening. But yeah.
Eric: And if he did, it'd be a little bit of the Icarus syndrome, right? Because in order to grab that, it'd be flying a little too close to the sun, I think, but, moving aside from Bitcoin and ether, now the question becomes with the new chairman Gensler focus on regulating this space.
In a writ large, expensive way. Like how the classification of a digital asset as a commodity, is that going to get much more complicated now than it was before?
Christine: Get more complicated? It's basically, I, I, I agree. So, so. Ooh. Where do we go from here? I think one of the things that I would hope never to see, but it seems like we're moving in that direction. This there is from Dodd-Frank, there is something called a mixed swap, which is a swap that has elements of a security and a commodity. So that could be that as what, if you've got a single name, you've got a single name, security under liar, and it's also referenced to, Bitcoin, right. That's a mix swap a sensibly, both the CFTC and the SEC has jurisdiction over those products.
And there's a sensibly, a path forward for somebody to offering that, I mean we're 10 years out of Dodd-Frank. We're just standing up the security based swap deal. Regime security swap regime. Nobody has wanted to test the waters of a mixed swap because the, the swap regime is pretty intense.
The security based swap regime was going to be equally intense and then being in the crosshairs of. That's, that's just a market killer. So, I think, I think we're going to see some consolidation of Bitcoin and ether on one side and then everything else on the other side.
And I don't want to say an absolutely not saying that everything on the other side, Is not a commodity or it is a security, but I'm just saying for the time being, we're only going to have clarity, real sort of meaningful clarity around Bitcoin and ether. And it's going to take some time to figure out a framework to evaluate what is the security.

And what's not, I think of chairman, counselor had his way or everything else would be a security. You've had that experience. That's essentially this, the approach of the status seeking that if it's not become- it's a security. And even though that's clearly not correct. But I think that's going to be the lay of the land right now with chairman Gensler at the helm, unless, and until Congress kind of Swedes in and sorts out this mess and creates a framework to help the market regulators, make the determination if somebody needs security or something, a commodity.
Unfortunately, I don't see Congress doing that anytime soon. And I think if they did do it, it would be some kind of framework in which the SEC kind of has the first buy with apple and anything you've been on deemed to be security may be a commodity. But that's kind where we are now.
And so that would just be enshrining, the sort of the mess that we're in right now, where the SEC sees everything as a security and can't really take, doesn't have another way to approach this space, because it's, it's power rep. So that's tough. Like those are tough sort of issues to unpack until we throw in what's the solution here.
Yeah. None are really fortunate. Because again, we go back to this sort of bifurcation in Congress between the CTC, the SEC they've got different power bases. So, it's, the, the way the path forward in the short term, I think is going to be challenging. If you are not squarely dealing with something that's Bitcoin Eve.
And then it's also going to be challenging as SEC stands up its securities swap regime. And I think that's going to be a pretty intense. Please to offer innovative new product, developing sort of volume of liquidity and garnering some market share that space. It's hard to do it to begin with.
It's hard to do it in a new regulatory regime and it's hard to do it with a regulator that really just wants to shut you down. So. Kudos to everybody out here, do the best they can. I, I, I think this goes back to our original conversation around how I would revise my congressional testimony.
I'd just say to the, to the crypto community, we're our own best advocates. We've really got to be out there pushing Congress along so that we're not stuck in this space where. We're, we're being regulated by people who don't understand us and don't like us and are not, really interested in helping us develop.
They're just interested in growing their power.
Eric: All right. I was hoping by bringing you on the podcast, you would clarify everything for us, but she's Christine, why couldn't you have done better on that front? No, just kidding. It actually does. And provides a lot of, I mean, listen, the point of this is to try to get some clarity around what is not clear by definition at this point or friendly or encouraging of frankly, of innovation.
Uh, so. We're going to focus on it, in a number of episodes on the regulatory import and lobbying quite frankly, because there's a lot to unpack as well. So, listen, thank you so much for coming on.
Christine: Thank you so much for having me. This was a lot of fun. I love talking Shaw and I got to talking about Terminator Two.
Eric: I know
Christine: This is like a huge win win, so thank you.
Eric: Thanks so much Christine.