

# Public Statements & Remarks

## Dissenting Statement of Commissioner Summer K. Mersinger Regarding Settlement with Uniswap Labs

September 04, 2024

Today, the Commodity Futures Trading Commission (“CFTC” or “Commission”) once again swings its proverbial enforcement “hammer” against another DeFi protocol.[1] Given that the Commodity Exchange Act (“CEA”) and CFTC rules were written for traditional, centralized market infrastructure providers and intermediaries, it was my hope that one day soon the Commission would consider rulemaking, or at the very least guidance, making clear how DeFi protocols could comply with them.[2] Unfortunately, today is not that day.

### Regulation Through Enforcement[3]

This case has all the hallmarks of what we have come to know as regulation through enforcement: A settlement with a *de minimis* penalty that bears little relationship to the conduct alleged, sweeping statements about the broader industry that are not germane to the case at hand, and legal theories that have not been tested in court.[4]

Using our enforcement authorities against DeFi protocols instead of providing clarity through notice-and-comment rulemaking risks driving responsible DeFi developers overseas to create businesses, jobs, and economic activity away from the United States—leaving behind the bad actors and criminals who are only interested in taking advantage of American citizens.

Additionally, if we continue with this enforcement-first approach, one or several DeFi protocols we target may choose to litigate rather than settle out of court. Facing litigation in these cases will not only come at the cost of expending substantial government (and private sector) resources,[5] but also risks a morass of court cases yielding mixed results and conflicting conclusions.

The CFTC is not the only agency struggling with an increase in regulation through enforcement, but it is my hope that we will stop using what is often a short-sighted tactic. Wielding the hammer of enforcement against these DeFi protocols may result in some short-term “wins,” but in the long-term, without more, it will only create problems.

### The Cost of Doing the Right Thing

In addition, I fear this settlement creates a distorted precedent for future Commission actions—penalizing efforts to comply with the law.

Uniswap created, offered, and maintained a protocol that allowed for trading of leveraged tokens by third parties, all facts that support the charges in this settlement. But, Uniswap also took proactive measures, attempting to block trading of leveraged tokens. In fact, Uniswap blocked the particular tokens at issue in this settlement after the Commission's settlement in a previous "DeFi Sweep"[6] involving those same tokens.

Rather than applauding Uniswap for being attentive to our enforcement efforts and initiating steps to respond to our approach in policing the DeFi space, we brought charges against Uniswap covering the time period before those particular tokens were blocked from its platform. For those in the DeFi community trying to comply with the CEA and CFTC regulations, the only take-away this settlement offers is the approximate cost the Commission assigns to an attempt by DeFi to do the right thing.

### **Misaligned Priorities**

The decision to devote resources to this case also raises concerns about the Commission's enforcement priorities. Uniswap did not act as a liquidity provider, extend credit, actively trade leveraged tokens, or collect trading fees on transactions in the leveraged tokens at issue. Additionally, no harm to the market or to customers has been alleged in this matter. For every case we bring against a DeFi protocol where there are no allegations of fraud or complaints of customers losing money, we risk taking resources from a case where innocent victims suffer actual financial harm at the hands of a real fraudster.

In his recent testimony to Congress regarding the CFTC's budget, Chairman Behnam discussed the need to prioritize agency resources due to growing fraud targeting retail traders in digital asset markets:

Nowhere have we been more active than in the digital asset space..... With many agency resources which are not considered in our budget appropriation being allocated to an unregulated market, I fear the current trajectory is unsustainable. Namely, we will continue to see rampant fraud and manipulation in the digital asset market that will hurt American customers, and possibly infect the traditional financial markets.[7]

I share the Chairman's concern that "the current trajectory is unsustainable," and this concern is heightened when we use our enforcement resources to investigate DeFi activity where there is no documented harm or no significant profit to the DeFi protocol stemming from the activity at issue, as well as where we see proactive steps toward compliance.

We are currently in the midst of an epidemic of financial fraud. Fraud known as "Pig Butchering" alone may account for up to \$75 billion in losses to victims and is a huge source of funding for trans-national criminal syndicates.[8] I commend the Commission for providing customer alerts on Pig Butchering and other online frauds and scams, for bringing its first case involving Pig Butchering in December 2023, and especially for recently hosting the first interagency conference to combat Pig Butchering.[9] But we must do more to fight this fraud—and critically, that means using our finite resources wisely.

### **No Room for Innovation**

The concept of platform liability is complex.[10] While there may be some instances where a platform could be liable for conduct occurring by using its protocol, the broad extension of such liability absent aggravating facts is disturbing.

Through this settlement, the Commission appears to be taking the position that any DeFi platform could be liable for any and all conduct occurring on its protocol. The practical effect of this approach is to severely chill the launching of any DeFi protocol within the United States and to significantly increase the odds that all DeFi innovation and economic activity will occur elsewhere. This theory of liability also raises a broader question about whether the Commission is fulfilling its responsibility under the CEA to promote “responsible innovation” (not stifle it), which Congress included as a central tenet of the CFTC’s mission.[11]

The word “responsible” in front of the word “innovation” in Congress’ statement of the CFTC’s mission was deliberate, because we all know that innovation can just as easily be used by criminals.[12] For example, in the 1930s, new faster cars allowed criminals to escape from crime scenes and to engage in crime sprees across multiple states.[13] To stem this tide of crime in the so-called “Public Enemy Era,” Congress, the Department of Justice, and the FBI chose to meet this threat by passing new laws, adopting regulations, and stepping up law enforcement capabilities,[14] that targeted the criminals, not the invention they used in committing their crimes.

But, imagine if J. Edgar Hoover had charged Henry Ford with liability for the crimes of John Dillinger and Bonny and Clyde because the Ford V8 was central to their ability to commit crimes.[15] This result is the natural endpoint of the Commission’s logic that is at play in this settlement.

Continuing to bring and settle these cases with DeFi platforms is not in line with the CFTC’s objectives and vision. This settlement and the Commission’s earlier “DeFi Sweep” settlements raise transparency questions and concerns around the CFTC’s commitment to its stated goals. Our 2022-2026 Strategic Plan acknowledged that “innovations such as DeFi require extensive stakeholder engagement,” and specifically called out DeFi as an area to “[i]ncrease stakeholder engagement and leverage principles-based regulation.”[16]

Again, I quote Chairman Behnam’s recent testimony:

Today, technology is driving change in the financial markets, and the CFTC must keep pace in order to fulfill its mission and Congressional mandate. Our work centers on customer protection and market resiliency, while supporting continued growth and innovation that will take the agency into the next 50 years.[17]

Enforcement actions like this undercut the credibility of our Strategic Plan and are contrary both to our statutory mission to promote responsible innovation and to our own publicly-stated Core Value of “transparency to market participants about our rules and processes.”[18]

## **A Better Way Forward**

Unlike the broader regulatory uncertainty within the crypto markets, the CFTC has exclusive regulatory jurisdiction over DeFi protocols involved in derivatives transactions. This enables the Commission to issue regulations that promote responsible innovation – while achieving our other statutory and regulatory objectives—by finding a way for protocols that want to comply with the law and to operate within a regulated, environment to be able to do so.

Notice-and-comment rulemaking would provide the DeFi community, consumer advocates, industry representatives, and the American public with the opportunity to engage with the Commission and utilize their expertise and experience to suggest how DeFi could properly be regulated while remaining true to our obligations under the CEA.

Regulation through enforcement is at best a band-aid. At some point, the Commission must engage in a rulemaking process around DeFi and consider our role in promoting responsible innovation for the future of the U.S. derivatives markets.

For these reasons, I respectfully dissent.

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[1] See Dissenting Statement of Commissioner Summer K. Mersinger Regarding Enforcement Actions Against: 1) bZeroX, LLC, Tom Bean, and Kyle Kistner; and 2) Ooki DAO (September 22, 2022), available at Dissenting Statement of Commissioner Summer K. Mersinger Regarding Enforcement Actions Against: 1) bZeroX, LLC, Tom Bean, and Kyle Kistner; and 2) Ooki DAO | CFTC (<https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement092222>); Dissenting Statement of Commissioner Summer K. Mersinger Regarding Enforcement Actions Against: 1) Opyn Inc., 2) Deridex, Inc., 3) ZeroEx Inc. (September 7, 2023), available at Dissenting Statement of Commissioner Summer K. Mersinger Regarding Enforcement Actions Against: 1) Opyn Inc., 2) Deridex, Inc., 3) ZeroEx Inc. (“DeFi Sweep”) (<https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement090723>).

[2] *Id.*

[3] See Brummer, Christopher J. and Yadav, Yesha and Zaring, David T., “Regulation by Enforcement” (April 2024), University of Southern California Law Review, Vol. 96, No. 6, available at <https://southerncalifornialawreview.com/2024/04/15/regulation-by-enforcement/> (<https://southerncalifornialawreview.com/2024/04/15/regulation-by-enforcement/>).

[4] *Id.*

[5] See Dale, Brady, “SEC chair Gary Gensler’s court losses are piling up in crypto,” Axios, August 30, 2023; Schwartz, Leo, “Judge slams SEC for ‘gross abuse of power’ in crypto case, imposes sanctions,” Fortune, March 18, 2024; and Godoy, Jody, “US SEC drops claims against two Ripple Labs executives,” Reuters, October, 19, 2023.

[6] See n.1, *supra*.

[7] Testimony of Chairman Rostin Behnam Before the Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. Senate (June 13, 2024), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam47> (<https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam47>) (“Behnam Testimony”).

[8] Griffin, John M. and Mei, Kevin, “How Do Crypto Flows Finance Slavery? The Economics of Pig Butchering” (February 29, 2024), available at: <https://ssrn.com/abstract=4742235> (<https://ssrn.com/abstract=4742235>).

[9] See CFTC Customer Advisory Alerts App and Social Media Users to Financial Romance Fraud (February 7, 2024), available at: <https://www.cftc.gov/PressRoom/PressReleases/8859-24> (<https://www.cftc.gov/PressRoom/PressReleases/8859-24>); CFTC’s First Pig Butchering Scam Judgment (December 20, 2023), available at: <https://www.cftc.gov/PressRoom/PressReleases/8841-23> (<https://www.cftc.gov/PressRoom/PressReleases/8841-23>); First Interagency Fraud Disruption Conference Focuses on Combatting Crypto Schemes Commonly Known as “Pig Butchering” (July 11, 2024), available at <https://www.cftc.gov/PressRoom/PressReleases/8932-24> (<https://www.cftc.gov/PressRoom/PressReleases/8932-24>).

[10] See Dissenting Statement of Commissioner Hester Pierce, Rendering Innovation Kaput: Statement on Amending the Definition of Exchange (April 14, 2023), available at: <https://www.sec.gov/news/statement/peirce-rendering-innovation-2023-04-12> (<https://www.sec.gov/news/statement/peirce-rendering-innovation-2023-04-12>).

[11] CEA Section 3(b), 7 U.S.C. § 5(b).

[12] See Natarajan, M., Clarke, R.V. & Johnson, B.D. “Telephones as facilitators of drug dealing,” *Eur J Crim Policy Res* 3, 137–153 (1995), available at: <https://doi.org/10.1007/BF02242934> (<https://doi.org/10.1007/BF02242934>).

[13] Egan, Peter, “In Search of Public Enemy Number 1 in a 1934 Ford,” December 23, 2014, available at <https://www.roadandtrack.com/car-culture/a24456/the-dillinger-trail-in-a-34-ford/> (<https://www.roadandtrack.com/car-culture/a24456/the-dillinger-trail-in-a-34-ford/>).

[14] Burrough, Bryan, “Public Enemies: America’s Greatest Crime Wave and the Birth of the FBI 1933-1934,” New York, Penguin Publishing (2004).

[15] See In Search of Public Enemy Number 1, n.13, *supra*, at 13.

[16] Commodity Futures Trading Commission, 2022-2026 Strategic Plan at 10 (2022), available at CFTC Strategic Plan ([https://www.cftc.gov/media/7081/CFTC2022\\_2026StrategicPlan/download](https://www.cftc.gov/media/7081/CFTC2022_2026StrategicPlan/download)).

[17] See Behnam Testimony, n.7, *supra*.

[18] CFTC Core Values, Clarity, available at <https://www.cftc.gov/About/AboutTheCommission> (<https://www.cftc.gov/About/AboutTheCommission>).

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