

diffusetap
Virtual Event Series

From CFTC Crypto Taskforce to NFT Innovator

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DiffuseTap: From CFTC Crypto Taskforce to NFT Innovator

Last time on DiffuseTap, Jeff Bandman, Principal of Bandman Advisors, talked to us about creating the first crypto taskforce and how it originally was not intended for regulation, what makes the CFTC a potentially better suit to handle crypto regulation than the SEC, and why the CFTC had to step in against Ooki DAO.

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DiffuseTap

This networking session is part of our weekly virtual events series. Networking (you'll bump into at least a dozen high caliber fund managers) meets purposeful (you'll tap into brand-new sources of ideas)... straight from your armchair like a boss.

Meet the Speaker



JEFF BANDMAN is Founder and Principal of [Bandman Advisors](#), an advisory practice that helps clients such as governments, startups, and global firms meet strategic innovation and regulatory challenges. Prior to Bandman Advisors, Jeff was a senior official at the Commodity Futures Trading Commission, and one of the first crypto regulators. He led the creation of LabCFTC, the first hub for engagement with FinTech innovation established by a U.S. market regulator. LinkedIn: [@jeffbandman](#)

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KENNY ESTES: Jeff, would you mind unmuting yourself and telling everybody all about your background and what you're up to now?

JEFF BANDMAN: Sure. Good morning. Great to meet everybody. Looking forward to chatting further. I'd say I'm a corporate lawyer, turned financial services business executive, turned financial regulator, who became one of the earliest regulators to work on crypto issues as a senior official at the [CFTC](#). I started a blockchain and crypto asset taskforce in 2014 to 2015, after we testified to Congress that we thought virtual currencies were a commodity, and therefore of interest to the Commodity Futures Trading Commission.

My day job is regulating financial market infrastructure, but my side hustle was blockchain. That led to the design and launch of [LabCFTC](#) in 2017, the first US market regulator to have an innovation hub. Then, I spent a number of years doing a mix of teaching policy work, advising governments, and advising companies. I was doing consulting on a portfolio basis.

And then about a year ago, I started working with somebody in the NFT space, who is also a big champion of the open metaverse. He's known pseudonymously on crypto Twitter as [@punk6529](#). Nowadays, my main focus is we have an NFT asset management business. As we mint NFTs, we are advocates for an open metaverse and have launched an open metaverse initiative.

I also do a fair amount of policy work. I'm an advisor to [ESMA](#), which is the European SEC, and the [EU Blockchain Observatory and Forum](#). I run a quarterly closed user group of regulators from around the world via Global Digital Finance, now called [GBBC Digital finance](#). Back when I was a corporate lawyer, we built and ran [Cantor Fitzgerald's](#) market data business after 9/11. I was first exposed to crypto in early 2014, then I went to the CFTC and dug into it as a regulator. So, that's a brief intro, from corporate lawyer to regulator to NFT degen. I look forward to today's conversation.

AYLA KREMB: Awesome. I will jump right in with a question into the past. The CFTC Taskforce. What is its job? Maybe at its inception, it was one thing and then it later became something else, but what was the main objective at the starting point?

JEFF: The starting point goes back to the time that Chairman Tim Massad, who succeeded Gary Gensler, testified to Congress in 2014 and said we thought that virtual assets, Bitcoin specifically, was a commodity. We were starting to see more activity both on the virtual currency side and with people using Blockchain. We started up the taskforce because we thought we should know a little bit more about it.

There wasn't necessarily a plan to do anything regulatory. In fact, at the beginning we had two missions. One was to solve the problem that regulatory agencies can get very siloed. Part of it was to do something horizontal and to make sure people from all parts of the organization, which included enforcement, data scientists, economists, and lawyers, were all discussing it, and that we could discuss internally.



We also had people from traditional companies come in and talk to us, as well as some of the new companies. One of the Winklevosses came in. Joy Krug, who is now at Pantera, also came in to tell us about it, and all these different people. It was very interesting to learn about these things. As I was the chair of this, I started chatting with the Treasury, the SEC, the Fed, and then later on, international regulators.

Today, there's this firehose of information, even regulatory information. In fact, the BIS was able to do a paper a couple of years ago on the market impact of regulatory statements. But at the time, we were all just figuring it out together. So really, the first job of this taskforce was to just get a handle of what was going on both internally and externally when we learned things, and to disseminate it around the agency.

Flash forward a couple of years of this work going on, Chairman Chris Giancarlo, now known as crypto dad, came in. I was doing this alongside my principal job, which was supervising systemically important market infrastructure in the form of clearing houses. He came in and said he wanted me to focus just on this and to set up an innovation hub. He said, "I know other people call these sandboxes, but I don't want to call this one a sandbox. I want to call it a lab. People can get hurt in a lab." And he said, "You're old enough to remember Lab Morgan, from the .com days. Well, I'm going to call this lab CFTC." And I said, "Wow, great name". So, we populated that.

I think this groundwork, back when there wasn't necessarily a regulatory agenda, really did make the CFTC one of the best prepared regulators. By late 2017, as the exchanges proposed to list Bitcoin futures, options, and swap execution facilities, I think the agency was ready because it had done a lot of the homework and had already had that internal discussion.

KENNY: Okay, so that's what the CFTC is. One question. I think we'd like to say that at the end of the said taskforce, when you left it, everything was crystal clear. But that is not the case today. I keep hearing this guy named Gary over at a different regulatory agency talking about crypto, and there seems to be some sort of turf war. Do you want to give us a little lay of the land where digital asset regulation stands today? And if you have your crystal ball handy, maybe you could tell us where it's going to go in the near future.

JEFF: I think that even before crypto, navigating the U.S. regulatory landscape for financial businesses or innovative businesses could be challenging just because you have these two different layers. You have state regulation and federal regulation, which are often overlapping things. I think digital assets provide both some familiar challenges, but also novel challenges because the instruments can change characteristics, and because it's very programmable.

So far, the U.S. has had a little bit of legislation at the state level, but there has not been a lot of legislation at the national level. This actually makes the U.S., in my opinion, an outlier. A lot of other jurisdictions have



had national legislation to deal with crypto assets. Europe just passed landmark legislation called the MiCa crypto asset reform. Japan has also done it, and a lot of other countries are doing it.

In the U.S., there has been discussion in Congress. Over the last three or four sessions, new things have been introduced. It feels like we're closer. Senator Toomey said he thought we would get stable coins during the lame-duck session a few months ago. He said he doesn't know whether we'll still get that, but it seems like momentum is building for it.

In the meantime, for market participants, it can be very complicated navigating what fits into where. I think some areas are clear, like the AML and money transmission. Those things are clear. But I think some of the newest stuff, like web3, is very challenging. I think that's an area where the SEC could be doing more, but hasn't.

The thesis around web3 is that you're creating a new phase of the Internet where users can participate in economics and governance. That also potentially triggers the so-called Howey Test, which is the definition for whether you have an offer of sale of securities, and figuring out how to navigate what's legitimate and have some safeguards around it versus what opens the doors.

Crypto fraud is very, very challenging. It seems like the SEC has not shown a willingness to really step in and do some blind drawing there. And so, it may be Congress that has to set the direction for this. I think that's more likely to happen after the midterms this year.

AYLA: What do you think about the current way in which regulation happens, where it's almost more enforcement-based without putting the rules down upfront? What's your thinking around that? Maybe we'll take some examples. Somebody in chat posted the Ooki DAO cases that just happened recently. What is your thinking around that?

JEFF: Let me break that down into two parts. First is regulation by enforcement, and then Ooki DAO. I think three or four years ago, it seemed like people were saying they wanted more clarity. I think part of that was a bit of crypto exceptionalism. People were saying "Because it's crypto, we don't want the rules to apply to us." I don't think that reasoning was particularly persuasive to the regulators, whether it's the SEC or the CFTC, or anybody else. I don't think that's persuasive to policymakers as well.

But I will say, I have seen a lot of companies that try to engage and get guidance not because they're trying to find some loopholes so they can not comply, but because they do want to comply. And I think a lot of those companies have been frustrated. In my opinion, I think web3 would affirmatively be a good thing for society. I think that the demand is there. And I think it's not helpful when some of the rhetoric of regulators demonizes market participants. I worry that people are not genuinely trying to navigate these things because of false assumptions.

The SEC's job is a balancing of missions. Every regulator is balancing missions. The SEC is balancing capital formation and investor protection. But I think there's more they could be doing to write rules. I



understand why they're hesitant, because we have decades and centuries of people trying to part investors from their money. They're right to be cautious. But I do feel like they could be doing more.

This Ooki DAO case, I have to say that that came as a bit of a surprise, frankly. This is an enforcement decision that the CFTC just announced in late September, like a number of these enforcement cases. I've spent a lot of time in crypto, but I had never heard of these guys, the individuals or the product or the platform. It seems like they came up with an unregistered market, and they probably should have registered with the CFTC from what I can tell from reading about it. And then, they thought "Okay, well, we can get around this by just transmitting it into a DAO, which we are still potentially going to control."

The job of a regulator is to see who should be registered and who isn't, because part of their job is to create a level playing field for the people who actually are registered, who came in through the front door and are playing by the rules. But what was novel about this Ooki DAO case was that they found a theory of liability not just for the people who were controlling it, which were the two defendants who reached a settlement with the CFTC, but also implicitly.

They said that all of the people who were participants are owners of the DAO, and they potentially had this liability. I think this was troubling on a number of levels. First of all, from what I can tell at least, the other participants in the DAO weren't aware of this and didn't have a chance to defend themselves. Commissioner Mersinger wrote a very thoughtful dissent, which I urge people who are into this kind of thing to read.

The dissent laid out how they could have found aiding and abetting liability, which she felt had a clear precedent and statutory history. I think this has given a lot of people time to pause. Prior to this, people thought the CFTC was doing the best job of balancing its missions. But now, there are concerns that this was a really gratuitous shot at DAOs, where people are still trying to figure out how they work and what the best practices are.

From what I understand, it's actually delayed some of the momentum in Congress to give express statutory authority to the CFTC to regulate that. I understand that a markup of the Stabenow-Boozman bill, which was due to take place, paused because people wanted to digest what was happening.

Personally, I think that the industry probably still prefers to be regulated, or to have clarity about where the lines are between the CFTC and the SEC. What I think will happen is that eventually it will pick up again. But I think it's definitely giving people a lot of pause and it took people by surprise. I see a couple of questions in the chat, by the way, should I answer?

KENNY: I'll try to get a bunch of them all boiled in one now. You've mentioned the SEC. You mentioned the Howey Test. You mentioned regulation. In your opinion, do you think that these are securities? Should they fall under SEC purview? Should they fall under CFTC? And as knock on that, do you think that we're going to have that clarity when things pick back up just after the regulators have figured it out themselves, or is it going to require legislation?



JEFF: I think it's going to require Congress to do something. I understand why the SEC is cautious, because if you say that this is a security, then a lot of fraudsters out there are potentially poised to exploit that. And so, the SEC obviously has to take their mission to protect customers very, very seriously. I'd also say that in terms of language, instead of determining whether something is or is not a security, what we need to think more about is the verb than the noun. For instance, whether it's an offer or a sale of securities. And so, even if you have an underlying thing that's a commodity, if it's packaged in a certain way, it can be that.

I think that the SEC are the best positioned experts to help provide that guidance to promote web3, and to help define and draw these lines. It's not a trivial task. It's very challenging. But it doesn't appear to be their priority to do that in general. Although chair Gensler and chair Clayton before him have said that a lot of these things are securities, at the time of the case around a guy at [Coinbase](#) who was allegedly front running coins, the SEC hadn't really specified and enforced action around which tokens were securities or which ones weren't.

Perhaps we'll see more of that. It would help the market if at least they say, "Okay, this one looks like a security, and this one doesn't." But I think it is going to take more direction from Congress to try to tackle these issues, and it probably matters which party has control of which house. Even though I do think a lot of these things could or should be bipartisan issues, there does seem to be a little bit more of a progressive-slash-Republican divide than one might hope.



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Dennis Chookaszian

Corporate Director, CME Group

DiffuseTap: Institutional Grade Governance

Sharing his decades-long expertise on corporate governance, Dennis talked about how to avoid a co-partnership going sour, the problem with overly idealistic CEOs, and the importance of keeping your board in check. [Read on](#)



Susan Brazer

CEO & Founder, LionShare Media

DiffuseTap: Media Metaverse 2022

Susan described the 2020 digital media landscape; the evolution of media distribution; how converging, emerging technology points to the metaverse; and the prospect of having an open, decentralized, and free Web 3.0 marketplace. [Read on](#)



Raj Mukherjee J.D.

VP/Global Head of Tax, Binance.US

DiffuseTap: Crypto Taxes Decoded with Binance.US

Raj explained the complexities of the US crypto tax landscape, how he built a dynamic tax information system for [Coinbase](#) and [Binance](#) from scratch, and how investors can profit from crypto without getting caught in a taxation mess. [Read on](#)

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