THE TRADING GAME: AN ANALYSIS OF ROBINHOOD'S USE OF DIGITAL ENGAGEMENT PRACTICES

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INTRODUCTION

In December 2020, the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth filed an Administrative Complaint against Robinhood Financial LLC ("Robinhood"), a registered broker-dealer, in part, "for violations of Massachusetts law in connection with Robinhood's . . . use of strategies such as gamification to encourage and entice continuous and repetitive use of its trading application ["app"]."[1] This action is part of a growing trend in which regulators have voiced potential concerns[2] about broker-dealer use of digital engagement practices ("DEPs"), which include "behavioral prompts, differential marketing, game-like features (commonly referred to as "gamification"), and other design elements or features designed to engage with retail investors on digital platforms."[3]

This Note will evaluate the novel use of gamification, or game-like features, by broker-dealers in their online and mobile platforms. "A broker-dealer . . . is a person or firm in the business of buying and selling securities for its own account or on behalf of its customers" that serves several

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1. Complaint at *3, Robinhood Fin., LLC v. Galvin, No. 2184CV00884, 2022 Mass. Super. Lexis 19 (Mar. 30, 2022) (No. E-2020-0047).

2. *E.g.*, Letter from Robert W. Cook, President and Chief Exec. Officer, Fin. Indus. Regul. Auth., to Elizabeth Warren, Sen., U.S. Senate (Feb. 23, 2021) [hereinafter Cook Letter], http://www.warren.senate.gov/imo/media/doc/FINRA%20Response.pdf [http://perma.cc/A2HT-GJ3C].

3. Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Exchange Act Release No. 34,92766, 86 Fed. Reg. 49067, 49068 (Sept. 1, 2021) [hereinafter Request for Information].

important roles like "providing investment advice to customers [and] . . . facilitating trading activities."[4] Broker-dealer use of gamification to perform these functions will specifically be analyzed in relation to two potential legal issues that the Financial Industry Regulatory Authority ("FINRA") has already identified. These issues are whether broker-dealer marketing and advertising using game-like features follow regulations governing communications with the public and whether broker-dealers are making recommendations in compliance with relevant rules relating to recommendations when broker-dealers use game-like features.[5] Ultimately, this Note concludes that the current use of game-like features, at least by Robinhood, does not violate existing regulations. However, additional information is necessary to complete the proposed analysis, which will hopefully be available following the Securities and Exchange Commission's ("SEC") recent request for public comment on broker-dealer use of DEPs.[6] Therefore, based on the proposed analysis, if regulators want to rein in broker-dealer use of gamification, they will probably need to amend existing regulations. This is a favorable objective given critical policy concerns, like protecting retail investors, or "non-professional investor[s]" participating in the securities market,[7] especially those that are inexperienced or young.

This Note will evaluate the issue of gamification in the context of popular online broker-dealer, Robinhood. The company was founded in 2013[8] and, over the past few years, has grown into a major player in the securities industry.[9] As of March 2021, the company had 18 million Net Cumulative Funded Accounts.[10] However, the company has proven particularly popular with millennial and Generation Z investors; the company stated in its Form S-1 filed during its initial public offering in 2021 that "as of March 31, 2021, approximately 70% of our [Assets Under Custody] came from customers on our platform aged 18 to 40, and the median age of customers on our platform was 31,"[11] which will prove relevant to the issues analyzed in this Note.

This Note will proceed in several parts. Part I will present the concept

4. Adam Hayes, *Broker-Dealer*, INVESTOPEDIA, http://www.investopedia.com/terms/b/broker-dealer.asp [http://perma.cc/BV3B-E6W4].

5. Cook Letter, *supra* note 2, at 5.

6. Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, *supra* note 3, at 49068.

7. Adam Hayes, *Retail Investor*, INVESTOPEDIA, http://www.investopedia.com/terms/r/retailinvestor.asp [http://perma.cc/P7TN-T4RK].

8. ROBINHOOD MKTS., INC., REGISTRATION STATEMENT (S-1) 8 (July 1, 2021) [hereinafter REGISTRATION STATEMENT].

9. *Id.* at 173.

10. *Id.* at 2.

11. *Id.* at 173.

of gamification, including its potential risks, the DEPs that Robinhood has implemented in its platform, the history of how broker-dealers came to use these features, including the development of the modern technologies that have made these features possible, and the legal issues raised by broker-dealer use of gamification. Part II will introduce the regulatory bodies that govern the U.S. securities industry, the specific regulations that are relevant to evaluating the legal issues in this Note, and the policy goals that underlie the U.S. securities regulation system. Finally, Part III will analyze whether Robinhood's use of game-like features violates existing securities regulation, will summarize the legal and legislative actions that have already been taken regarding this issue, and will present policy concerns that lean in favor of increased regulation.

I. THE GAMIFICATION ISSUE

A. WHAT IS GAMIFICATION?

Generally, gamification is defined as "the process of adding games or gamelike elements to something (such as a task) so as to encourage participation."[12] These elements are traditionally found in games or video games and include features like rewards, badges, or levels.[13] In applying game-like features to non-game situations, these elements are "carried into the real world to help motivate individuals to achieve their goals or boost performance."[14] The intended purpose of implementing game-like features is often to promote consistent user engagement.[15] These game-like elements are effective at fostering user engagement because they take advantage of human psychological inclinations towards certain ideals, like fulfilling accomplishments or winning games.[16]

Gamification has already been applied to several other industries, including other consumer-facing industries.[17] One common example is in the airline industry, where customers gather "frequent flyer" points each time they purchase a ticket through the airline, which grants them a reward for

12. *Gamification*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/gamification [http://perma.cc/3MG2-LZAY].

13. *Gamification*, INVESTOPEDIA, http://www.investopedia.com/terms/g/gamification.asp [http://perma.cc/6DEK-4ZBE].

14. *Id.*

15. Nina Angelovska, *Gamification Trends for 2019: Making Room for Game-Elements in Politics*, FORBES (Jan. 20, 2019, 3:54 PM), http://www.forbes.com/sites/ninaangelovska/2019/01/20/gamification-trends-for-2019-making-room-for-game-elements-in-politics [http://perma.cc/96FC-LUXL].

16. *Gamification*, *supra* note 13.

17. Cook Letter, *supra* note 2, at 5.

continually using the airline.[18] Gamification has also been successfully applied in the education industry. For instance, popular language-learning program Duolingo has implemented game-like design elements like animated features and progress bars to encourage users to engage in spaced repetition.[19] Carefully evaluating the success of different features allowed the company to find the best solution to improve user engagement and learning.[20]

B. The Potential Risks of Gamification

Some of these examples, like Duolingo, clearly use gamification to encourage positive user behaviors and demonstrate the highest potential of gamification. However, generally speaking, there are also certain risks associated with gamification.[21] For instance, an ineffective gamified design can distract users from the intended behavior the game-like features are supposed to encourage and instead lead users towards less desirable behaviors.[22] An additional risk is the addictive nature of games, which has been observed in video games and gambling.[23] This element "raises possible risks when using gamification for commercial purposes" and "can easily be seen as manipulative or exploitative [of consumers] and raise potential ethical issues."[24]

In the context of gamification by broker-dealers, regulators have acknowledged some of the potential dangers of these DEPs.[25] The main harm gamification can potentially cause retail investors is to induce them to complete certain trades that are not beneficial to them.[26] For instance, in his testimony before the House Committee on Financial Services on May 6, 2021, SEC Chair Gary Gensler stated that "[f]ollowing the wrong prompt on a trading app . . . could have a substantial effect on a saver's financial position. A big loss could have immediate implications for the app user's ability to afford their rent or pay other important bills."[27] This issue is

18. *Gamification*, *supra* note 13.
19. Beth Chasse, *Taking a Crack at Gamification*, DUOLINGO: BLOG (July 27, 2021), http://blog.duolingo.com/gamification-design [http://perma.cc/6BB5-BYFW].
20. *Id.*
21. *Gamification*, *supra* note 13.
22. *Id.*
23. *Id.*
24. *Id.*
25. *E.g.*, Gary Gensler, Chair, Sec. & Exch. Comm'n, Testimony Before the House Committee on Financial Services (May 6, 2021) (transcript available on U.S. Securities and Exchange Commission website) [hereinafter Gensler Testimony], http://www.sec.gov/news/testimony/gensler-testimony-20210505 [http://perma.cc/UPA6-S5BE].
26. *Id.*
27. *Id.*

worsened when younger retail investors lose money due to compounding,[28] "the process in which an asset's earnings . . . are reinvested to generate additional earnings over time."[29] Thus, for younger investors, a minor loss today could be keeping them from a sizable return in the long run.[30] These risks may occur if broker-dealers use DEPs to communicate in a way that "understate[s] the risk of a particular investment or the odds of eye-popping returns,"[31] which can be misleading to investors.

These dangers can be raised if broker-dealers use DEPs to influence retail investors to unknowingly make either more risky trades or more frequent trades.[32] For instance, in his remarks at SEC Speaks on October 13, 2021, Rick Fleming, Director of the Office of the Investor Advocate at the SEC, stated that "DEPs, using . . . game-like features, may blur the line between solicited and unsolicited transactions . . . . [and] may subtly nudge investors to trade specific securities."[33] This would, thus, constitute a recommendation by the broker-dealers and make it purview to SEC regulations on recommendations, which is not currently the case.[34] These recommendations could potentially encourage customers to execute trades that do not match their risk-profiles.[35] This is most concerning if DEPs prompt users to "us[e] trading strategies that carry additional risk (*e.g.*, options trading and trading on margin) . . . and . . . trad[e] in complex securities products."[36] Further, making more frequent trades is, generally, not an effective trading strategy; for instance, "[s]ome academic studies suggest more active trading or even day trading results in lower returns for the average trader."[37] However, the business model used by broker-dealers today largely relies on high-volume trading, as explained later in this Note, making broker-dealer and user motives not fully aligned.

28. *Id.*

29. James Chen, *What is Compounding?*, INVESTOPEDIA, http://www.investopedia.com/terms/c/compounding.asp [http://perma.cc/BX46-6S77].

30. Gensler Testimony, *supra* note 25.

31. Thomas Franck & Maggie Fitzgerald, *SEC Steps Up Research into Brokers' 'Gamification' of Trades, Chair Gary Gensler Says*, CNBC (Aug. 27, 2021, 3:13 PM), http://www.cnbc.com/2021/08/27/sec-steps-up-research-into-gamification-of-trading-with-online-brokers-gary-gensler-says.html [http://perma.cc/UD5X-TC8A].

32. Thomas K. Potter, III, *Gamification of Securities Trading: Big Risk or Just Evolution?*, BURR & FORMAN LLP: SEC. LITIG. (Oct. 15, 2021), http://www.burr.com/2021/10/15/gamification-of-securities-trading-big-risk-or-just-evolution [http://perma.cc/53D4-B53W].

33. Rick Fleming, Inv. Advoc., Sec. & Exch. Comm'n, Investor Protection in the Age of Gamification: Game Over for Regulation Best Interest? (Oct. 13, 2021) (transcript available on U.S. Securities and Exchange Commission website), http://www.sec.gov/news/speech/fleming-sec-speaks-101321 [http://perma.cc/8JX5-WAVL].

34. *Id.*

35. Request for Information, *supra* note 3, at 49069.

36. *Id.*

37. Gensler Testimony, *supra* note 25.

These outcomes demonstrate what is at stake for retail investors and why regulators may be concerned. However, it is worth noting that DEPs are "potentially harm[ful]"[38] to investors, and more information, specifically more data, is needed to quantify their effects. The answers to many questions in the SEC's request for public comment on the use of DEPs will hopefully fill this information gap.

C. Application Features that are Potentially at Issue

In the context of broker-dealer platforms evaluated in this paper, customers are faced with DEPs or game-like features through the entire lifecycle of executing a trade on a broker-dealer platform, "from initial advertisements through the opening of accounts and the presentation of different investment choices to communications following a trade."[39] This Note will address these features in two categories: advertising features at account opening and in-app features.

1. Advertising Features at Account Opening

FINRA has stated that game-like features can appear in "initial advertisements" by broker-dealers.[40] While it is unclear exactly which advertisements FINRA is concerned about, this paper will address a few noteworthy advertising techniques used by Robinhood, including marketing campaigns, visual design features, advertisements showing celebratory graphics, and other references to DEPs in marketing materials.

As of August 2022, upon opening Robinhood's website, one major marketing initiative is readily apparent: at the top of Robinhood's homepage, it states "Get your first stock free."[41] This initiative is one of Robinhood's "main marketing strategies."[42] The company "randomly assigns a free share to users who link a bank account for the first time or refer a friend to its app."[43] This promotion is not only available to customers that join Robinhood organically but also to customers that join Robinhood "through paid marketing channels."[44] Further, the incentive is extended to existing users that refer a new user to Robinhood, which is known as the "Robinhood

38. Request for Information, *supra* note 3, at 49069.
39. Cook Letter, *supra* note 2, at 5.
40. *Id.*
41. ROBINHOOD, http://robinhood.com/us/en [http://perma.cc/79JN-FXZL].
42. Paul Kiernan, *Regulators Scrutinize a Robinhood Marketing Ploy: Free Shares*, WALL ST. J. (Aug. 25, 2021, 7:30 AM), http://www.wsj.com/articles/regulators-scrutinize-a-robinhood-marketing-ploy-free-shares-11629891014 [http://perma.cc/5F26-VN76].
43. *Id.*
44. REGISTRATION STATEMENT, *supra* note 8, at 124.

Referral Program."[45] Through this program, Robinhood "credits referring and referred customers with a stock reward (of one share each per referral), with the potential value of each share ranging from $2.50 to $225."[46] Although most new users receive a stock valued at less than $10,[47] what may not seem to be an exciting offer is, nonetheless, an effective marketing technique; "[I]n 2020 and in the three months ended March 31, 2021, over 80% of new Funded Accounts joined [Robinhood's] platform organically or through the Robinhood Referral Program."[48] Thus, while FINRA has not specified if it is concerned specifically about this marketing effort, the Referral Program is clearly a substantial part of Robinhood's marketing initiatives and is worth evaluating in this Note.

In September 2021, Robinhood also initiated a new marketing campaign that was generally geared towards younger users by granting additional promotions for college students.[49] The campaign entailed giving college students "who sign up for brokerage accounts using their school email address $15 to trade, and enter[ing] them into a $20,000 giveaway."[50]

Finally, as Robinhood has acknowledged, it has created a "mobile-design feature that is user-friendly and easily accessible" by leveraging tools like "visual cues, [and] colors."[51] Visual cues are one of the DEPs identified by the SEC as being used by broker-dealers to communicate with users.[52] It is unclear, but this quality of the app interface may be present even in advertisements. Advertisements have also previously included graphics of celebration, most notably confetti,[53] for certain actions, another DEP identified by the SEC.[54] For instance, a prior advertisement used by Robinhood showed a woman, presumably a Robinhood user, sitting in what appears to be a coffee shop and holding a smartphone that is shooting out bright green confetti while others nearby watch.[55] There are not telltale signs

45. *Id.*
46. *Id.*
47. *See id.*
48. *Id.* at 169.
49. Peter Rudegeair & Caitlin McCabe, *Robinhood Is Going on a College Tour to Recruit New Customers*, WALL ST. J. (Sept. 15, 2021, 7:00 AM), http://www.wsj.com/articles/robinhood-is-going-on-a-college-tour-to-recruit-new-customers-11631703600 [http://perma.cc/YB7Y-33BT].
50. *Id.*
51. Letter from David Dusseault, President, Robinhood Fin., LLC, to Vanessa A. Countryman, Sec'y, Sec. & Exch. Comm'n 7 (Oct. 1, 2021) [hereinafter Dusseault Letter], http://www.sec.gov/comments/s7-10-21/s71021-9316498-260092.pdf, [http://perma.cc/NRW8-EJGL].
52. Request for Information, *supra* note 3, at 49069.
53. Caitlin McCabe, *Robinhood to Remove Controversial Digital Confetti from Trading App*, WALL ST. J. (Mar. 31, 2021, 7:11 PM), http://www.wsj.com/articles/robinhood-to-remove-controversial-digital-confetti-from-trading-app-11617195612 [http://perma.cc/U2HV-HFLC].
54. Request for Information, *supra* note 3, at 49069.
55. McCabe, *supra* note 53.

to indicate the user is an experienced investment professional that is working intently on her securities trading strategy. Rather, she is in the casual setting of a coffee shop with a notebook and pen in front of her, implying she may be working on something else at the moment, when her phone has suddenly erupted in celebration. Additional discussion of celebratory features like confetti will be included in the description of in-app features.

Other concerns raised in terms of marketing and advertising relate to the way that broker-dealers may communicate about certain trading methods or strategies. For instance, the SEC has identified "copy trading" as a DEP that "enable[s] investors to copy the trades of other investors . . . in certain types of investments."[56] Broker-dealer communication in marketing materials that relates to "copy trading" is a relevant issue although it is not clear what an example of such an advertisement entails.

2. In-app Features

The SEC has identified several DEPs implemented by broker-dealers in online trading platforms, including "(i) social networking tools, (ii) games, streaks and other contests with prizes, (iii) points, badges and leaderboards, (iv) notifications, (v) celebrations for trading, (vi) visual cues, (vii) ideas presented at order placement and other curated lists or features, (viii) subscriptions and membership tiers, and (ix) chatbots."[57] This Note will expand on some of these features, specifically in the context of Robinhood.

i. Prizes

As previously mentioned, Robinhood offers new users[58] and existing users that refer a new user one free stock upon signing up for a Robinhood account[59] and sometimes creates additional promotions for targeted populations, like university students.[60] Robinhood also offers periodical sweepstakes for new users and existing users that refer a new user to the site.[61]

56. Request for Information, *supra* note 3, at 49068.
57. Letter from Kevin M. Carroll, Managing Dir. and Assoc. Gen. Couns., Sec. Indus. & Fin. Mkts. Ass'n, to Vanessa A. Countryman, Sec'y, Sec. Exch. Comm'n 1 (Oct. 1, 2021), http://www.sifma.org/wp-content/uploads/2021/10/SIFMA-comment-re-DEPs-10.1.2021-FINAL.pdf [http://perma.cc/4TKY-UBKG].
58. ROBINHOOD, *supra* note 41.
59. REGISTRATION STATEMENT, *supra* note 8, at 124.
60. Rudegeair & McCabe, *supra* note 49.
61. Dusseault Letter, *supra* note 51, at A-1 ("Robinhood offered $500 to 200 sweepstakes winners who referred friends or signed up for a Robinhood account and linked their bank account, in the summer of 2021.").

ii. Streaks

In the past, Robinhood has incentivized customers to interact regularly with the app. Specifically, "[i]n 2019, Robinhood rolled out a new cash management feature with an early access waitlist and utilized gamification to reward customers who interacted daily with the app by improving their positions on the waitlist."[62] In 2022, Robinhood similarly launched a new product, the crypto wallet, and created a waitlist for interested users.[63] In order to move up the waitlist, users had to invite new users to Robinhood.[64] For each new user they referred to Robinhood, they were able to "jump the list by half."[65]

iii. Notifications

Robinhood sends customers notifications to their mobile phones, emails, and through the app with in-app messages.[66] However, these notifications are generally able to be turned off by customers, unless they "serve a regulatory purpose or relate to important account information."[67] Notifications customers might receive include: "the price of a stock the customer owns reaching a 52-week high or low or changing by 5% or 10%; suspicious activity in the customer's account; margin maintenance alerts or margin call warnings; options expiration reminders; upcoming dividend payments by companies who stock the customer owns; upcoming earnings announcements by companies whose securities the customer owns; and a friend whom the customer referred through the Stock Referral Program joining Robinhood."[68]

iv. Celebrations

Robinhood uses animations and graphics to mark user milestones, including "opening an account, funding an account, and a first investment."[69]

62. Complaint at *6, Robinhood Fin., LLC v. Galvin, No. 2184CV00884, 2022 Mass. Super. Lexis 19 (Mar. 30, 2022) (No. E-2020-0047).

63. *Non-Custodial Wallet Waitlist*, ROBINHOOD, http://www.robinhood.com/us/en/support/articles/invite-friends-move-up-the-waitlist [http://perma.cc/ZJ4R-TEDP].

64. *Id.*

65. *Id.*

66. Dusseault Letter, *supra* note 51, at A-2.

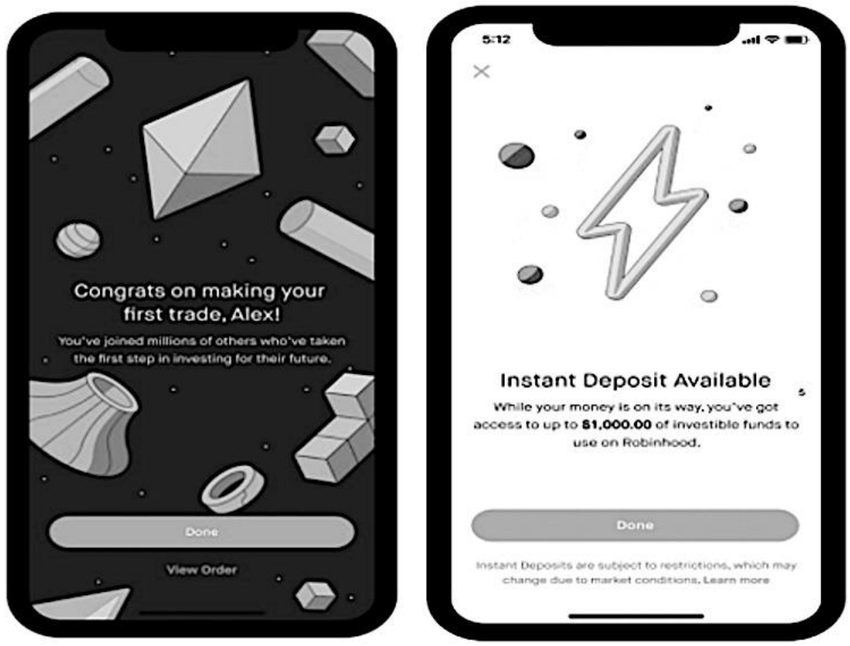
67. *Id.*

68. *Id.*

69. *Id.*

As of late 2021, these "dynamic visual experiences"[70] include various shapes in bright colors.[71] Figure 1 shows examples of these milestone visuals.

FIGURE 1. Celebration Visuals on Robinhood[72]



Previously, from 2016 to 2021,[73] Robinhood employed animated confetti for this purpose.[74] However, before going public, Robinhood removed what proved to be a controversial feature after allegations of gamification.[75] Although Robinhood felt the confetti animation was "really misconstrued,"[76] it decided to "remove the 'distraction' from its overall mission to 'democratize' investing."[77]

70. Maggie Fitzgerald, *Robinhood Gets Rid of Confetti Feature Amid Scrutiny over Gamification of Investing*, CNBC (Mar. 31, 2021, 9:05 AM), http://www.cnbc.com/2021/03/31/robinhood-gets-rid-of-confetti-feature-amid-scrutiny-over-gamification.html [http://perma.cc/7EUB-97GT].

71. Dusseault Letter, *supra* note 51, at B-4.

72. *Id.*

73. McCabe, *supra* note 53.

74. Dusseault Letter, *supra* note 51, at A-2 to A-3.

75. McCabe, *supra* note 53.

76. *Id.*

77. *Fitzgerald*, supra note 70.

v. Visual Cues

Robinhood's user interface leverages the use of "visual cues such as objects, pictures, symbols and words."[78]

vi. Ideas or Lists of Features

According to Robinhood, "Robinhood does not present ideas at order placement. Robinhood does not recommend clients purchase any particular securities or engage in any investment strategies. Robinhood does not send clients specific investment recommendations based on their investment profile, demographic information, or geographic information."[79] However, Robinhood does present certain lists to customers.[80] Some of these lists are customer-created "Watch Lists" that allow users to build a personalized list of securities they are interested in.[81] Robinhood then shares news stories about these securities with the user.[82] Robinhood also shows customers some non-customer-generated lists, including a default "Watch List" for new users that can then be customized or deleted by users as well as five other lists like the "100 Most Popular" list.[83] However, all of these "Robinhood-generated lists . . . are based on objective standards and are not personalized to the customer; the same content is displayed to every customer."[84] Finally, "Robinhood offers lists generated by an interdependent research firm, Morningstar, Inc., which categorizes and lists securities by sector (e.g., the technology list includes 894 individual stocks)."[85]

D. THE EVOLUTION OF GAMIFICATION IN SECURITIES TRADING

The issue of gamification may, in part, stem from the way that Robinhood earns revenue. The company offers commission-free trading, meaning that retail-investors using the trading platform can make trades for free.[86] The company's mission is clear: "to democratize finance for all."[87] For Robinhood's founders, making trading accessible to retail investors by eliminating commissions was an impetus for creating the firm.[88]

78. Dusseault Letter, *supra* note 51, at 12, A-3.
79. *Id.* at A-3.
80. *Id.* at A-3, A-4.
81. *Id.* at A-3.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at A-3, A-4.
86. ROBINHOOD WEB DISCLOSURES, ROBINHOOD 2 (2021), http://assets.ctfassets.net/5ft2qdzfrz9o/4dS54TtWhunu3115K0NMgR/556f10fb306228686a513ad18d3c5b1c/Robinhood_Web_Disclosures__Sep_2021_.pdf [http://perma.cc/4QCX-F35Q].
87. REGISTRATION STATEMENT, *supra* note 8, at 1.
88. ROBINHOOD, *supra* note 41.

For young retail investors today, it can be hard to imagine when commission-free trading wasn't the norm. The first step in reaching this price point began on May 1, 1975, when fixed trading commissions were banned.[89] Until then, brokers could not charge a rate lower than the fixed rate and, thus, a lower volume trade could cost an investor the same amount as a high volume trade.[90] However, once the "fixed rates sheltering [brokerage firms] from the discipline of competition" were removed, commission prices substantially dropped, and the brokerage industry boomed.[91] This monumental "May Day" proved to be a major leap towards "democratizing the world of investing."[92]

About a decade later, another industry revolution followed that created the trading world we know today. "E-brokers" emerged in the 1990s, when trading through online platforms became possible for retail-investors.[93] It was during this time that "day trading" gained popularity.[94] Despite this, online commissions still sat at around forty dollars.[95] Over the next few decades, e-brokers like Charles Schwab & Co., Inc. ("Charles Schwab"), TD Ameritrade, Inc. ("TD Ameritrade"), and E*Trade LLC ("E*Trade") went after the investors that "traditional firms weren't interested in handling."[96] By continuing to lower prices and attract more investors, these e-brokers grew in size, with comparable customer assets as the broker and wealth management arms of firms like Bank of America and Morgan Stanley.[97]

Now here is how Robinhood fits into the puzzle. Robinhood was founded in 2013.[98] From its inception, it targeted several goals. One was quick and seamless trades.[99] This was achieved through almost immediate access to trades upon signing up with the brokerage.[100] According to

89. Jason Zweig, *Lessons of May Day 1975 Ring True Today: The Intelligent Investor*, WALL ST. J. (Apr. 30, 2015, 11:20 PM), http://www.wsj.com/articles/lessons-of-may-day-1975-ring-true-today-the-intelligent-investor-1430450405 [http://perma.cc/QPP9-LRRD].

90. *Id.*

91. *Id.*

92. *Id.*

93. Lisa Beilfuss & Alexander Osipovich, *The Race to Zero Commissions*, WALL ST. J. (Oct. 5, 2019, 5:30 AM), http://www.wsj.com/articles/the-race-to-zero-commissions-11570267802 [http://perma.cc/SX5M-XLTP].

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. REGISTRATION STATEMENT, *supra* note 8, at 8.

99. Anna Mazarakis & Alyson Shontell, *The Founders of Robinhood, a No-Fee Stock-Trading App, Were Initially Rejected by 75 Venture Capitalists — Now Their Startup Is Worth $1.3 Billion*, INSIDER (July 6, 2017, 9:59 AM), http://www.businessinsider.com/robinhood-app-vlad-tenev-founder-free-stock-trading-valuation-2017-7 [http://perma.cc/VBC7-XXY5].

100. *Id.*

Robinhood co-founder Vladimir Tenev, Robinhood was "the first [online brokerage] to create th[e] experience of being able to go from nothing to being an owner of a stock instantaneously."[101] Another foundational feature was unlimited commission-free trading for self-directed-brokerage accounts,[102] which similarly was not prevalent with competitors at the time.[103] Today, Robinhood is not unique in this aspect; over the last few years, as some broker-dealers began offering commission-free trading, competitive forces ultimately led many of the large players in the industry to do the same.[104]

This evolution is crucial to the rise of gamification in trading because, in eliminating commissions, broker-dealers had to look to other avenues for revenue generation. Robinhood's largest revenue stream is "transaction-based," including fees like payment for order flow ("PFOF") for equities and options or "Transaction Rebates" for cryptocurrencies that are generated when Robinhood transmits customer trades to market makers for trade execution.[105] Therefore, Robinhood's revenue directly correlates to the number of trades that are executed.[106]

It is important to emphasize that commission-free trading is essentially universally available today and is offered by the largest online broker-dealers, like Charles Schwab, TD Ameritrade, and E*Trade.[107] It is also generally viewed as being highly beneficial, making trading more accessible to retail investors and expanding the industry.[108] However, the PFOF business model used by broker-dealers, which allows for commission-free trading, also "drive[s] much of the gamification trend" because it "gives investment-app developers every incentive to maximize user engagement with the product."[109] This development in the broker-dealer business model leads to the prevalence of gamification and makes it apparent why gamification can simultaneously be attractive to broker-dealers and concerning for retail investors.

101. *Id.*
102. *Investments You Can Make on Robinhood*, ROBINHOOD, http://www.robinhood.com/us/en/support/articles/investments-you-can-make-on-robinhood [http://perma.cc/SZN7-2QWC].
103. Mazarakis & Shontell, *supra* note 99.
104. Beilfuss & Osipovich, *supra* note 93.
105. REGISTRATION STATEMENT, *supra* note 8, at 34.
106. Mazarakis & Shontell, *supra* note 99.
107. Beilfuss & Osipovich, *supra* note 93.
108. *Id.*
109. Kyle Langvardt & James Fallows Tierney, *On "Confetti Regulation": The Wrong Way to Regulate Gamified Investing*, 131 YALE L.J.F. 717, 723 (2022).

E. THE MODERN TECHNOLOGIES UNDERLYING GAMIFICATION IN SECURITIES TRADING

Several modern technologies have contributed to the prevalence of gamification by broker-dealers described in this paper and have changed the way that broker-dealers conduct business.

One initial point to recognize is that the issues evaluated in this paper, those relating to the use of DEPs, specifically game-like features, are primarily an issue stemming from the use of broker-dealer apps. It is specifically through digital platforms like mobile investment smartphone apps and portals that broker-dealers can implement DEPs and, thus, interact with retail investors in a novel way. Thus, the issue of DEPs, and more specifically gamification, is a modern one of our virtual world that heavily relies on online and mobile use.

Other technologies that have changed the way broker-dealers interact with customers are the analytical tools used along-side DEPs that allow broker-dealers to evaluate the impact of the DEPs.[110] These tools include "predictive data analytics and artificial intelligence/machine learning . . . models" that can allow broker-dealers "to analyze the success of specific features and practices at influencing retail investor behavior."[111] These analytics can help broker-dealers present customers with targeted features on the online platforms or with tailored advertisements.[112] Ultimately, these technologies allow for a seemingly infinite degree of personalization in the user experience, creating "an ever-changing set of features that are differentially communicated to different customer segments."[113]

One modern technology that has further paved the way for gamification is blockchain. Blockchain was developed in 2008 and is a "peer-to-peer network that sits on top of the internet."[114] The technology allows for bilateral transactions and produces unique, permanent records of transactions in an open database.[115] As gamification has become more popular in a range of industries, blockchain has been viewed as a "complementary

110. Request for Information, *supra* note 3, at 49068.
111. *Id.*
112. *Id.*
113. Gensler Testimony, *supra* note 25.
114. Marco Iansiti & Karim R. Lakhani, *The Truth about Blockchain*, HARV. BUS. REV. (Jan–Feb. 2017), http://www.hbr.org/2017/01/the-truth-about-blockchain [http://perma.cc/HWE9-YD7U].
115. *Id.*

technology."[116] One reason is blockchain's record-keeping capabilities,[117] which allow for verified records that cannot be manipulated or erased.[118] Another reason is the capacity to create unique elements for users, creating a more personalized user experience than traditional software allows for.[119] Given these capabilities, Blockchain can be viewed as "the perfect technology for gamification."[120]

Finally, although Robinhood "does not provide social forums within [its] app or [its] website,"[121] the SEC identified "social networking tools" as one of the possible DEPs used by broker-dealers.[122] These tools could allow broker-dealers to "embed social networking tools into their platforms, or enhance existing tools to allow an investor to create an on-line persona or avatar."[123] Of course, social media could not exist without the invention of the Internet and its widespread use, making the implementation of social networking tools onto broker dealer platforms a relatively recent phenomenon.

F. POTENTIAL LEGAL ISSUES UNDERLYING BROKER-DEALER USE OF DEPS, SPECIFICALLY OF GAMIFICATION

Different approaches can be taken in evaluating the legal consequences of broker-dealer gamification. This paper will specifically evaluate two regulatory issues already identified by FINRA as possible concerns.[124] These concerns fall into two general categories: (1) advertising and marketing, and (2) recommendations to consumers.[125] Further, in outlining these questions, FINRA referenced existing regulations that may be relevant,[126] which will be expanded on in Part II.

The two potential regulatory issues are as follows:

> *Advertising and marketing.* Are a member broker-dealer's communications to investors—regardless of format and technology—in

116. *How Blockchain Technology Is Bringing Gamification to Every Industry*, NASDAQ (Feb. 20, 2018, 3:06 AM), http://www.nasdaq.com/articles/how-blockchain-technology-bringing-gamification-every-industry-2018-02-20 [http://perma.cc/FPC9-UGHD].

117. *Id.*

118. Iansiti & Lakhani, *supra* note 114.

119. *Blockchain, the Perfect Tech for Gamification?*, CRYPTONEWS (May 24, 2021, 9:53 PM), http://www.cryptonews.com/news/blockchain-the-perfect-tech-for-gamification-10438.htm [http://perma.cc/N4F2-VN3S].

120. *Id.*

121. Dusseault Letter, *supra* note 51, at 9.

122. Request for Information, *supra* note 3, at 2.

123. *Id.*

124. Cook Letter, *supra* note 2, at 5.

125. *Id.*

126. *Id.*

> compliance with FINRA's rules regarding communications with the public?
>
> *Recommendations to customers.* Depending on the facts and circumstances, do some of these interactions constitute "recommendations" that would be covered by the SEC's Regulation Best Interest ("Reg BI"), which requires a broker-dealer making recommendations of securities to act in a retail customer's "best interest"? If not, should they?[127]

II. HISTORY OF RELEVANT REGULATION

A. THE RELEVANT REGULATORY BODIES

In the United States, securities regulation involves a system of both federal regulation and self-regulation, including the SEC, securities exchanges, and FINRA.[128] Beyond these systems, states can also impose laws on buying and selling securities.[129]

1. Federal Regulation: Securities Exchange Commission

The first step in creating a system of federal securities regulation was the Federal Securities Act of 1933, "which regulates the public offering and sale of securities in interstate commerce."[130] The Act also established several foundational principles, like requiring disclosures by sellers of securities to buyers.[131] Thereafter, Congress passed the Securities Exchange Act of 1934 ("Exchange Act"), establishing the SEC.[132] The SEC was made responsible for enforcing the regulations included in the Federal Securities Act of 1933 and with "administering federal securities laws."[133]

Today, the SEC continues to regulate securities markets.[134] All issues of securities offered for sale as well as all financial service firms and their representatives must be registered with the SEC.[135] These regulations place broker-dealers, like Robinhood, under the purview of the SEC.

127. *Id.*

128. *Securities*, CORNELL L. SCH.: LEGAL INFO. INST., http://www.law.cornell.edu/wex/securities [http://perma.cc/N8PL-6ULR].

129. *Blue Sky Law*, CORNELL L. SCH.: LEGAL INFO. INST., http://www.law.cornell.edu/wex/blue_sky_law [http://perma.cc/J8SK-UJ9E].

130. *Securities*, *supra* note 128.

131. *Id.*

132. *Id.*

133. *Id.*

134. James Chen, *Securities and Exchange Commission (SEC) Defined, How it Works*, INVESTOPEDIA, http://www.investopedia.com/terms/s/sec.asp [http://perma.cc/698C-29ZU].

135. *Id.*

2. Self-Regulation: Securities Exchanges and Financial Industry Regulatory Authority

As clearly established in the Exchange Act, the SEC was not intended to be solely responsible for securities regulation.[136] This was accomplished by allowing for the creation of securities exchanges that would play a role in regulation through self-regulation.[137] The Exchange Act required securities exchanges to register with the SEC, which in turn required "that all exchanges adopt a regulatory regime for their members, in the form of exchange rules."[138]

Until 2007, each securities exchange was structured as a separate self-regulatory organization, with the New York Stock Exchange ("NYSE") being the largest.[139] In parallel, the National Association of Securities Dealers ("NASD") had formed and served as the only registered securities association.[140] Thereafter, in July 2007, the NASD and the regulatory arm of the NYSE merged to form FINRA with the intention of forming a more effective and unified body of regulations to the benefit of both members and investors.[141]

Today, FINRA continues to "protect investors and ensure the market's integrity" by "oversee[ing] more than 624,000 brokers across the country—and analyz[ing] billions of daily market events."[142] More specifically, FINRA regulates three kinds of firms: broker-dealer firms, capital acquisition brokers, and funding portals.[143] Thus, broker-dealers like Robinhood, are under its jurisdiction.[144]

Although FINRA is overseen by the SEC,[145] it has significant regulatory power in its own capacity. For instance, it writes its own set of rules that apply to "every single brokerage firm and broker in the United States."[146] FINRA's rulemaking process is a ten-step process that relies on

136. *Self Regulatory Organization*, CORNELL L. SCH.: LEGAL INFO. INST., http://www.law.cornell.edu/wex/self_regulatory_organization [http://perma.cc/A3ZD-YQ24].

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *About FINRA*, FINRA, http://www.finra.org/about [http://perma.cc/3RNF-M5NN].

143. *Firms We Regulate*, FINRA, http://www.finra.org/about/firms-we-regulate [http://perma.cc/S8N4-GM78].

144. *Broker-Dealer Firms We Regulate*, FINRA, http://www.finra.org/about/firms-we-regulate/broker-dealer-firms-we-regulate [http://perma.cc/Z2RV-3TY9].

145. *What We Do*, FINRA, http://www.finra.org/about/what-we-do [http://perma.cc/ZF45-ZYJM].

146. *Five Steps to Protecting Market Integrity*, FINRA, http://www.finra.org/about/what-we-do/five-steps-protecting-market-integrity [http://perma.cc/89ES-6CXA].

both internal and external evaluations.[147] Some of the stages of the process include review by FINRA management and Advisory and District Committees, a comment period, and review by the SEC for compliance with the Exchange Act.[148]

Further, FINRA has the authority to enforce broker-dealer conformity to "[FINRA] rules, federal securities laws and the rules of the Municipal Securities Rulemaking Board."[149] Compliance is enforced through periodic reviews of broker-dealer activity and inquiries following investor complaints.[150] Through its dispute resolution forum, FINRA almost exclusively conducts all securities-related arbitrations and mediations in the country.[151] If broker-dealers are found in violation of any of its regulations, FINRA can "fine, suspend or bar them from the industry."[152]

Ultimately the U.S. securities regulatory system ties together these bodies of federal regulation and self-regulation. On the one hand, the securities industry is granted "substantial power to supervise itself," including having authority over "the actual process of rulemaking and enforcement against members."[153] On the other hand, the SEC maintains a significant amount of influence.[154] At the front end, the SEC sets regulatory goals, while at the back end, it monitors the self-regulatory bodies to ensure they comply with their statutory responsibilities.[155]

3. State Regulation: Blue Sky Laws

Prior to the development of federal securities laws, individual states enacted their own laws to regulate securities markets.[156] These laws were known as "blue sky" laws, a name "derive[d] from the characterization of baseless and broad speculative investment schemes which such laws targeted."[157] By 1933, right before the Federal Securities Act of 1933 was passed, almost all states had made their own blue sky laws "in response to [the fact that] ordinary investors were losing money in highly speculative or fraudulent schemes promising high investment returns, such as oil fields and

147. *FINRA Rulemaking Process*, FINRA, http://www.finra.org/rules-guidance/rulemaking-process [http://perma.cc/SV45-KRE3].
148. *Id.*
149. *Five Steps to Protecting Market Integrity*, *supra* note 146.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Self Regulatory Organization, supra* note 136.
154. *Id.*
155. *Id.*
156. *Blue Sky Law, supra* note 129.
157. *Id.*

exotic investments in foreign countries."[158] Although the blue sky laws are not uniform across all states, they "share certain features in their approach to prevent misinformation about investment returns and risks."[159]

Once federal laws regulating securities were passed, some laws were duplicated across both the federal and state systems; others were not.[160] Eventually, federal legislation was enacted to preempt these duplicative blue sky laws.[161]

B. The Existing Regulations

Securities regulation is a highly complex area of the law and evaluating whether the implementation of DEPs violates securities regulation is not a straight-forward process, especially since additional information is probably necessary.[162] Thus, a more substantive analysis than can be completed in a paper of this length is likely needed. Nonetheless, given FINRA's substantial regulatory power,[163] this paper will focus on evaluating the specific regulations FINRA singled out as relevant in its letter to Senator Elizabeth Warren dated February 23, 2021[164] and its *2021 Report on FINRA's Examination and Risk Monitoring Program*.[165] The proposed analysis will proceed with a parallel discussion of the potential issues in the two previously identified categories: (1) advertising and marketing, and (2) recommendations to consumers.

1. Advertising and Marketing

In outlining the issue of whether gamified broker-dealer communications violate existing FINRA rules, FINRA specifically cited its Rule 2210(d)(1).[166] Rule 2210 is titled "Communications with the Public," and section (d) specifically covers "Content Standards."[167] It is unclear from FINRA's statement which parts of this lengthy rule are relevant but the subsections that seem most relevant are as follows:

158. *Id.*
159. *Id.*
160. *Id.*
161. Troy Segal, *Blue Sky Laws*, INVESTOPEDIA, http://www.investopedia.com/terms/b/blueskylaws.asp [http://perma.cc/ULB7-T76S].
162. Request for Information, *supra* note 3.
163. *Self Regulatory Organization*, *supra* note 136.
164. Cook Letter, *supra* note 2, at 5.
165. FIN. INDUS. REGUL. AUTH., 2021 REPORT ON FINRA'S EXAMINATION AND RISK MONITORING PROGRAM 1, 22 (Feb. 2021), http://www.finra.org/sites/default/files/2021-02/2021-report-finras-examination-risk-monitoring-program.pdf [http://perma.cc/QQ3R-9YNW].
166. Cook Letter, *supra* note 2, at 5.
167. FINRA, Rule 2210 (2019), http://www.finra.org/rules-guidance/rulebooks/finra-rules/2210 [http://perma.cc/B96W-KKQP].

> (A) All member communications must be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading.
>
> (B) No member may make any false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication. No member may publish, circulate or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading . . . .
>
> (D) Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return and yield inherent to investments.
>
> (E) Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.[168]

2. Recommendations to Customers

Similarly, in relation to the second issue FINRA has identified regarding whether gamified interactions represent "recommendations," FINRA specifically mentions the SEC's Reg BI.[169]

As previously mentioned, Robinhood offers customers commission-free trading through self-directed brokerage accounts.[170] This type of account is "designed for investors 'who wish to make their own investment choices in a [] brokerage account.' "[171] In fact, Robinhood's Customer Agreement states that, as a customer, "[y]our Account is self-directed and . . . you are solely responsible for any and all orders placed in your Account, for your investment decisions, and for determining the suitability of any particular transaction, security, or investment strategy."[172] The Customer Agreement further holds that Robinhood "does not provide any investment advice or recommend any particular security, transaction, or

168. *Id.*

169. Cook Letter, *supra* note 2, at 5.

170. *Investments You Can Make on Robinhood*, *supra* note 102.

171. Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc., 464 F. Supp. 3d 634, 638 (S.D.N.Y. 2020).

172. ROBINHOOD FINANCIAL LLC, ROBINHOOD FINANCIAL LLC & ROBINHOOD SECURITIES, LLC CUSTOMER AGREEMENT 2 (2022), http://cdn.robinhood.com/assets/robinhood/legal/Robinhood%20Customer%20Agreement.pdf [http://perma.cc/5PBL-MZ4Q].

order . . . unless specifically agreed upon in writing and clearly identified by Robinhood as an individualized investment recommendation for you."[173] This would imply that Robinhood does not believe any of its communications with customers, including any that arise from the use of DEPs, constitute recommendations. However, regulators like FINRA now want to evaluate whether these gamified communications do in fact constitute recommendations, in which case, additional regulations would apply to these communications.[174]

Several regulations cover recommendations, most notably Reg BI, which was passed in 2019.[175] The foundation of Reg BI is the requirement that "[w]hen making . . . a [securities transaction or investment strategy] recommendation to a retail customer, [broker-dealers] must act in the best interest of the retail customer at the time the recommendation is made, without placing [their] financial or other interest ahead of the retail customer's interests."[176] This obligation is further broken down into more specific types of requirements relating to disclosures, care, conflicts of interest, and compliance.[177] Specifically relevant to the issue at hand is the care obligation: broker-dealers "must exercise reasonable diligence, care, and skill in making the recommendation."[178] However, even under the requirements of Reg BI, broker-dealers do not have to meet the same fiduciary standards that financial advisors do.[179] Even though Reg BI has "all the hallmarks of a fiduciary standard," it only applies in the "narrow circumstance when [broker-dealers] are making the recommendation," instead of at all times, the way fiduciary standards apply.[180]

The broker-dealer recommendations covered by Reg BI are "recommendations of any securities transaction or investment strategy involving securities (including account recommendations)," however, the SEC does not provide one single definition of what constitutes a recommendation and instead states this must be evaluated on a case-by-case basis by considering the "facts and circumstances of a particular

173. *Id.*
174. Cook Letter, *supra* note 2, at 5.
175. *Regulation Best Interest*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/info/smallbus/secg/regulation-best-interest [http://perma.cc/G8BT-LUW5].
176. *Id.*
177. *Id.*
178. *Id.* (emphasis omitted).
179. Bob Pisani, *Brokers Will Have to Tell You a Lot More About What They Are Advising You to Buy Starting Next Week*, CNBC (June 25, 2020, 7:11 AM), http://www.cnbc.com/2020/06/25/brokers-will-have-to-tell-you-a-lot-more-about-what-they-are-advising-you-to-buy-starting-next-week.html, [http://perma.cc/495W-KPN9].
180. *Id.*

situation."[181] In adopting Reg BI, the SEC reiterated factors for consideration from a NASD Policy Statement from 2001[182] (written by the NASD prior to its merger with the NYSE to create FINRA in 2007) that stated determining whether a recommendation was made may depend on whether the communication " 'reasonably would be viewed as a "call to action," '[183] and 'reasonably would influence an investor to trade a particular security or group of securities.' "[184] Importantly, the SEC identified an additional factor in stating that "[t]he more individually tailored the communication to a specific customer or targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a 'recommendation.' "[185]

Finally, the NASD, now succeeded by FINRA, has previously provided helpful examples of other electronic communications that are considered recommendations.[186] These examples are valuable because, although the technology underlying DEPs makes their use a particularly modern issue, these examples allow us to consider gamification in the context of other digital communication practices instead of as an entirely novel issue. For instance, the NASD stated that a broker-dealer would be considered to make a recommendation if it "sends a customer specific electronic communication (e.g., an e-mail or pop-up screen) to a targeted customer or targeted group of customers encouraging the particular customer(s) to purchase a security,"[187] but not if "pursuant to a customer's request, it sends the customer (1) electronic 'alerts' . . . or (2) research announcements . . . that are not tailored to the individual customer, as long as neither . . . would lead a customer reasonably to believe that the firm is suggesting that the customer take action in response."[188]

C. Policy Goals Underlying Broker-Dealer Regulations

1. Protection of Investors

A foundational principle underlying the efforts of both the bodies of federal regulation and self-regulation is protecting investors.[189] For instance,

181. *Regulation Best Internet, supra* note 175.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Notice to Members 01-23*, FINRA, http://www.finra.org/rules-guidance/notices/01-23 [http://perma.cc/9Y6V-B8GA].
187. *Id.*
188. *Id.* at n.14.
189. U.S. SEC. & EXCH. COMM'N, http://www.sec.gov [http://perma.cc/G7QX-TS38]; *About FINRA*, *supra* note 142.

the SEC website states that "[t]he SEC enforces the securities laws to protect the more than 66 million American households that have turned to the securities markets to invest in their futures."[190] The FINRA website similarly states that "FINRA is dedicated to protecting investors and safeguarding market integrity in a manner that facilitates vibrant capital markets."[191]

This goal is primarily achieved through disclosure requirements, which make up "the cornerstone of federal securities regulation."[192] "The idea of 'merit regulation' -- that some securities simply shouldn't be sold to anyone even if they want them . . . is not part of the plan under the federal securities laws."[193] Instead, federal regulations require "companies offering securities, such as stocks or bonds, for public sale to provide truthful information about these securities and the risks associated with investing in them . . . [and] to periodically report certain information on an ongoing basis."[194] After receiving this "complete disclosure," investors can make an investment decision confidently.[195]

2. Advance the Public Interest

Similarly, since its inception, the U.S. system of securities regulation has considered the notion of advancing the "national public interest."[196] For instance, the Securities Exchange Act of 1934 was intended to provide broad stability, including to "protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions."[197] As previously stated, various responsibilities required of market participants, like the production of material disclosures, are crucial not only to allowing investors to make informed decisions but also to "maintain[ing] fair, orderly, and efficient markets, and facilitat[ing] capital formation," goals that go hand in hand.[198]

190. U.S. SEC. & EXCH. COMM'N, *supra* note 189.
191. *About FINRA*, *supra* note 142.
192. EVA SU, CONG. RSCH. SERV., IF11256, SEC SECURITIES DISCLOSURE: BACKGROUND AND POLICY ISSUES 1 (2019).
193. Charles C. Cox, Comm'r, Sec. Exch. Comm'n, Small Issuer Disclosure Policy and the Fringes of "Merit Regulation" 5 (Oct. 3, 1986), http://www.sec.gov/news/speech/1986/100386cox.pdf [http://perma.cc/Y7GA-UTZM].
194. SU, *supra* note 192, at 1.
195. *About FINRA*, *supra* note 142.
196. 15 U.S.C. § 78b.
197. *Id.*
198. *Our Goals*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/our-goals [http://perma.cc/2HZR-NC2E].

III. APPLYING THE EXISTING REGULATORY FRAMEWORK TO THE NOVEL ISSUE OF GAMIFICATION BY BROKER-DEALERS

A. DO NOVEL GAMIFICATION PRACTICES USED BY BROKER-DEALERS VIOLATE EXISTING REGULATIONS?

The analysis below is qualified in that it only represents the author's analysis and opinion. Regulators have only posed these issues as open questions and have not made any conclusions yet.[199]

1. Advertising and Marketing

As previously explained in Part I, the main marketing issues evaluated in this paper include specific marketing campaigns and the use of DEPs, specifically certain visual design features and celebratory graphics, in marketing materials.

In regard to Robinhood's marketing promotions, opponents of Robinhood have accused the company of "us[ing] advertising and marketing techniques that targeted younger individuals . . . with little, if any, investment experience."[200] However, even if such practices are "aggressive"[201] as opponents claim and do sometimes target young investors, like marketing campaigns aimed at university students,[202] these marketing strategies are probably not in violation of any existing advertising or marketing regulations, namely FINRA Rule 2210(d)(1) - Communications with the Public. The main promises that Robinhood makes in its advertising campaigns or on its home page, particularly the promise of a free stock upon signing up for an account and commission-free trading[203] are not misleading and are in fact provided by Robinhood.[204]

Another potential concern relating to advertising and marketing is the use of DEPs, specifically visual cues and celebratory graphics in marketing materials. As of 2021, Robinhood continued to use visual cues, like "objects, pictures, symbols and words" in its platform[205] and potentially also in its ads. However, Robinhood attests that use of visual cues is not a new phenomenon and even more-traditional elements, like storefronts, can be considered

199. Cook Letter, *supra* note 2, at 4–6.
200. Complaint at *4, Robinhood Fin., LLC v. Galvin, No. 2184CV00884, 2022 Mass. Super. Lexis 19 (Mar. 30, 2022) (No. E-2020-0047).
201. *Id*. at 3.
202. Rudegeair & McCabe, *supra* note 49.
203. ROBINHOOD, *supra* note 41.
204. REGISTRATION STATEMENT, *supra* note 8, at 9, 124.
205. Dusseault Letter, *supra* note 51, at A-3.

visual cues.[206] Robinhood also cites to previous SEC comments that "endorsed the use of 'visually engaging and effective designs' to appeal to retail customers and make information more accessible, noting that '[t]here is also empirical evidence that visualization improves individual perception of information.' "[207] As of 2021, Robinhood utilizes certain celebratory images, including animations and graphics and has used confetti in the past.[208] Robinhood holds that regulators "traditionally have viewed retail investor participation in the securities markets as important because of the opportunities for wealth accumulation that accompanies this participation" and Robinhood's "acknowledgment of investors' milestones is consistent with these views."[209]

In-app use of these game-like features needs to be evaluated under the SEC's Reg BI, which will be discussed in the next subsection. However, showing these features before account opening is subject to FINRA Rule 2210(d)(1) - Communications with the Public. It is not immediately clear whether these features could be in violation of FINRA Rule 2210(d)(1). For instance, could an advertisement showing confetti falling on a user[210] constitute a "false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication?"[211] To answer this question would require additional information, including whether Robinhood still uses this type of advertisement, which is unlikely since Robinhood has removed confetti from its platform,[212] and whether retail investors are even discovering broker-dealer platforms from advertisements, which the SEC has requested comments on.[213]

A final concern relating to advertising and marketing has to do with the way certain social features, in particular "copy trading" are marketed. Robinhood specifically has stated that it does not allow for copy trading.[214] However, if other platforms do allow it, they could potentially "oversimplify the risks of investing" in their marketing materials by "touting an automated trading experience or showcasing low- risk traders to follow."[215] This could

206. *Id.*
207. *Id.*
208. *Id.* at A-2, A-3.
209. *Id.* at A-3.
210. McCabe, *supra* note 53.
211. Rule 2210 (2019), *supra* note 167.
212. Dusseault Letter, *supra* note 51, at 5.
213. Request for Information, *supra* note 3, at 49071.
214. Dusseault Letter, *supra* note 51, at 5.
215. Letter from David P. Meyer, President, Pub. Invs. Advoc. Bar Ass'n, to Vanessa A. Countryman, Sec'y, Sec. & Exch. Comm'n (Oct. 1, 2021) [hereinafter Meyer Letter], http://www.piaba.org/piaba-newsroom/comment-letter-request-comment-release-34-92766-broker-dealer-and-investment-adviser [http://perma.cc/22AV-HGDX].

potentially violate the FINRA Rule 2210(d)(1)(A) requirement that communications be "fair and balanced."[216] To evaluate this issue, more information likely needs to be gathered as to which platforms allow for copy trading and how these platforms market to the public.

As this analysis demonstrates, at this point, Robinhood has not violated FINRA Rule 2210(d)(1). However, the additional information the SEC is currently gathering will be helpful in evaluating this issue with regard to other broker-dealers.

2. Recommendations to Customers

The SEC's Reg BI clearly states that, when making recommendations to retail customers, broker dealers are supposed to prioritize the "best interest" of the customers over the broker-dealer's interests.[217] The central issue necessary to evaluate here is whether broker-dealer communication using DEPs, specifically game-like features, constitutes a recommendation. If it does, then broker-dealer communication using DEPs would not only be subject to the SEC's Reg BI[218] but also potentially violate Reg BI.

Evaluating whether broker-dealer communication using DEPs constitutes a recommendation requires considering the "facts and circumstances"[219] surrounding the communication, including the following factors:

i. Whether broker-dealer communication using DEPs can be perceived as a "call to action"[220] to customers or can "influence"[221] customers to make certain trades.

Robinhood has plainly denied that its platform or any of the features it uses influence users to make certain trades.[222] Specifically, Jacqueline Ortiz Ramsay, Robinhood's head of policy communications, stated that "[t]he platform is self-directed, and we disagree with any characterization of our current products and features as 'gamified' or as amounting to a call to action to trade."[223]

Nevertheless, other parties think differently, specifically considering

216. Rule 2210 (2019), *supra* note 167.
217. *Regulation Best Interest*, *supra* note 175.
218. Request for Information, *supra* note 3, at n.31.
219. *Regulation Best Interest, supra* note 175.
220. *Id.*
221. *Id.*
222. Kenneth Corbin, *Should Reg BI Apply to Robinhood?*, BARRON'S (Sept. 10, 2021, 1:24 PM), http://www.barrons.com/advisor/articles/robinhood-reg-bi-regulation-gamification-51631294540, [http://perma.cc/T2RB-C74C].
223. *Id.*

the Robinhood-generated lists of securities that the company provides to users; for example, in its Administrative Complaint against Robinhood, the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth held that the lists Robinhood provides are shown to customers "[i]n an effort to encourage trading,"[224] which it argues "is no different from a broker-dealer agent handing a list of securities to a customer, pretending to be surprised when the customer purchases securities from that list, and then proclaiming that he made no recommendations to the customer."[225] Similarly, David Meyer, President of the Public Investors Advocate Bar Association, stated in his response letter to the SEC's request for information dated October 1, 2021, that when broker-dealers present customers lists of securities, they "encourage[] customers to search for and make those investments and should be considered a 'recommendation.' Despite providing these lists to all customers by default, these broker-dealers are not conducting an analysis under Reg BI of the securities contained in the lists for customers, which is inconsistent with their obligations as registered broker-dealers."[226]

To fully evaluate this factor, empirical data is necessary to understand whether retail investors are in fact influenced by broker-dealer use of gamification. The answer to certain questions in the SEC's request for information will be particularly helpful to this analysis, including: "What customer and client trends have been observed in connection with or as a result of the adoption and implementation of DEPs? . . . Is there data showing how, for customers with a similar investment profile, these changes compare with any changes in the behavior of customers or clients of firms that do not utilize DEPs?"[227] It is only with additional information that this concern can be fully analyzed.

ii. Whether broker-dealer communication using DEPs is "individually tailored . . . to a specific customer or targeted group of customers."[228]

On the one hand, the Robinhood platform does create some personalized experiences for its users through its use of DEPs, like notifications and curated lists. For instance, as previously discussed, the notifications that users receive can include user-specific updates based on the user's current portfolio, like:

224. Complaint at *6, Robinhood Fin., LLC v. Galvin, No. 2184CV00884, 2022 Mass. Super. Lexis 19 (Mar. 30, 2022) (No. E-2020-0047).
225. *Id.* at 6–7.
226. Meyer Letter, *supra* note 215.
227. Request for Information, *supra* note 3, at 49071.
228. *Regulation Best Interest*, *supra* note 175.

> [T]he price of a stock the customer owns reaching a 52-week high or low or changing by 5% or 10%; suspicious activity in the customer's account; margin maintenance alerts or margin call warnings; options expiration reminders; upcoming dividend payments by companies who stock the customer owns; upcoming earnings announcements by companies whose securities the customer owns; and a friend whom the customer referred through the Stock Referral Program joining Robinhood.[229]

In its Administrative Complaint against Robinhood, the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth specifically called out Robinhood for using these notifications to "encourage interaction with the application and trading."[230] Also, some of the curated lists, another type of DEP mentioned by the SEC,[231] that are available on the Robinhood platform are customizable, like the "Watch Lists" that Robinhood users can make to track securities they are interested in.[232] Thereafter, "Robinhood provides customers with news updates regarding the stocks the customer has elected to add to the list,"[233] creating a personalized avenue of communication with each customer.

Furthermore, the technology for this customization is certainly available today. As previously mentioned, specifically with the use of Blockchain, a large amount of customization is possible. Given the capacity to create unique records in Blockchain[234], broker-dealers leveraging Blockchain to implement DEPs can create more personalized user experiences than using traditional software allows for.[235] These qualities are part of what can make "Blockchain . . . the perfect technology for gamification."[236]

On the other hand, Robinhood has denied certain customizations in the game-like features it uses. For instance, the default "Watch List" that Robinhood shows customers when they open an account is the same for every customer.[237] Robinhood also shows customers five other lists of securities like the "100 Most Popular" list, but all of these Robinhood-

229. Dusseault Letter, *supra* note 51, at A-2.
230. Complaint at *18, Robinhood Fin., LLC v. Galvin, No. 2184CV00884, 2022 Mass. Super. Lexis 19 (Mar. 30, 2022) (No. E-2020-0047).
231. Request for Information, *supra* note 3, at 49067, 49069.
232. Dusseault Letter, *supra* note 51, at A-3.
233. *Id.*
234. Iansiti & Lakhani, *supra* note 114.
235. *Blockchain, the Perfect Tech for Gamification?*, *supra* note 119.
236. *Id.*
237. Dusseault Letter, *supra* note 51, at A-3.

generated lists are "based on objective standards and are not personalized to the customer; the same content is displayed to every customer."[238] Further, users can forgo creating a custom "Watch List,"[239] and thus would not receive news updates the way a user would if they did create one. Finally, in regard to notifications, the personalized notifications that relate to the stocks users hold can be turned off in the settings of user smartphones.[240]

Ultimately, from the research uncovered in this note, there probably is support to demonstrate that Robinhood is creating individualized communication to its customers based on their portfolios and securities interests. However, although this is the default setting, customized communication channels, like notifications or news based on your "Watch List," can easily be removed by users.

iii. Whether broker-dealer communication using DEPs meets any of the examples of online communications considered to be recommendations.

As previously stated, an example provided by the NASD, now succeeded by FINRA, in 2001 of when a broker-dealer is considered to make a recommendation is if it "sends a customer specific electronic communication (e.g., an e-mail or pop-up screen) to a targeted customer or targeted group of customers encouraging the particular customer(s) to purchase a security."[241] This example provides helpful context to evaluate the issue of gamification in the existing regulatory framework, as opposed to construing it as an entirely novel issue.

As previously explained, Robinhood enables customers to create custom lists but also shows customers five lists, including the "100 Most Popular" list.[242] These five "Robinhood-generated lists . . . are based on objective standards and are not personalized to the customer"[243] and thus are not tailored to specific customers or groups of customers. Robinhood pointed out in its response letter to the SEC's request for information dated October 1, 2021, that "the securities industry has provided customers with lists of issuers by category (e.g., most actively traded or current buy ratings), trade ideas, and research reports for decades, and FINRA has confirmed that providing customers . . . lists of securities meeting broad, objective criteria does not constitute a recommendation."[244] Based on these circumstances,

238. *Id.*
239. *Id.*
240. *Id.* at A-2.
241. *Notice to Members 01-23*, *supra* note 186.
242. Dusseault Letter, *supra* note 51, at A-3.
243. *Id.*
244. Dusseault Letter, *supra* note 51, at A-4.

namely the objective approach to generating these lists, Robinhood's current use of DEPs probably does not match with the example provided by FINRA and does not imply that Robinhood uses DEPs or game-like features to make recommendations.

As evidenced by the analysis above, there is probably not a clear answer to any of these questions, and, thus, it is difficult to determine whether Robinhood is making recommendations through its use of DEPs. While the individualized lists presented to users are not entirely consistent with Reg BI, users are easily able to opt-out of these lists. Further, most lists that Robinhood provides are created objectively and are not unique for each user. Thus, on balance, the proposed analysis does not lend to a clear violation by broker-dealers. Only if this question is answered affirmatively can we then analyze the second issue: whether the recommendation violates the best interest of customers.

This violation has already been alleged against Robinhood. For example, in its Administrative Complaint against Robinhood, the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth stated that "by successfully encouraging inexperienced investors to continuously and repeatedly execute trades on its platform, Robinhood prioritized its revenue over the best interests of its customers."[245] This argument might be based on findings that others have pointed out. For instance, SEC Chair Gary Gensler stated in his May 6, 2021 testimony before the House Commission on Financial Services that "[s]ome academic studies suggest more active trading or even day trading results in lower returns for the average trader."[246] If such findings are valid, broker-dealers would benefit from the greater trade volume that DEPs encourage due to the PFOF business model (explained in Part I), while investors would be hurt from it. Thus, if such data can be confirmed, it is probably the case that implementing DEPs or game-like features into broker-dealer platforms violates Reg BI.

Another argument presented by the President of the Public Investors Advocate Bar Association specifically relating to the use of curated lists is that "[d]espite providing these lists to all customers by default, these broker-dealers are not conducting an analysis under Reg BI of the securities contained in the lists for customers, which is inconsistent with their obligations as registered broker-dealers."[247] This argument probably rests on the "care obligation" provided by Reg BI, namely to "exercise reasonable

245. Complaint at *27–28, Robinhood Fin., LLC v. Galvin, No. 2184CV00884, 2022 Mass. Super. Lexis 19 (Mar. 30, 2022) (No. E-2020-0047).

246. Gensler Testimony, *supra* note 25.

247. Meyer Letter, *supra* note 215, at 3.

diligence, care, and skill in making the recommendation."[248] If broker-dealers are not conducting the necessary diligence to review the securities in these lists, they could potentially be in violation of Reg BI.

However, as previously mentioned, any violations of Reg BI are contingent on broker-dealer communications being classified as recommendations. Ultimately, based on the proposed analysis above Robinhood has not violated any existing regulations based on its use of gamification, but to answer all these questions with certainty will require more information. This may be because these regulations may not have been written with modern issues like gamification in mind. Thus, if regulators want to prevent broker-dealers from using DEPs or game-like features, it is likely they may need to amend existing regulations.

B. WHAT LEGAL AND LEGISLATIVE ACTION HAS ALREADY BEEN TAKEN?

Several actions have already been taken by securities regulators and legislative representatives to show that they are considering the issue of gamification.

In May 2021, SEC Chair Gary Gensler addressed rising concerns over gamification, specifically stating that "we need to evaluate our rules, and we may find that we need to freshen up our rule set,"[249] implying that the SEC may be amenable to updating its regulations due to this issue. Thereafter, on September 1, 2021, the SEC issued a request for information and public comment on broker-dealer use of DEPs.[250] This request was intended to gather information on the technologies underlying DEPs, investor experiences using DEPs, and "whether DEPs are making a recommendation or providing investment advice."[251] The request "particularly welcome[s] statistical, empirical, and other data from commenters" on several key issues that would prove helpful to the analysis of whether DEPs, specifically gamification, violate existing regulations, as previously mentioned.[252] Similarly, FINRA President and CEO, Robert Cook, in his statement before the Financial Services Committee of the U.S. House of Representatives on May 6, 2021, addressed the need for additional information regarding

248. *Regulation Best Interest*, *supra* note 175 (emphasis omitted).

249. Gensler Testimony, *supra* note 25.

250. Press Release, Sec. & Exch. Comm'n, SEC Requests Info. & Comment on Broker-Dealer & Inv. Adviser Digit. Engagement Pracs., Related Tools & Methods, & Regul. Considerations & Potential Approaches; Info. & Comments on Inv. Adviser Use of Tech. (Aug. 27, 2021), http://www.sec.gov/news/press-release/2021-167 [http://perma.cc/82H7-NPQ9].

251. *Id.*

252. Request for Information, *supra* note 3, at 49085.

gamification and stated that FINRA will collaborate with the SEC to address this issue.[253] Although the SEC request for public comment is now closed,[254] as of December 2021, the SEC and FINRA have not made any determinations on next steps.

As previously acknowledged, beyond federal regulation, some state regulators have also brought their attention to this issue, including the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth, which filed an Administrative Complaint against Robinhood, in part, for gamified features in December 2020.[255] It is worth noting that in March 2022, a Massachusetts judge declared that the state law Robinhood was accused of violating was invalid, which would impact some of the claims brought against Robinhood.[256] Despite this, the decision was put on hold, with an administrative trial planned for late September, the outcome of which remains to be seen.[257]

Some legislators have also expressed concern about gamification. Several legislators wrote to Robinhood's most senior leadership seeking additional information on safeguards for investors.[258] Others also inquired with the SEC and FINRA about investor protection and urged these regulators to "take steps" to protect "novice investors."[259] Finally, in July 2021, "U.S. Congressman Sean Casten's (D-IL) 'Trading Isn't a Game Act' passed out of the House Financial Services Committee."[260] The legislation

253. Robert W. Cook, President and Chief Exc. Officer, Fin. Indus. Regul. Auth., Statement Before the Financial Services Committee U.S. House of Representatives (May 6, 2021), http://www.finra.org/media-center/speeches-testimony/statement-financial-services-committee-us-house-representatives [http://perma.cc/U89J-95UY].

254. Request for Information, *supra* note 3, at 49067, 49078.

255. Complaint at *3, Robinhood Fin., LLC v. Galvin, No. 2184CV00884, 2022 Mass. Super. Lexis 19 (Mar. 30, 2022) (No. E-2020-0047).

256. Nate Raymond, *In Win for Robinhood, Judge Declares Massachusetts Investment Advice Rule Invalid*, REUTERS (Mar. 30, 2022, 3:21 PM), http://www.reuters.com/legal/litigation/win-robinhood-massachusetts-judge-declares-fiduciary-rule-invalid-2022-03-30 [http://perma.cc/D3EX-AD52].

257. *Id.*

258. Letter from Brad Sherman, Congressman, U.S. House of Representatives, to Vladimir Tenev, Co-Founder and Co-Chief Exec. Officer, Robinhood & Baiju Bhatt, Co-Founder and Co-Chief Exec. Officer, Robinhood 1 (July 13, 2020), http://sherman.house.gov/sites/sherman.house.gov/files/Robinhood%20letter_0.pdf [http://perma.cc/38TN-YQL5].

259. Letter from Sean Casten, Congressman, U.S. House of Representatives, to Jay Clayton, Chairman, Sec. & Exch. Comm'n & Robert W. Cook, President and Chief Exec. Officer, Fin. Indus. Regul. Auth. 1 (Sept. 18, 2020), http://casten.house.gov/sites/evo-subsites/casten-evo.house.gov/files/2020-09-18%20FINRA%20SEC%20ltr%20re%20Online%20Trading%20Platforms%20FINAL.pdf [http://perma.cc/3WRS-5V7L].

260. Press Release, Sean Casten, Congressman, U.S. House of Representatives, Casten's "Trading isn't a Game Act" to Investigate Gamification of Trading Passes Out of Committee (July 30, 2021), http://casten.house.gov/media/press-releases/castens-trading-isnt-game-act-investigate-gamification-

would call on the U.S. Government Accountability Office (U.S. GAO) to perform a study on the impacts of gamification by broker-dealers.[261] These preliminary efforts demonstrate that legislators at least have the issue of gamifications on their radars.

C. POLICY CONCERNS RELATING TO GAMIFICATION AND RECOMMENDATIONS

As the proposed analysis in this Note suggests, broker-dealer use of DEPs does not violate current SEC and FINRA regulations. However, more information on DEPs is needed, specifically more data concerning their effect on investors. The SEC's request for public comment filed in September 2021 draws out various key questions,[262] the answers to which will likely prove decisive in this analysis.

However, even if broker-dealer use of DEPs does not violate existing regulations, the issue remains as to whether regulations *should* cover DEPs. Several policy reasons make regulation of this area favorable for investors.

One concern is the growing number of retail investors participating in the securities market, which exposes more people to both the benefits and dangers of investing. As discussed, opening up the market largely began with the wide-spread use of commission-free trading over the last few years.[263] However, the last twenty months during the COVID-19 pandemic have brought a "new wave of inexperienced and unsophisticated market participants."[264] Robinhood reported similar findings, stating that "[i]n 2020, our Net Cumulative Funded Accounts grew 143% to 12.5 million, increasing to 18.0 million as of March 31, 2021."[265] This boost in new investors during the pandemic could be due to the "extra time at home" or due to replacing more traditional forms of entertainment that suddenly became unavailable, like sports, with investing.[266] Some Americans also leveraged their federal stimulus checks to invest; for instance, Americans "earn[ing] between $35,000 and $75,000 per year . . . increased stock trading by 90% in the week after receiving their stimulus checks."[267]

trading-passes-out [http://perma.cc/363C-LYSB].

261. *Id.*

262. Request for Information, *supra* note 3.

263. Beilfuss & Osipovich, *supra* note 93.

264. Meyer Letter, *supra* note 215.

265. REGISTRATION STATEMENT, *supra* note 8, at 3.

266. Lori Konish, *Many Americans Invested Their $1,200 Stimulus Checks. What the Pros Say You Should Know before You Trade*, CNBC (Aug. 24, 2020, 11:23 AM), http://www.cnbc.com/2020/08/24/many-people-invested-their-stimulus-cash-what-to-know-before-you-do.html [http://perma.cc/G66A-TLZ7].

267. *Id.*

Moreover, Robinhood has a track record of attracting new users that previously were not captured by the market: "[f]rom January 1, 2015 to March 31, 2021, over half of the customers funding accounts on [Robinhood's] platform told [Robinhood] that Robinhood was their first brokerage account."[268] It is certainly admirable that Robinhood is able to boost market accessibility to broader groups and that more Americans are eager to invest in their futures. However, the potential harms that users who are still learning about investing can be exposed to by platforms that use DEPs is worth keeping in mind. Specifically, users may be unaware they are being prompted to conduct more frequent or risky trades that ultimately are against their best interests.[269]

Another reason for regulation of DEP use is the increased access to securities trading for young investors, even minors. Several leading broker-dealers specifically target young users. For instance, as previously stated, in 2021, Robinhood led a marketing campaign targeting university students.[270] Other broker-dealers have implemented new initiatives to streamline the process for minors to set up a sponsored investment account; for example, "Fidelity Investments Inc. said [in 2021] that it would offer investing and savings accounts to 13- to 17-year-olds whose parents or guardians also invest with the firm."[271] Startups, like Bloom, have also joined this initiative and aim to increase access to trading for minors.[272]

In June 2020, Alexander Kearns, a twenty-year-old college student, took his life after seeing a negative $730,165 cash balance in his Robinhood account.[273] This tragedy is "a cautionary tale of the serious risks associated with the race to the bottom in the brokerage business," which has "attract[ed] younger customers, many of whom have little understanding of the securities and markets they are dabbling in."[274] This increased access to young investors is particularly worrying in the context of gamification because gamification relies on the use of game-like features, which could make broker-dealer platforms look more like video games than investment platforms with money at stake. Also, young users could misunderstand the sophistication of the trades they are executing, specifically if broker-dealers

268. REGISTRATION STATEMENT, *supra* note 8, at 124.
269. Request for Information, *supra* note 3, at 49069.
270. Rudegeair & McCabe, *supra* note 49.
271. *Id.*
272. BLOOM, http://www.joinbloom.co [http://perma.cc/D5BL-J739].
273. Sergei Klebnikov & Antoine Gara, *20-Year-Old Robinhood Customer Dies by Suicide After Seeing a $730,000 Negative Balance*, FORBES (June 17, 2020, 10:55 AM), http://www.forbes.com/sites/sergeiklebnikov/2020/06/17/20-year-old-robinhood-customer-dies-by-suicide-after-seeing-a-730000-negative-balance [http://perma.cc/73SG-HGX9].
274. *Id.*

grant them access to more complicated investment vehicles, like options trading, the way Alex Kearns did.[275]

On the other hand, gamification can present important benefits, specifically in allowing for increased comfort with trading platforms and more equitable user experiences. Robinhood holds that it is specifically its "user-friendly" interface that is "appealing to investors who have historically been underserved by the financial community."[276] This effort has allowed Robinhood to meet important milestones: "the number of women trading on Robinhood's platform nearly tripled in 2020, and . . . Robinhood customers are also more racially and ethnically diverse than the industry average."[277] Robinhood also finds that certain visual cues, a type of DEP, can "appeal to retail customers and make information more accessible."[278] Further, Robinhood's use of notifications, another DEP, allows it to communicate in a more equitable manner because it can simultaneously share updates with all customers, in contrast to having to place individual calls to customers in the past.[279]

Ultimately, as these policy concerns illustrate, regulators will need to weigh the benefits Robinhood has achieved through its use of game-like features and the dangers these features can present. The approach they decide to take can only be speculated on at this point. However, additional regulations should be implemented given the enormous risks involved with inexperienced and young retail investors using broker-dealer platforms, as demonstrated by the story of Alex Kearns. Specifically, if the SEC's request for public comment returns statistically significant data showing that gamified platforms can manipulate users into making riskier or more frequent trades, regulators should protect users from the negative consequences of such investment strategies.[280]

Of course, any regulations passed should not stifle the progress Robinhood has made in improving accessibility to securities trading[281] and providing more equitable user experiences.[282] Robinhood's mission "to democratize finance for all"[283] is praiseworthy, and the strides it has already made towards achieving this goal are commendable.[284] Although the design

275. *Id.*
276. Dusseault Letter, *supra* note 51, at 7.
277. *Id.*
278. *Id.* at A-3.
279. Dusseault Letter, *supra* note 51, at A-2.
280. Gensler Testimony, *supra* note 25.
281. Dusseault Letter, *supra* note 51, at 7.
282. *Id.* at A-2.
283. *Id.* at 1.
284. *Id.* at 7.

of Robinhood's platform may be the driving force behind this increased access,[285] users deserve, first and foremost, to be protected. The SEC's goal has always been to protect investors,[286] and this goal cannot be compromised. Thus, any new regulations to protect users from the use of DEPs would be in line with this fundamental goal of American securities regulation. Any new regulations should not necessarily prevent users from making trades that are unfavorable, which would be inconsistent with the American disclosure-based regulatory system.[287] Instead, they should protect users in the limited circumstance that broker-dealers are making personalized recommendations, which would be consistent with existing regulations, like Reg BI,[288] and regulations of other more-traditional communication forms, like those concerning email messages.[289]

CONCLUSION

As demonstrated, investor protection is crucial and should remain the top priority of regulators; in its Administrative Complaint against Robinhood, the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth similarly "request[ed] that an order be entered . . . [t]aking any such further action which may be in the public interest and necessary and appropriate for the protection of Massachusetts investors."[290] On balance, using the proposed analysis in this Note, Robinhood's use of DEPs is not currently in violation of existing federal regulations. What determination federal and state regulators make on this point and what next steps they decide to take remains to be seen. However, even if gamification is a novel concept in the context of securities trading, the policies underlying the American securities regulation system are longstanding. Regulators should lean on these policies in evaluating whether to make regulatory changes to protect investors against broker-dealer use of DEPs.

285. *Id.*
286. *What We Do*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/what-we-do [http://perma.cc/MAZ6-3TTV].
287. SU, *supra* note 192, at 1.
288. *Regulation Best Interest, supra* note 175.
289. *Notice to Members 01-23*, *supra* note 186.
290. Complaint at *31–32, Robinhood Fin., LLC v. Galvin, No. 2184CV00884, 2022 Mass. Super. Lexis 19 (Mar. 30, 2022) (No. E-2020-0047).