

# A CASE FOR REGULATING GAMIFIED INVESTING

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## INTRODUCTION

Investing applications, such as Robinhood Financial LLC, have fueled a flurry of investing activity amongst individual investors. This rise is largely attributed to zero commission and fractional-share trading.<sup>1</sup> Indeed, a recent Deutsche Bank survey indicated nearly half of U.S. retail investors were completely new to the markets in the past year.<sup>2</sup> These new investors are younger, earn lower incomes, and are more racially diverse than more experienced investors.<sup>3</sup> But retail investors are not just entering the markets, they are active in the markets—accounting for twenty-three percent of U.S. equity trading in 2021, more than twice the amount in 2019.<sup>4</sup>

Robinhood is largely seen as the impetus behind the movement toward zero-commission and fractional-share trading.<sup>5</sup> Having built a trading application with the mission to democratize finance,<sup>6</sup> in a sense, they have been largely successful. Robinhood has grown from half a million users in 2014 to 22.5 million users in the second quarter of 2021.<sup>7</sup> This includes adding ten million users from 2020 to

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1. John Csiszar, *How Our Approach to Investing Has Changed Forever*, YAHOO! (Mar. 10, 2021), <https://www.yahoo.com/now/approach-investing-changed-forever-190007929.html> [<https://perma.cc/9285-EYUP>].

2. Katie Martin & Robin Wigglesworth, *Rise of the Retail Army: The Amateur Traders Transforming Markets*, FIN. TIMES (Mar. 9, 2021), <https://www.ft.com/content/7a91e3ea-b9ec-4611-9a03-a8dd3b8bddb5> [<https://perma.cc/54ZD-XSD4>].

3. Mark Lush et al., *Investing 2020: New Accounts and the People Who Opened Them*, FINRA 2-3 (Feb. 2021), [https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them\\_1\\_0.pdf](https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them_1_0.pdf) [<https://perma.cc/QMB9-GRU4>].

4. Martin & Wigglesworth, *supra* note 2.

5. See SEC. & EXCH. COMM'N, STAFF REPORT ON EQUITY AND OPTIONS MARKET STRUCTURE CONDITIONS IN EARLY 2021 7-8 (Oct. 14, 2021), <https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf> [<https://perma.cc/JL8X-7GKG>] (explaining once Robinhood popularized a no commission, no account minimum model, other firms followed including—Webull Financial LLC, SoFi Securities LLC, Interactive Brokers LLC, TD Ameritrade, Inc., E\*Trade Financial Corporation, Ally Financial LLC, Charles Schwab Corporation, and Fidelity Investments, LLC).

6. *Our Mission*, ROBINHOOD, <https://robinhood.com/us/en/support/articles/our-mission/> [<https://perma.cc/M6DW-K87P>] (last visited Oct. 21, 2021).

7. *Number of Users of Robinhood 2014-2021*, STATISTA, <https://www.statista.com/>

the second quarter of 2021.<sup>8</sup>

Although Robinhood has grown its trading platform to a vast user-base, there is significant concern about the practices Robinhood has utilized to attract and grow that user-base.<sup>9</sup> Specifically, Robinhood, and other broker-dealers (companies that buy and sell investment products on behalf of their customers or themselves),<sup>10</sup> utilize gamification to encourage investors to trade more and engage in riskier trading practices.<sup>11</sup> Although there are many uses and definitions of gamification, at its basic level, gamification “uses motivation-oriented game components, including leader-boards, achievement systems, and other metrics to motivate various forms of consumption, education, employment, and industry.”<sup>12</sup> Said a little differently, gamification introduces elements of a game into nongame activities.<sup>13</sup> These design strategies, employed through gamification, have also been referred to as “behavioral design” or “digital engagement practices.”<sup>14</sup>

Gamification plays a pivotal role in appealing to younger audiences and driving trades.<sup>15</sup> Younger and inexperienced traders, who are already more susceptible to gamification, are most likely to use mobile applications to trade—the most prevalent and effective medium for gamification.<sup>16</sup>

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statistics/822176/number-of-users-robinhood/ (last updated Sept. 24, 2021) [<https://perma.cc/FM72-GXNU>].

8. *See id.*

9. *See* Annie Massa & Tracy Alloway, *Robinhood’s Role in the ‘Gamification’ of Investing*, BLOOMBERG WEALTH (July 16, 2021, 12:00 AM), <https://www.bloomberg.com/news/articles/2020-12-19/robinhood-s-role-in-the-gamification-of-investing-quicktake> [<https://perma.cc/YR4D-CPE4>].

10. *See Registered Financial Professionals*, FINRA, <https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/registered-financial-professionals> [<https://perma.cc/X6UK-Y6DC>] (last visited Jan. 14, 2022).

11. *See Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III: Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. 1 (May 6, 2021) [hereinafter *Hearings*] (statement of Gary Gensler, Chairman, Securities and Exchange Commission); Massa & Alloway, *supra* note 9.

12. N. Katherine Hayles et al., *Speculation: Financial Games and Derivative Worlding in a Transmedia Era*, 40 CRITICAL INQUIRY 220, 221 (Spring 2014).

13. *Gamification 101: An Introduction to the Use of Game Dynamics to Influence Behavior*, BUNCHBALL 2 (2010), <http://jndglobal.com/wp-content/uploads/2011/05/gamification1011.pdf> [<https://perma.cc/V3JM-4JVF>]; *see* discussion *infra* Section I.B.

14. *See* Hamza, *Gamification and Behavioural Design*, BOOTCAMP (Jan. 8, 2022) <https://bootcamp.uxdesign.cc/gamification-and-behavioural-design-75fe06a80dda> [<https://perma.cc/K3ZK-6R5Q>]; Press Release, SEC. & EXCH. COMM’N, SEC Requests Information and Comment on Broker-Dealer and Investment Advisor Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology (Aug. 27, 2021), <https://www.sec.gov/news/press-release/2021-167> [<https://perma.cc/ZK6P-BGTS>]. Each term is largely synonymous with the other. For purpose of clarity, this Note will use the term “gamification.”

15. *See* discussion *infra* Sections I.C, I.D.

16. *See* Lush et al., *supra* note 3.

Currently, gamified investing is largely unregulated.<sup>17</sup> The most applicable rule that could regulate broker-dealers' use of gamification is Regulation Best Interest ("Regulation BI"). Regulation BI, promulgated by the Securities and Exchange Commission ("SEC"), requires broker-dealers—*when making a recommendation*—to “act in the best interest of the retail customer.”<sup>18</sup> This requires broker-dealers to refrain from placing any interest (financial or otherwise) ahead of the customer's interest.<sup>19</sup> However, as it is currently understood, gamification does not constitute a recommendation and thus does not fall under the scope of Regulation BI.<sup>20</sup> The SEC, in recognizing the potential harm gamification may have on investors and the inadequacy of current securities law in regulating gamification, has requested public comment on these practices signaling a regulatory change may soon occur.<sup>21</sup>

This Note seeks to demonstrate the need to regulate gamification in the investing context more rigorously. In Part I, this Note describes the influence of games and how that has led to the proliferation of gamification. Part I then examines gamification in the investing context and how Robinhood employs gamification in its application. Part II surveys the current landscape of securities law. This begins with a brief explanation of the securities backdrop and the suitability standard, which previously governed broker-dealers' conduct. Next, Part II explains Regulation BI and the standard it sets for broker-dealers. Part III demonstrates the harms to retail investors and the conflicts of interest between broker-dealers and retail investors resulting from gamification. This assessment supports, and Part III argues, why gamification should constitute a recommendation under Regulation BI. Part IV proposes that the SEC should broaden and clarify how gamification constitutes a recommendation under Regulation BI. Finally, Part IV asserts that Indiana can act—like Massachusetts and other states have—to protect Hoosier investors, regardless of the SEC's decision on whether to regulate gamification.

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17. See discussion *infra* Part III.

18. Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318, 33,319-20 (July 12, 2019) (codified at 17 C.F.R. pt. 240) [hereinafter Final Rule: Regulation BI].

19. *Id.* at 33,320.

20. See discussion *infra* Part III.

21. In its request for comment, the SEC specifically identified social networking tools; games and streaks with prizes; points, badges, and leaderboards; notifications; celebrations for trading; visual cues; ideas presented at order placement; subscription tiers; and chatbots as the design practices that they are seeking to learn more about. See *Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice*, 86 Fed. Reg. 49,067 (Sept. 1, 2021) [hereinafter *Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices*].

## I. OVERVIEW OF GAMIFICATION

*A. What Is a Game?*

From childhood to adulthood, games have consumed our lives. Days of hide-and-seek in the backyard turned into late-night Monopoly games in the living room. Even as games evolve and transform, they continue to fill our days with entertainment and excitement. This ability that games have to captivate and hold our attention is the very reason companies and leaders have introduced game elements into other parts of our lives.<sup>22</sup>

This captivation of games is demonstrated in the vast amounts of money people spend to be a part and participate in games. For instance, the casino gaming industry contributes \$261 billion to United States' gross domestic product;<sup>23</sup> the video game industry contributes \$90 billion;<sup>24</sup> the sports events industry contributes \$73.5 billion.<sup>25</sup> Companies utilizing gamification are seeking to capitalize on people's appetite for games.

Game designer and performance studies Ph.D. Jane McGonigal, argues that all games have four defining traits: a goal, rules, a feedback system, and voluntary participation.<sup>26</sup> The *goal* is an outcome that individuals will seek to accomplish.<sup>27</sup> The *rules* set boundaries on how individuals can accomplish the specified goal.<sup>28</sup> A *feedback system* communicates to individuals how well they are doing in the game and how close they are to reaching their goal.<sup>29</sup> Finally,

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22. See Felix Raczkowski, *Making Points the Point: Towards a History of Ideas of Gamification*, in RETHINKING GAMIFICATION 141, 157 (Mathias Fuchs et al. eds., 2014), available at [https://mediarep.org/bitstream/handle/doc/2952/Rethinking\\_Gamification\\_141-160\\_Raczkowski\\_History\\_of\\_ideas\\_.pdf?sequence=7](https://mediarep.org/bitstream/handle/doc/2952/Rethinking_Gamification_141-160_Raczkowski_History_of_ideas_.pdf?sequence=7) [<https://perma.cc/Q7QT-K24K>] (“Digital games appear as phenomena that can be used, their appeal can be made productive, and they can develop a motivational attraction that may be adapted for fields of operation as varied as consulting or marketing. Mere elements of games appear to be capable of transforming mundane structures, systems, and spaces into ludic ones.”).

23. *National Economic Impact of the U.S. Gaming Industry*, AM. GAMING ASS'N (June 1, 2018), <https://www.americangaming.org/resources/economic-impact-of-the-u-s-gaming-industry-2/> [<https://perma.cc/QD6S-98Q6>].

24. *Study: Gaming Industry Contributed \$90B to U.S. Economy in 2019*, REUTERS (Dec. 3, 2020, 1:54 PM), <https://www.reuters.com/article/esports-business-gaming-economy/study-gaming-industry-contributed-90b-to-u-s-economy-in-2019-idUSFLM6F7yh2> [<https://perma.cc/Y58E-AAWP>].

25. Darren Heitner, *Sports Industry to Reach \$73.5 Billion by 2019*, FORBES (Oct. 19, 2015, 7:15 AM), <https://www.forbes.com/sites/darrenheitner/2015/10/19/sports-industry-to-reach-73-5-billion-by-2019/?sh=1862001c1b4b> [<https://perma.cc/4B5U-KXAC>].

26. JANE MCGONIGAL, REALITY IS BROKEN: WHY GAMES MAKE US BETTER AND HOW THEY CAN CHANGE THE WORLD 21 (2011).

27. *Id.*

28. *Id.*

29. *Id.*

*voluntary participation* “establishes common ground” for the game to be played by multiple people and ensures that everyone accepts the goal, rules, feedback.<sup>30</sup> To reinforce and enhance the four defining traits of a game, game designers employ various features including “interactivity, graphics, narrative, rewards, competition, virtual environments, or the idea of ‘winning.’”<sup>31</sup>

### B. Introducing Game Elements into The Non-Game

Fundamentally, gamification “appl[ies] the mechanics of gaming to nongame activities to change people’s behavior.”<sup>32</sup> Through the use of game mechanics, such as points, levels, challenges, leaderboards, etc., the activity is gamified to engage and motivate the user.<sup>33</sup> In turn, these various game mechanics seek to replicate the desires and motivations that are indicative of a game experience—including rewards, status, achievement, self-expression, and competition.<sup>34</sup>

The idea that gamification induces the behavior it seeks, in turn, creates disparate views. For instance, Gabe Zichermann and Christopher Cunningham, both having written and spoken on gamification, suggest that gamification is used to “engage users and solve problems.”<sup>35</sup> Similarly, Acorns, a financial technology company, views gamification as a way to nudge the person into making better decisions.<sup>36</sup> However, a more skeptical view of gamification from sociology professor PJ Rey counters that “[g]amification is . . . more about creating willing subjects” in pursuit of another’s purpose—such as the needs of capitalism.<sup>37</sup>

Through the proliferation of online connectivity and web-based applications, game designers have had increasing opportunities to integrate gamification into everyday activities. In fact, the instantaneous feedback in digital games—where there is little time between an individual’s actions and the game’s response—partially makes digital games more addictive.<sup>38</sup> Importantly, this

30. *Id.*

31. *Id.*

32. BUNCHBALL, *supra* note 13, at 2.

33. *Id.*

34. *Id.*

35. GABE ZICHERMANN & CHRISTOPHER CUNNINGHAM, *GAMIFICATION BY DESIGN* xiv (Mary Treseler ed., 2011).

36. Letter from Acorns, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Oct. 1, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9316164-260077.pdf> [<https://perma.cc/DPL9-EEJ3>]; see generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008) (A nudge “alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”).

37. PJ Rey, *Gamification and Post-Fordist Capitalism*, in *THE GAMEFUL WORLD: APPROACHES, ISSUES, APPLICATIONS* 277, 279 (Steffen P. Walz & Sebastian Deterding eds., 2015).

38. See MCGONIGAL, *supra* note 26, at 24 (“What makes *Tetris* so addictive, despite the

allows an individual in a digital game to begin each game “*not knowing what to do and not knowing how to play.*”<sup>39</sup> This is different from traditional games where individuals require instructions prior to playing. “In fact, it’s a truism in the game industry that a well-designed game should be playable immediately, with no instruction whatsoever.”<sup>40</sup> In a digital game, individuals are able to play the game without up-front instructions and receive instant feedback to their inputs into the game. Thus, they can learn as they move along in the game.

### C. Gamification in Investing

Robinhood has utilized various forms of gamification in its trading application. Most famously, confetti animations would rain down in the Robinhood application when users purchased their first stock or opened an account.<sup>41</sup> Popularized in commercials and advertisements, the Robinhood confetti became an identifiable part of the company’s brand.<sup>42</sup> Among other gamification techniques, Robinhood offers free stock for signing up friends, displays the one-hundred most-held stocks by fellow Robinhood investors, displays the top twenty stocks with the most volatility, and sends notifications that include emojis.<sup>43</sup> Another online brokerage firm, eToro, allows investors to “find your favorite featured eToro users and copy all of their trades in one click.”<sup>44</sup>

Moreover, when initiating a trade in Robinhood, it is easier to make the trade than cancel it.<sup>45</sup> To confirm a purchase, an investor swipes up.<sup>46</sup> To cancel a trade,

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impossibility of winning, is the intensity of the feedback it provides.”).

39. *Id.* at 26.

40. *Id.*

41. Caitlin McCabe, *Robinhood to Remove Controversial Digital Confetti From Trading App*, WALL ST. J. (Mar. 31, 2017, 7:11 PM), [https://www.wsj.com/articles/robinhood-to-remove-controversial-digital-confetti-from-trading-app-11617195612?mod=searchresults\\_pos10&page=1](https://www.wsj.com/articles/robinhood-to-remove-controversial-digital-confetti-from-trading-app-11617195612?mod=searchresults_pos10&page=1) [<https://perma.cc/QG46-NCCD>]. Robinhood, with its sights set on mending its public image before their Initial Public Offering, decided to discontinue use of the confetti, *id.*

42. *See id.*

43. *See* Annie Massa & Edward Robinson, *Robinhood’s Role in the ‘Gamification’ of Investing*, WASH. POST (Dec. 21, 2020, 9:39 AM), [https://www.washingtonpost.com/business/robinhoods-role-in-the-gamification-of-investing/2020/12/19/83b310ca-41bf-11eb-b58b-1623f6267960\\_story.html](https://www.washingtonpost.com/business/robinhoods-role-in-the-gamification-of-investing/2020/12/19/83b310ca-41bf-11eb-b58b-1623f6267960_story.html) [<https://perma.cc/QB3T-ZGUC>]; Liz Ormitz, *How Robinhood Transformed Retail Trading Ahead of Its IPO*, WALL ST. J. (July 15, 2021, 12:43 PM), [https://www.wsj.com/video/series/wsj-explains/how-robinhood-transformed-retail-trading-ahead-of-its-ipo/5B2015FF-0ED5-43B1-9597-E5CE1DE88D8B?mod=Searchresults\\_pos2&page=1](https://www.wsj.com/video/series/wsj-explains/how-robinhood-transformed-retail-trading-ahead-of-its-ipo/5B2015FF-0ED5-43B1-9597-E5CE1DE88D8B?mod=Searchresults_pos2&page=1) [<https://perma.cc/6Z6U-DDHR>].

44. Paul Kiernan & Peter Rudegeair, *SEC Launches Review of Online Strategies Used by Brokers, Advisers*, WALL ST. J. (Aug. 27, 2021, 3:24 PM), [https://www.wsj.com/articles/sec-launches-review-of-online-strategies-used-by-brokers-advisers-11630081811?mod=Searchresults\\_pos10&page=1](https://www.wsj.com/articles/sec-launches-review-of-online-strategies-used-by-brokers-advisers-11630081811?mod=Searchresults_pos10&page=1) [<https://perma.cc/8NC6-X4DP>].

45. Michael Wursthorn & Euirim Choi, *Does Robinhood Make It Too Easy to Trade? From*

a user has to press an “edit” button on the top left corner and then press another button to complete the cancellation.<sup>47</sup> In another context—options trading, a much more complex and speculative security—Robinhood allows customers access instantaneously. Unlike the process at large brokerage houses that manually review all applications to trade options—a process that can take days to get access to a basic level of options trading<sup>48</sup>—Robinhood conditions option trading on answers to a questionnaire.<sup>49</sup>

Logging onto the Robinhood website or mobile application resembles more of a game application or social media site than an investing platform. The application consists of sharp colors and flashy designs, and every navigable screen has a distinct colorful graphic. Stock prices move up and down like slot machines.<sup>50</sup> A social-media-style news feed—right underneath a trending list of various investment products—populates and re-populates with market-worthy news.<sup>51</sup> Stock lists can be customized with user-chosen emojis.<sup>52</sup> All these features on Robinhood’s application are designed to keep people engaged in their application.<sup>53</sup>

In Figure 1 below, Robinhood’s platform displays stock lists that are most popular with other Robinhood users.<sup>54</sup> This type of display effectively prompts the investor to copy the trades of another. Inexperienced investors, in search of information and with less ability to evaluate stocks, are even more susceptible to lists like Figure 1. The SEC has indicated that “copy trading” raises regulatory

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*Free Stocks to Confetti*, WALL ST. J. (Aug. 20, 2020, 2:53 PM), [https://www.wsj.com/articles/confetti-free-stocks-does-robinhoods-design-make-trading-too-easy-11597915801?mod=article\\_inline](https://www.wsj.com/articles/confetti-free-stocks-does-robinhoods-design-make-trading-too-easy-11597915801?mod=article_inline) [https://perma.cc/NXS5-P2SA].

46. *Id.*

47. *Id.*

48. See *Fast Answers to Your Most Common Questions*, CHARLES SCHWAB, <https://www.schwab.com/faqs#:~:text=Please%20note%3A%20Options%20approval%20may,at%20Schwab%20will%20be%20rejected> [https://perma.cc/JSJ8-6LVF] (last visited Sept. 18, 2022) (“Options approval may take 5-10 business days.”).

49. See Lee Stanton, *How To Get Approved For Options In Robinhood*, ALPHR (Mar. 5, 2021), <https://www.alphr.com/get-approved-options-robinhood/#:~:text=Robinhood%20determines%20if%20you're,Credit%20spreads> [https://perma.cc/DLH6-XGTT].

50. See Mark Wilson, *How Robinhood Turns Stock Trading into a Game That It Always Wins*, FAST COMPANY (Feb. 09, 2021), <https://www.fastcompany.com/90602455/how-robinhood-turns-stock-trading-into-a-game-that-it-alwayswins> [https://perma.cc/ZKZ8-78SB].

51. *Id.*

52. Lists, ROBINHOOD, <https://robinhood.com/us/en/support/articles/lists/> [https://perma.cc/7SMB-QB4S] (last visited Sept. 9, 2022).

53. Ornitz, *supra* note 43.

54. Lists, *supra* note 52. Robinhood states on its website that these lists “are provided for informational purposes only . . . and are not investment advice or a recommendation,” *id.*; *Trending Lists*, ROBINHOOD, <https://robinhood.com/> [https://perma.cc/6PZL-7GQG] (last visited Jan. 31, 2022) (accessed through investor login, on file with author).

concerns.<sup>55</sup> Trending Lists effectively allow “investors to copy the trades of other investors.”<sup>56</sup>

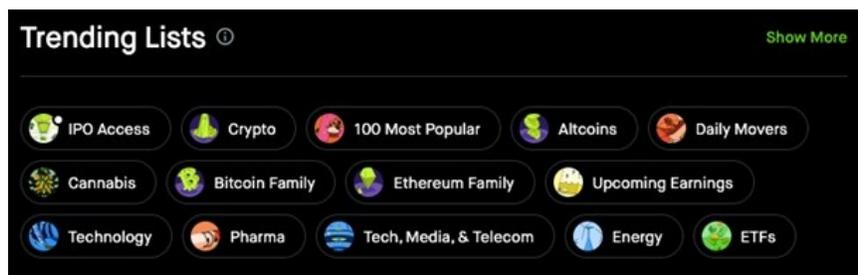


Figure 1

Figures 2, 3, and 4 are a sampling of the types of graphics and vivid colors that Robinhood displays on its application.<sup>57</sup> Robinhood holds that “[i]t’s important to distinguish between accessible, modern design and gamification . . . .”<sup>58</sup> Nonetheless, these types of graphics and vivid colors transform Robinhood into a game-like platform, that can change people’s investing behavior.<sup>59</sup>



Figure 2

Figure 3

Figure 4

Figures 5, 6, and 7 below are some of the rewards users can receive from Robinhood. To receive this stock reward, a Robinhood user is prompted to “scratch-off” a lottery-like ticket or “pick-a-card.” The SEC, in its Request for Comment, is concerned with “games that use interactive graphics and offer prizes

55. *Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices*, *supra* note 21, at 49,068 n.3.

56. *Id.* at 49,068.

57. Photograph of Robinhood’s Graphics, in ROBINHOOD, <https://robinhood.com/> [<https://perma.cc/6PZL-7GQG>] (last visited Jan. 31, 2022) (accessed through investor login, on file with author).

58. Wursthorn & Choi, *supra* note 45.

59. *See id.*

(e.g., slot-machine style interactive graphics, interactive wheels of fortune, or virtual “scratch-off” lottery tickets).<sup>60</sup>

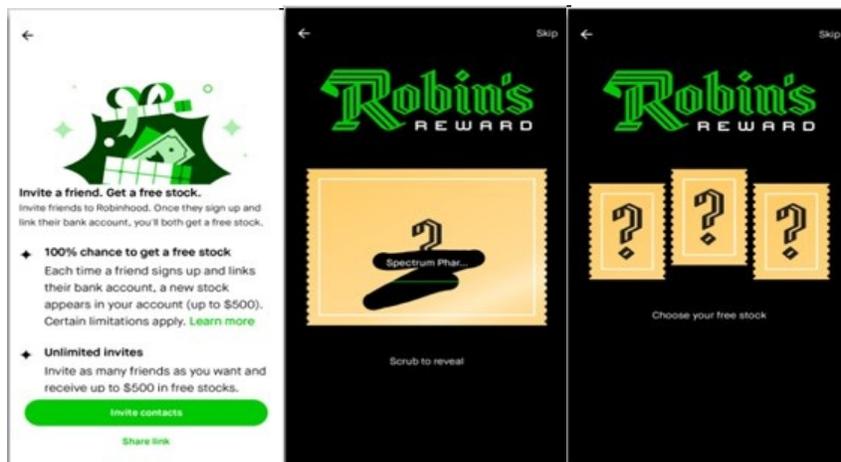


Figure 5<sup>61</sup>

Figure 6<sup>62</sup>

Figure 7<sup>63</sup>

#### D. Experiences with Robinhood

The experience and perspective of investors using Robinhood sheds some light on the realities of the Robinhood application. For instance, Rachel Putman, a novice investor from Arkansas, consciously resists the urge to trade impulsively on her Robinhood account.<sup>64</sup> To help minimize any potential losses that may arise, Ms. Putman has designated her Robinhood account as her “play” account.<sup>65</sup> Speaking about Robinhood, Ms. Putman explained, “I know it’s not the most responsible way to get into investing . . . It’s easy gambling—on your phone, in

60. *Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices*, *supra* note 21, at 49,068 (emphasis added).

61. Mark Wilson, Photograph of Robinhood “Invite a Friend” screen, in Mark Wilson, *How Robinhood Turns Stock Trading into a Game That It Always Wins*, FAST COMPANY (Feb. 09, 2021), <https://www.fastcompany.com/90602455/how-robinhood-turns-stock-trading-into-a-game-that-it-alwayswins> [<https://perma.cc/ZKZ8-78SB>].

62. Mark Wilson, Photograph of Robinhood’s “Robin’s Reward” screen, in Mark Wilson, *How Robinhood Turns Stock Trading into a Game That It Always Wins*, FAST COMPANY (Feb. 09, 2021), <https://www.fastcompany.com/90602455/how-robinhood-turns-stock-trading-into-a-game-that-it-alwayswins> [<https://perma.cc/ZKZ8-78SB>].

63. *Id.*

64. Lisa Beilfuss, *The Latest Trend in Mobile Gaming: Stock-Trading Apps*, WALL ST. J. (Jan. 22, 2019, 7:00 AM), [https://www.wsj.com/articles/the-latest-trend-in-mobile-gaming-stock-trading-apps-11548158400?mod=article\\_inline](https://www.wsj.com/articles/the-latest-trend-in-mobile-gaming-stock-trading-apps-11548158400?mod=article_inline) [<https://perma.cc/HC69-4PMF>].

65. *Id.*

your pocket . . . and you could lose it all in the checkout line.”<sup>66</sup>

Others are not as prudent as Ms. Putnam. Morgan Snipes, a small-business owner and novice investor, pays an additional monthly fee to be able to trade on margin—magnifying returns or losses.<sup>67</sup> Even though Mr. Snipes is new to investing, he stated, “I’m attempting to make a profession out of it.”<sup>68</sup>

In another example, Richard Dobatse used to trade infrequently before setting up his Robinhood account.<sup>69</sup> Now, Mr. Dobatse has taken out two \$30,000 home equity loans to fund his speculative option and stock trading.<sup>70</sup> At one point Mr. Dobatse’s account was worth over \$1 million.<sup>71</sup> The value of his account is now worth \$6,956.<sup>72</sup>

This anecdotal evidence of Robinhood’s ability to change investors’ behavior is not an anomaly. Massachusetts filed an administrative complaint against Robinhood for, *inter alia*, “use of strategies such as gamification to encourage and entice continuous and repetitive use of its trading application,” in violation of Massachusetts regulations.<sup>73</sup> In its complaint, Massachusetts claimed that “at least 241 Robinhood customers with no investment experience averaged at least 5 trades per day on Robinhood’s trading platform” over a three-year period.<sup>74</sup> Moreover, Massachusetts specifically identified the trades of twenty-five Robinhood customers without investment experience.<sup>75</sup> For instance, one customer on Robinhood made 12,748 trades and averaged ninety-two trades a day.<sup>76</sup> Another customer made 7,317 trades and averaged seventy-five trades per day.<sup>77</sup>

#### *E. SEC Action*

Gary Gensler, Chairman of the SEC, has expressed his skepticism about gamification within the investing context.<sup>78</sup> Mr. Gensler distinguished gamification in investing from gamified techniques in other instances.<sup>79</sup> He stated,

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66. *Id.*

67. *Id.*

68. *Id.*

69. Nathaniel Popper, *Robinhood Has Lured Young Traders, Sometimes With Devastating Results*, N.Y. TIMES (Sept. 25, 2021), <https://www.nytimes.com/2020/07/08/technology/robinhood-risky-trading.html> [<https://perma.cc/8AYF-YGNZ>].

70. *Id.*

71. *Id.*

72. *Id.*

73. Complaint at 2, *In re Robinhood Financial, LLC*, No. E-2020-0047 (Mass. Sec. Div. Dec. 16, 2020), 2020 WL 7711667 at 1; *see* discussion *infra* Section IV.B.

74. *Id.* at 14, 2020 WL 7711667 at 8.

75. *Id.* at 14-18, 2020 WL 7711667 at 7-9.

76. *Id.* at 14, 2020 WL 7711667 at 8.

77. *Id.*

78. *Hearings*, *supra* note 11.

79. *Id.*

“[i]f we watch a movie that a streaming app recommends and don’t like it, we might lose a couple of hours of our evening. If a fitness app nudges us to exercise, that’s probably a good thing.”<sup>80</sup> However, “[f]ollowing the wrong prompt on a trading app . . . could have a substantial effect on a saver’s financial position.”<sup>81</sup> Indicating the urgency of the situation, Mr. Gensler stated, “[i]f we don’t address this now, the investing public—those saving for their futures, retirements, and education—may shoulder a burden later.”<sup>82</sup> “A small loss now could compound into a significant loss at retirement.”<sup>83</sup>

Ultimately, on September 1, 2021, the SEC set the rule-making process in motion when it solicited public comments on a review of broker-dealer practices, including gamification.<sup>84</sup> In response to this request, hundreds of organizations, businesses, and investors responded by sharing their experiences and advice.<sup>85</sup> Robinhood submitted a comment letter and representatives have met with officials from the SEC twice to discuss matters in the Request.<sup>86</sup>

## II. SECURITIES LAW BACKDROP

Robinhood and other broker-dealers are primarily regulated by the SEC. This section introduces the congressional legislation that authorized the SEC to regulate broker-dealers, previous applicable standards broker-dealers adhered to when considering recommendations, and current regulations governing broker-dealers when making recommendations to customers.

### *A. Dodd-Frank*

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).<sup>87</sup> Congress passed Dodd-Frank in the aftermath of the 2008 financial crisis—the worst recession since The Great Depression.<sup>88</sup> Under Section 913 of Dodd-Frank, Congress indicated its intent to regulate broker-dealers more stringently.<sup>89</sup> Congress did not explicitly

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80. *Id.* at 2.

81. *Id.*

82. *Id.*

83. *Id.*

84. See *Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices*, *supra* note 21.

85. *Comments on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice*, SEC. & EXCH. COMM’N, <https://www.sec.gov/comments/s7-10-21/s71021.htm> [<https://perma.cc/N8VZ-GVWM>] (last visited Feb. 2, 2022).

86. *Id.*

87. Pub. L. No. 111-203, § 913, 124 Stat. 1376 (2010).

88. See Robert Rich, *The Great Recession*, FED. RESRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/great-recession-of-200709> [<https://perma.cc/755E-3X8K>].

89. Thomas Lee Hazen, *Are Existing Stock Broker Standards Sufficient? Principles, Rules, and*

impose any new duties upon broker-dealers; rather, Congress left that decision to the SEC.<sup>90</sup> However, Dodd-Frank required the SEC to complete a report to assess “the effectiveness of existing legal or regulatory standards of care” for broker-dealers.<sup>91</sup> Upon completion of that study, the SEC recommended that broker-dealers and investment advisers should both be subject to a uniform fiduciary standard.<sup>92</sup> This would require broker-dealers when “providing personalized investment advice . . . to act in the best interest of the customer without regard to the financial or other interest of the [broker-dealer] . . . providing the advice.”<sup>93</sup> However, after this study and recommendation, the SEC did not act until its proposal of Regulation BI.<sup>94</sup>

### B. Suitability

Prior to Regulation BI, a broker-dealer’s conduct was governed by the suitability standard.<sup>95</sup> This standard requires customer-specific suitability “which focuses on the financial objectives, needs, and other circumstances of the particular customer; and ‘reasonable basis’ . . . suitability, which focuses on the characteristics of the recommended security.”<sup>96</sup> Suitability, by its express terms and subsequent court interpretations, is limited to recommendations.<sup>97</sup>

Without any clear guidance, confusion resulted as to what exactly constituted a recommendation.<sup>98</sup> In enacting new rules on penny stocks, the SEC provided additional guidance to what may constitute a recommendation under suitability standards.<sup>99</sup> The SEC advised, “in most situations in which the broker-dealer brings a specific [d]esignated [s]ecurity to the attention of the customer, a subsequent purchase of the security will involve an implicit or explicit recommendation by the broker-dealer.”<sup>100</sup>

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*Fiduciary Duties*, 2010 COLUM. BUS. L. REV. 710, 715 (2010); see § 913(g), 124 Stat. at 1828 (2010).

90. Hazen, *supra* note 89, at 716.

91. § 913(b), 124 Stat. at 1824 (2010).

92. SEC. & EXCH. COMM’N, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS v-vi (Jan. 2011), <https://www.sec.gov/files/913studyfinal.pdf> [<https://perma.cc/6BVN-CHWR>].

93. *Id.* at vi.

94. See generally Chase Ponder, *Fiduciary Standards and Best Interests: Should States Take the Lead?*, 24 N.C. BANKING INST. 241 (Mar. 2020) (recounting various attempts to create a new broker-dealer standard prior to Regulation BI).

95. See FINRA Rule 2111 (2022).

96. Frederick Mark Gedicks, *Suitability Claims and Purchases of Unrecommended Securities: An Agency Theory of Broker-Dealer Liability*, 37 ARIZ. ST. L.J. 535, 547 (2005); see also Lewis D. Lowenfels & Alan R. Bromberg, *Suitability in Securities Transactions*, 54 BUS. LAW. 1557, 1580-84 (1999).

97. Lowenfels & Bromberg, *supra* note 96, at 1560.

98. See *id.*

99. *Id.* at 1561.

100. Sales Practice Requirements for Certain Low-Priced Securities, Exchange Act Release No. 27160, 54 Fed. Reg. 35,468-01 (Aug. 28, 1989).

### *C. Regulation Best Interest*

In proposing the Regulation BI standard, the SEC identified the inherent conflict of interests that exist between a broker-dealer and customer, which may lead a broker-dealer to maximize its compensation at the expense of the customer.<sup>101</sup> Nonetheless, the SEC sought to preserve investor choice and access to broker-dealer's existing services and products.<sup>102</sup> Rather than proposing a fiduciary standard that would harmonize with investment advisors, the SEC opted to expand the existing regulatory structure governing broker-dealers.<sup>103</sup>

Ultimately, the SEC adopted Regulation BI under the Securities Exchange Act of 1934 on July 12, 2019.<sup>104</sup> Leading up to its adoption, most of the reception of Regulation BI was largely positive; although, some commentators advocated for the status-quo and others advocated for a more stringent fiduciary standard.<sup>105</sup> Regulation BI applies to broker-dealers when making “a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer.”<sup>106</sup> Like the suitability rules, Regulation BI is only triggered when a broker-dealer has made a recommendation.<sup>107</sup> When making a recommendation, broker-dealers must “act in the retail customer’s best interest and cannot place its own interest ahead of the customer’s interests.”<sup>108</sup> This General Obligation to act in the customer’s best interest is satisfied only if four other obligations are also met: (1) Disclosure Obligation, (2) Care Obligation, (3) Conflict of Interest Obligation, and (4) Compliance Obligation.<sup>109</sup>

*1. Disclosure Obligation.*—To comply with the Disclosure Obligation, the “broker-dealer must disclose, in writing, all material facts about the scope and terms of its relationship with the customer.”<sup>110</sup> This includes disclosing all conflicts of interest that may induce a broker-dealer to make a recommendation.<sup>111</sup> The SEC stated that conflicts may take the form of a broker-dealer recommending “proprietary products, payments from third parties, and compensation arrangements.”<sup>112</sup>

*2. Care Obligation.*—Under the Care Obligation, the broker-dealer must

101. Regulation Best Interest, 83 Fed. Reg. 21,574, 21,575 (proposed May 9, 2018) [hereinafter Proposed Rule: Regulation BI].

102. *Id.* at 21,583.

103. *Id.* at 21,584.

104. Final Rule: Regulation BI, *supra* note 18, at 33,320.

105. Ian Hunley, *XII. Regulation Best Interest*, 38 REV. BANKING & FIN. L. 610, 620 (2019).

106. 17 C.F.R. § 240.151-1.

107. *See* Lowenfels & Bromberg, *supra* note 96.

108. Final Rule: Regulation BI, *supra* note 18, at 33,320.

109. *Id.*

110. *Id.* at 33,321.

111. *Id.*

112. *Id.*

consider the customer's investment profile—taking in the risks, costs, and benefits—to ensure that the recommendation does not place the broker-dealer's interest ahead of the retailer's.<sup>113</sup> This requires broker-dealers to exercise “reasonable diligence, care, and skill” in their recommendations.<sup>114</sup>

3. *Conflict of Interest Obligation.*—Under the Conflict of Interest Obligation, broker-dealers must maintain strategies to address, identify, and disclose conflicts of interest.<sup>115</sup> These strategies must mitigate or eliminate any incentives for the broker-dealer to place its interest ahead of the investor's interests.<sup>116</sup>

4. *Compliance Obligation.*—The Compliance Obligation requires broker-dealers to establish and enforce policies and procedures to achieve compliance with the Regulation BI as a whole.<sup>117</sup> This includes addressing “the circumstances under which the basis for a particular recommendation would be disclosed to a retail customer.”<sup>118</sup>

#### D. Goals of Regulation Best Interest

In proposing the new standard, the SEC identified four respects in which Regulation BI will increase investor protection compared to the previous suitability standard.<sup>119</sup> “First, [Regulation BI] would enhance the quality of recommendations provided by broker-dealers” because it shifts the focus on the customer's best interest, which is more stringent than previous suitability obligations.<sup>120</sup> Second, it would establish increased obligations to help resolve conflicts associated with adverse financial incentives.<sup>121</sup> Third, investors' awareness of the nature of their relationships with broker-dealers would be bolstered through more expansive disclosure.<sup>122</sup> Finally, enhanced disclosure would help investors evaluate conflicts of interest of recommendations from broker-dealers.<sup>123</sup>

#### E. What Constitutes a Recommendation?

When prescribing guidance to the Regulation BI, the SEC left “recommendation” purposefully vague as “[b]eing more prescriptive could result in a definition that is over inclusive, under inclusive, or both.”<sup>124</sup> The SEC reasoned that broker-dealers knew what constituted a recommendation, and the

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 33,360.

119. *See* Proposed Rule: Regulation BI, *supra* note 101, at 21,584.

120. *Id.* at 21,576.

121. *Id.*

122. *Id.*

123. *Id.*

124. Final Rule: Regulation BI, *supra* note 18, at 33,335.

SEC did not want to disrupt the “established infrastructures that already rel[ie]d on this term.”<sup>125</sup>

The SEC determined that what constitutes a recommendation should “turn on the facts and circumstances of the particular situation and therefore, whether a recommendation has taken place is not susceptible to a bright line definition.”<sup>126</sup> In this fact-intensive inquiry, factors should turn on whether the communication “reasonably could be viewed as a call to action and reasonably would influence an investor to trade a particular or group of securities.”<sup>127</sup> “The more individually tailored the communication” is toward a targeted customer or group of customers, the more likely it will be viewed as a recommendation.<sup>128</sup> The SEC maintained a recommendation would not occur, and thus Regulation BI would not apply, to “self-directed or otherwise unsolicited transactions by a retail customer.”<sup>129</sup>

### III. ASSESSING GAMIFIED INVESTING

This section assesses gamified investing and argues it should be understood as a recommendation under Regulation BI. With gamification under the purview of Regulation BI, the SEC will be able to better regulate gamification and protect retail investors.

#### A. Gamification as a Recommendation

As the SEC prescribed in its adoption of Regulation BI, a recommendation “should turn on the facts and circumstances of a particular situation.”<sup>130</sup> Within that framework, gamification should be considered as a recommendation because it brings securities to the attention of the investor and encourages trading<sup>131</sup>—especially considering Robinhood employs multiple gamification techniques in its application.<sup>132</sup> But the proliferation of gamification in broker-dealers’ applications largely resulted after SEC enacted Regulation BI, so the SEC has never considered how gamification may fit into the Regulation BI framework or any regulatory framework for that matter.<sup>133</sup>

1. *Shift to Impulse Trading.*—Professor Rey argues that gamification disassociates a commodity from its original purpose, and the reason for which the commodity is consumed is redefined.<sup>134</sup> In Professor Rey’s terminology, the

125. Proposed Rule: Regulation BI, *supra* note 101, at 21,593.

126. Final Rule: Regulation BI, *supra* note 18, at 33,335.

127. *Id.* (internal quotations omitted).

128. *Id.*

129. *Id.* at 33,384.

130. *Id.* at 33,335.

131. See Sales Practice Requirements for Certain Low-Priced Securities, Securities Exchange Act Release No. 27160 (Aug. 22, 1989), 54 Fed. Reg. 35,468-01 (Aug. 28, 1989).

132. See discussion *supra* Section I.C.

133. The SEC’s final rule enacting Regulation BI gives no mention to gamification or anything of the like. Final Rule: Regulation BI, *supra* note 18.

134. Rey, *supra* note 37, at 282.

commodity is transformed into a *hypercommodity*.<sup>135</sup> “Hypercommodities involve a . . . ‘disembedding’ of the commodity.”<sup>136</sup> In other words, the values and meanings associated with the original commodity are detached and reorganized to achieve the end of the hypercommodity.<sup>137</sup>

An example of this transformation is shown through a McDonald’s Monopoly promotion.<sup>138</sup> McDonald’s, as a part of a marketing campaign with Monopoly, attached game pieces to each meal item to signify a symbolic reward that can be earned.<sup>139</sup> Each time a food item was purchased was another chance to play the game and earn another game piece.<sup>140</sup> This promotion was meant to incentivize consumption at McDonald’s.<sup>141</sup> But in some cases, “consumers [were] driven more by the pursuit of another chance to win than they [were] by the actual food.”<sup>142</sup> The consumption of food, for some customers, was so remote that McDonald’s would have been successful selling empty cups and hamburger wrappers.<sup>143</sup> In other words, the commodity (consumption of food) was transformed into a hypercommodity (accumulating more game pieces).<sup>144</sup> Players would even sometimes dumpster-dive for packaging out the trash, demonstrating when “gamification is taken to its limits, it becomes a complete and utter abandonment of the real.”<sup>145</sup>

The McDonald’s example can be similarly demonstrated in the investing context. Specifically, gamification transforms the investor’s original purpose into the purpose prescribed by applications like Robinhood. For instance, if a retail investor’s original goal was to grow their long-term savings, Robinhood, through its gamification techniques, can shift that original purpose to something else, namely speculative frequent trading.

Although studies of this nature are just beginning, early evidence seems to suggest this type of shift is already occurring. For instance, the anecdotal evidence of many Robinhood customers suggests that the application moves investors to impulse trade.<sup>146</sup> Empirical studies have demonstrated Robinhood’s users are more likely to engage in attention-induced trading and accordingly suffer disproportionate losses.<sup>147</sup> In fact, Robinhood users trade forty times as

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135. *Id.* (“[G]amification can be understood as a process that transforms commodities into . . . hypercommodities.”).

136. *Id.* (internal citation omitted).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 282-83.

143. *Id.* at 283.

144. *Id.*

145. *Id.*

146. See discussion *supra* Section I.B.; Wilson, *supra* note 50.

147. Brad M. Barber et al., *Attention Induced Trading and Returns: Evidence From Robinhood Users*, J. FIN. (forthcoming) (on file with author); see Sayan Chaudhry & Chinmay Kulkarni, *Design*

much per dollar in their accounts compared with a customer of Charles Schwab.<sup>148</sup>

In response to the SEC’s request for public comment, the vast majority of retail investors, when asked their “goals for trading or investing in [an] online [brokerage] account,” state to “save and grow . . . money for medium- to long-term goals.”<sup>149</sup> In other words, most retail investors are not signing up for Robinhood and other online brokerage accounts for gambling and entertainment purposes. However, Robinhood’s gamified platform shifts and induces customers into frequent trades and disproportionate losses<sup>150</sup>—much more akin to a gambling application than an investing one. Investors’ actual use of the application and their outcomes are much different than their original purposes for joining Robinhood, namely for long-term growth.

Based on McGonigal’s defining characteristics of what constitutes a game, the stock market may well fit within that definition.<sup>151</sup> With the stock market already having game-like tendencies—*prior to being gamified*—customers may have a more difficult time realizing their original purpose for investing has been hypercommoditized.

Encouraging investors to impulse trade and trade differently than they have originally intended should constitute a recommendation—even if the source of the recommendation is the gamified techniques employed by Robinhood. To fully protect investors, regulatory emphasis must be placed on the effect of a broker-dealer’s actions, rather than the intention. If this is the case, broker-dealers will no longer be able to skirt Regulation BI by simply disclaiming their actions as ‘not constituting a recommendation.’ Although gamification was not considered as a recommendation when Regulation BI was introduced, in determining the

*Patterns of Investing Apps and Their Effects on Investing Behaviors*, ACM (2021), <https://dl.acm.org/doi/pdf/10.1145/3461778.3462008> [<https://perma.cc/NSSL-4KLM>].

148. Barber et al., *supra* note 147.

149. *E.g.*, Joshua Andrews, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Sept. 25, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9286798-251557.htm> [<https://perma.cc/MN7H-U9Y9>]; Alejandro Martinez, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Aug. 30, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9190373-249414.htm> [<https://perma.cc/3MYA-K37F>]; *see generally* *Comments on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice*, SEC. & EXCH. COMM’N, <https://www.sec.gov/comments/s7-10-21/s71021.htm> [<https://perma.cc/N8VZ-GVWM>] (last visited Feb. 2, 2022).

150. Barber et al., *supra* note 147.

151. Investors within the stock market each have a *goal* (long-term returns, short-term returns, thrill, retirement, etc.); *rules* to follow (securities laws and regulations); *feedback* (market graphs, rate of returns, etc.), and *voluntary participation* (investors can exit the market freely). *See* MCGONIGAL, *supra* note 26, at 21.

meaning and scope of recommendation, “form should be disregarded for substance and the emphasis should be on economic reality.”<sup>152</sup> The economic realities make clear that users are influenced—to their own detriment—by Robinhood’s gamified techniques.<sup>153</sup>

2. *Feedback.*—By increasing satisfaction and provoking positive emotion, Robinhood can additionally engage the investor and induce them to trade more frequently.<sup>154</sup> In another respect, this feedback allows the investors to begin trading before they are ready.<sup>155</sup> By introducing feedback that responds quickly to a user’s action, investors begin trading differently than they would have otherwise.<sup>156</sup>

Consider this scenario: you are a first-time trader logging onto a self-directed brokerage application without any of the features of the Robinhood application. Posed with what to do next, you take it upon yourself to research and find out the securities that fit your goals. Of course, that is the draw and benefit of self-directed brokerage accounts. But even then, the investor may decide this process is too onerous and decide to invest in a passively managed index fund, the best long-term strategy.<sup>157</sup>

However, consider how you may operate differently with the feedback of an application like Robinhood. Along with trending stock lists of other Robinhood investors, you receive notifications with emojis and free stock, all while navigating an application with flashy game-like designs and colors. Robinhood is effectively placing you into an application that resembles a game, rather than a trading platform.

In both situations the investor is acting on her own; however, the differences are stark. Gamification blurs the line between what is a solicited and unsolicited transaction and makes the distinction almost meaningless—even though Regulation BI sought to make the distinction clear.<sup>158</sup> Broker-dealers should not be able to skirt their entire obligation of Regulation BI, because “the customer technically initiates the trades after the broker has used subtle techniques to influence the customer to engage in active trading.”<sup>159</sup>

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152. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (citing *Sec. & Exch. Comm’n v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946)).

153. *See Barber et al.*, *supra* note 147; *see also Chaudhry & Kulkarni*, *supra* note 147.

154. *See MCGONIGAL*, *supra* note 26, at 39-40.

155. *See supra* notes 41-44 and accompanying text; *MCGONIGAL*, *supra* note 26, at 26.

156. *MCGONIGAL*, *supra* note 26, at 26.

157. 67% of actively managed U.S. equity funds underperformed the S&P Composite 1500 index, which comprises 90% of all U.S. publicly traded companies, over three years; 83.2% underperformed over ten years; and 86% underperformed over twenty years. Berlanda Liu & Gaurav Sinha, *SPIVA U.S. Scorecard*, S&P DOW JONES INDICES 9 (2021), <https://www.spglobal.com/spdji/en/documents/spiva/spiva-us-year-end-2020.pdf> [<https://perma.cc/Y9Z5-D6B8>].

158. Rick Fleming, *Investor Protection in the Age of Gamification: Game Over for Regulation Best Interest?*, SEC. & EXCH. COMM’N (Oct. 13, 2021), [https://www.sec.gov/news/speech/fleming-sec-speaks-101321#\\_edn11](https://www.sec.gov/news/speech/fleming-sec-speaks-101321#_edn11) [<https://perma.cc/54BS-UR74>].

159. *Id.*

Moreover, Robinhood's display of trending stocks that are popular with other Robinhood investors and the most volatile stocks of the day<sup>160</sup> essentially directs the investor to stocks and other investments the investor was not previously considering. Similarly, the ability to copy the trades of fellow investors on eToro's application,<sup>161</sup> directs customers to make the same trades as someone else. Although these lists do not necessarily directly solicit stocks or target a particular customer group, they seemingly influence a Robinhood or eToro user to trade a particular security or group of securities. The investor is implicitly directed to purchase the stocks located on trending lists and copy someone else's trades because just that: other people are doing it. With the rise in meme-stock trading,<sup>162</sup> investors are even more inclined to trade based on others, as to not miss out on the next big stock.

In the past, there may have been a clear line between when a broker-dealer recommended a security and when it did not, such as through an explicit endorsement over a phone call. However, through the rise of online trading and the introduction of gamification into investing, recommendations are not so obvious anymore. There should be no legal delineation between the phone call and gamified platform, as the effect of both is the same.

#### IV. CONFLICTS OF INTEREST

It is important to consider the rationale of broker-dealers introducing gamification into trading platforms. Even accepting Robinhood officials' contention that gamification is used for customers to learn and invest responsibly, its use does not end there.<sup>163</sup>

Under a payment for order flow model, broker-dealers are compensated for funneling orders to companies that ultimately execute the order.<sup>164</sup> Thus, the more order flows, or trades, broker-dealers' route, the more money they make.<sup>165</sup> So, broker-dealers have a strong incentive to increase the number of trades investors make. Simply following this incentive—that being, increasing the number of orders—pits the best interests of customers against Robinhood's profit. Through gamification, where Robinhood's platform pushes investors to trade more

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160. See *supra* Figure 1, notes 43, 54-56 and accompanying text.

161. See Kiernan & Rudegeair, *supra* note 44 and accompanying text.

162. See, e.g., Gunjan Banerji et al., *GameStop Mania Reveals Power Shift on Wall Street—and the Pros Are Reeling*, WALL ST. J. (Jan. 27, 2021, 6:46 PM), [https://www.wsj.com/articles/gamestop-mania-reveals-power-shift-on-wall-streetand-the-pros-are-reeling-11611774663?mod=article\\_inline](https://www.wsj.com/articles/gamestop-mania-reveals-power-shift-on-wall-streetand-the-pros-are-reeling-11611774663?mod=article_inline) [<https://perma.cc/4CA8-RYZU>]; see generally Adam Hayes, *Meme Stock*, INVESTOPEDIA (Sept. 22, 2022), <https://www.investopedia.com/meme-stock-5206762> [<https://perma.cc/89NE-7J8R>] (“A meme stock refers to the shares of a company that have gained a cult-like following online and through social media platforms.”).

163. Wursthorn & Choi, *supra* note 45.

164. GARY SHORTER, CONG. RSCH. SERV., IF11800, BROKER-DEALERS AND PAYMENT FOR ORDER FLOW (Apr. 2, 2021).

165. *Id.*

frequently and erratically, Robinhood has the means to achieve this end.

The payment for order flow model has seen a dramatic increase in recent years, with Robinhood and other broker-dealers profiting greatly. Payment for order flow revenue has nearly tripled at four major broker-dealers—TD Ameritrade, Robinhood, E\*Trade, and Charles Schwab—to \$2.5 billion in 2020 from \$892 million in 2019.<sup>166</sup> Highlighting the importance that the payment for order flow model is to Robinhood's viability, payment for order flow accounted for seventy-five percent of the company's revenue in 2020.<sup>167</sup>

To be sure, this conflict of interest and instance of perverse incentives is not synonymous with investing. For instance, financial advisors are often compensated through an assets under management model, where they are paid a percentage of the client's assets.<sup>168</sup> Thus, the investments the financial advisor chooses for the clients will directly affect the financial advisor's compensation. In this case, incentives are aligned between the financial advisor and the client. When the client is benefited, so is the financial advisor. This is unlike the incentives at play in Robinhood's payment for order model. Robinhood benefits when the investor trades more. However, empirical studies indicate investors suffer disproportionate losses when they trade more.<sup>169</sup> In this type of model, Robinhood is essentially incentivized to induce customers' behavior that is antithetical to sound investing. This is one of the reasons that neither Canada nor the United Kingdom allows payment for order flow.<sup>170</sup>

With payment for order flow impacting broker-dealers' bottom-line, gamification presents an avenue to increase the number of trades investors make. If gamification does not trigger Regulation BI, then the conflict of interest that is inherent in payment for order flow will not be disclosed to investors. Two of the purposes the SEC detailed in proposing Regulation BI were to help resolve adverse financial incentives between broker-dealers and investors and better equip investors to evaluate conflicts of interest from broker-dealers.<sup>171</sup> The SEC should bolster its enforcement to achieve these purposes and avoid rendering Regulation BI meaningless.<sup>172</sup>

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166. *Id.*

167. Robinhood also earns revenue from interest on securities and margins loans and through Robinhood Gold, their premium subscription service. Trefis Team, *How Does Robinhood Markets Make Money?*, FORBES (July 23, 2021, 8:30 AM), <https://www.forbes.com/sites/greatspeculations/2021/07/23/how-does-robinhood-markets-make-money/?sh=7b8d5e9e2d13> [https://perma.cc/8AKL-HEEP].

168. James Chen, *Assets Under Management (AUM): Definition, Calculation, and Example*, INVESTOPEDIA (Mar. 13, 2022), <https://www.investopedia.com/terms/a/aum.asp> [https://perma.cc/UX5W-MLYN].

169. Barber et al., *supra* note 147.

170. *Hearings*, *supra* note 11.

171. *See* Proposed Rule: Regulation BI, *supra* note 101, at 21,576.

172. Fleming, *supra* note 158.

## V. MOVING FORWARD

This section seeks to introduce ways in which the SEC can rectify the gaps in Regulation BI. Additionally, this section demonstrates Indiana's legislation alternatives that could protect Hoosier investors regardless of the SEC's decision on regulating gamification.

### A. Guidance to Recommendations

By clarifying guidance of practices that constitute a recommendation, the SEC need not overhaul the Regulation BI standard. Stating a broad fiduciary duty without more guidance would not create the change needed.<sup>173</sup> But the broker-dealer industry is not clear whether gamification constitutes a recommendation—rather the opposite.<sup>174</sup> For instance, Robinhood, in its letter to the SEC for public comment stated that its use of gamification does not constitute a recommendation.<sup>175</sup> On the other hand, the Public Investors Advocate Bar Association's letter to the SEC made clear they believed that gamification constituted a recommendation under Regulation BI.<sup>176</sup> This reality runs contrary to the SEC's rationale in declining to define recommendation more clearly when enacting Regulation BI.<sup>177</sup> Tellingly, most of those resisting change within the industry are broker-dealers,<sup>178</sup> while those advocating for change are not-for-

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173. See Donald C. Langevoort, *Brokers as Fiduciaries*, 71 U. PITT. L. REV. 439, 456 (Spring 2010) (“[A]n open-ended broker fiduciary obligation is so loaded with unanswered questions that baseline predictability would come slowly, if at all.”).

174. *But see* Proposed Rule: Regulation BI, *supra* note 101, at 21,593.

175. David Dusseault, President, Robinhood Financial, LLC, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Oct. 1, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9316498-260092.pdf> [<https://perma.cc/G8FJ-JT36>].

176. David P. Meyer, President, Public Investors Advocate Bar Association, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Oct. 1, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9315857-260056.pdf> [<https://perma.cc/9LV5-NLTE>].

177. See Final Rule: Regulation BI, *supra* note 18, at 33.

178. See, e.g., Dusseault, *supra* note 175; David Forman, Chief Legal Officer, Fidelity Brokerage Services LLC, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Oct. 1, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9315880-260065.pdf> [<https://perma.cc/VEL4-VTWJ>]; Anne Tennant, Managing Director and General Counsel, Morgan Stanley, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Oct. 1, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9315861-260059.pdf> [<https://perma.cc/UXR4-V8AW>]; Brandon Krieg, CEO, Stash Financial, Inc. and Stash Investments LLC, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Oct. 1, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9315860-260058.pdf> [<https://perma.cc/UHZ2-HSDG>].

profits representing retail investors.<sup>179</sup>

Although Robinhood has seen success in attracting people to its platform, this is not without costs. The empirical and anecdotal evidence of people doing worse in markets under the veil of gamification should give the SEC pause for concern. The entire idea of Dodd-Frank—the legislation spurring Regulation BI—is to ensure that a market calamity, like the Great Recession, never happens again. The sheer number of people becoming first-time investors coupled with the harms of gamification should push the SEC into regulating broker-dealers more closely. The lessons learned from the Great Recession and culminated in the legislation of Dodd-Frank should push the SEC to properly regulate broker-dealers to protect investors and the market alike.

Broadening the scope of ‘recommendation’ will not solve the perverse incentives inherent in a payment for order flow model. Other regulatory action may be needed to fully address that problem. However, by requiring broker-dealers to disclose conflicts of interest, investors will be able to assess the incentives that are in front of them.<sup>180</sup> This will allow them to make better and more informed decisions.

To be sure, classifying gamification as a recommendation, within the scope of Regulation BI, does not prohibit the use of them. Rather, it simply places gamification in the scope of Regulation BI. This would require broker-dealers to act in the investor’s best interest, provide the investor with further disclosures, and require broker-dealers to address and minimize conflicts of interest.

### *B. Massachusetts’s Enforcement*

Indiana could join other states in enacting a fiduciary standard to govern broker-dealers’ conduct when interacting with investors.<sup>181</sup> In response to the SEC’s decision to pass on a fiduciary rule and enact a best interest rule governing

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179. *See, e.g.*, Scott Eichhorn et al., Associate Director, University of Miami School of Law Investor Rights Clinic, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Oct. 1, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9316165-260078.pdf> [<https://perma.cc/HH6B-62D9>]; Stephen Hall et al., Legal Director and Securities Specialist, Better Markets, Inc., Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Oct. 1, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9315815-260050.pdf> [<https://perma.cc/T76U-55MX>]; Elissa Germaine et al., Director, Pace Investor Rights Clinic, Comment Letter on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices (Oct. 1, 2021), <https://www.sec.gov/comments/s7-10-21/s71021-9316491-260086.pdf> [<https://perma.cc/X9WT-H2CA>].

180. *Cf.* THALER & SUNSTEIN, *supra* note 36, at 98 (“The most important modification that must be made to a standard analysis of incentives is salience. Do the choosers actually notice the incentives they face?”).

181. *See* Ponder, *supra* note 94, at 263-69 (surveying four states—New Jersey, Massachusetts, Nevada, and New York—that have implemented some form of fiduciary duty).

broker-dealers, Massachusetts decided to adopt its own fiduciary rule.<sup>182</sup> On March 6, 2020, Massachusetts enacted the following regulation:

The following practices are a non-exclusive list of practices by a broker-dealer or agent which shall be deemed ‘unethical or dishonest conduct or practices’. . . : (a) Failing to act in accordance with a fiduciary duty to a customer when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security.<sup>183</sup>

The statutory authorization for 950 MASS. CODE REGS. 12.207(1)(a) is derived from MASS. GEN. LAWS ch. 110A, § 204(a)(2)(G).<sup>184</sup> Section 204(a)(2)(G) provides:

The secretary may by order impose an administrative fine or censure or deny, suspend, or revoke any registration or take any other appropriate action if he finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:--

(G) has engaged in any unethical or dishonest conduct or practices in the securities, commodities or insurance business[.]<sup>185</sup>

Under this regulation, Massachusetts has already initiated an administrative action against Robinhood for breaching its fiduciary duty to investors.<sup>186</sup> When interviewed about filing the complaint, William Galvin, the Secretary of the Commonwealth of Massachusetts, stated that Robinhood’s platform “is not presented as serious investing with substantial risk.”<sup>187</sup> Rather, “[i]t’s presented as some sort of game that you might be able to win.”<sup>188</sup>

Among other claims, Massachusetts alleged that Robinhood violated state law by its use of “aggressive tactics to attract new, often inexperienced, investors; . . .

182. See Justin Baer & Jason Zweig, *After Courts Kill a Federal Fiduciary Rule, Massachusetts Launches Its Own*, WALL ST. J. (Feb. 21, 2020, 3:25 PM), [https://www.wsj.com/articles/after-courts-kill-a-federal-fiduciary-rule-massachusetts-launches-its-own-11582311348?mod=article\\_inline](https://www.wsj.com/articles/after-courts-kill-a-federal-fiduciary-rule-massachusetts-launches-its-own-11582311348?mod=article_inline) [<https://perma.cc/W9EB-GHXR>].

183. 950 MASS. CODE REGS. 12.207(1)(a) (2020).

184. See MASS. GEN. LAWS ch. 110A, § 204(a)(2)(G) (2002).

185. *Id.*

186. Complaint, *In re Robinhood Financial, LLC*, No. E-2020-0047 (Mass. Sec. Div. Dec. 16, 2020), 2020 WL 7711667.

187. Caitlin McCabe, *Massachusetts Regulators File Complaint Against Robinhood*, WALL ST. J. (Dec. 16, 2020, 4:20 PM), [https://www.wsj.com/articles/massachusetts-regulators-to-file-complaint-against-robinhood-11608120003?st=ekw8gpthbc6b7xt&reflink=desktopwebshare\\_permalink](https://www.wsj.com/articles/massachusetts-regulators-to-file-complaint-against-robinhood-11608120003?st=ekw8gpthbc6b7xt&reflink=desktopwebshare_permalink) [<https://perma.cc/7HQU-5NBV>].

188. *Id.*

use of strategies such as gamification to encourage and entice continuous and repetitive use of its trading application; . . . and breach of the fiduciary conduct standard required by the Act and Regulations.”<sup>189</sup> The complaint alleges that Robinhood’s gamification methods, considered with its other practices, rose to a level that breached their fiduciary duty to customers.<sup>190</sup>

Massachusetts’s fiduciary rule requires broker-dealers to adhere to a duty of care, loyalty, and disclosure of conflicts to its customer.<sup>191</sup> But this fiduciary duty is only triggered when a broker-dealer makes a recommendation.<sup>192</sup> Predictably, Robinhood’s response to the complaint is that it doesn’t make recommendations.<sup>193</sup> Like Regulation BI, Massachusetts’s rule suffers the same flaw: what is a recommendation?

Under Massachusetts law, Robinhood and other broker-dealers would only be required to meet a fiduciary duty “when providing investment advice or recommending an investment strategy.”<sup>194</sup> So even with a heightened fiduciary duty, gamification doesn’t necessarily fall within that duty—it all depends on what recommendation means. Of course, through its initiation of an administrative proceeding, Massachusetts suggests that gamification does constitute a recommendation. Now it is up to the presiding tribunal whether it views gamification the same way.

### *C. Indiana’s Solution*

Massachusetts’s statutes and regulations give Indiana an effective template to work from. Currently, Indiana’s statutory scheme alone would not protect investors from gamification. However, the purpose of Indiana statutes regulating broker-dealers is similar to that of Massachusetts, albeit less robust. For instance, the Indiana Uniform Securities Act states, under the section for “General Fraud”:

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

- (1) to employ a device, scheme, or artifice to defraud;
- (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading; or
- (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.<sup>195</sup>

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189. Complaint at 2, *In re Robinhood Financial, LLC*, No. E-2020-0047 (Mass. Sec. Div. Dec. 16, 2020), 2020 WL 7711667 at 1.

190. *Id.* at 19-20, 2020 WL 7711667 at 10-11.

191. See 950 MASS. CODE REGS. 12.207(2) (2020).

192. See *id.*

193. McCabe, *supra* note 187.

194. 950 MASS. CODE REGS. 12.207(1)(a) (2020).

195. IND. CODE § 23-19-5-1 (2022).

This statute may provide a basis for Indiana’s Securities Commissioner to enact regulations that address gamification. This would be similar to Massachusetts—Massachusetts used its regulatory authority to describe what behaviors are “unethical or dishonest conduct or practices” under its statute.<sup>196</sup> Likewise, Indiana may enact a regulation defining what is “to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.”<sup>197</sup> Admittedly, it may be difficult to characterize gamification as fraud or deceit. Even so, the Commissioner has statutory authorization to “define terms, whether or not used in this article, but those definitions may not be inconsistent with this article.”<sup>198</sup> To protect Hoosier investors, Indiana could enact a rule like Massachusetts’s fiduciary duty rule for broker-dealers.<sup>199</sup> This regulation would not make gamification illegal; rather, when gamification is utilized, a fiduciary duty is triggered. In the alternative, if Indiana’s Securities Division believes it does not have the statutory authority to adopt a similar regulation, Indiana’s legislature should respond to grant them that authority to respond to gamification.

Indiana’s Securities Division’s principal mission is to protect investors.<sup>200</sup> Considering this, the Securities Division should bolster its securities regulations and enforcement—even if Indiana’s current securities regulations are largely administrative, with most dealing with procedures for registrations, filings, and records.<sup>201</sup> Even though Indiana does not have the record like Massachusetts of bringing actions against broker-dealers,<sup>202</sup> this type of action may be a start for more stringent enforcement.

However Indiana chooses to proceed, whether through statute or regulation, Indiana should clarify what constitutes a recommendation. Without clarification as to how and when gamification triggers the fiduciary rule, there will continue to be ambiguity to the detriment of retail investors. Thus, when enacting a fiduciary standard, Indiana should be clear on how gamification fits into the regulations and provide guidance to help broker-dealers comply.

#### CONCLUSION

An increasing number of individuals are investing in capital markets. Gamification has performed an essential role in attracting and engaging these

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196. See 950 MASS. CODE REGS. 12.207(1)(a) (2020).

197. IND. CODE § 23-19-5-1 (2022).

198. IND. CODE § 23-19-6-5(a)(2) (2022).

199. See 950 MASS. CODE REGS. 12.207(1)(a) (2020).

200. *About the Division*, IND. SEC’Y OF STATE, SEC. DIV., <https://securities.sos.in.gov/about-the-division/> [<https://perma.cc/GX7W-4FJK>] (last visited Feb. 3, 2022).

201. See, e.g., 710 IND. ADMIN. CODE 4-3 (securities registration); 710 IND. ADMIN. CODE 4-4 (disclosure requirements); 710 IND. ADMIN. CODE 4-5 (reporting requirements).

202. See McCabe, *supra* note 187 (“Massachusetts regulators . . . are known for taking a hard line against financial companies, previously bringing probes against Charles Schwab Corp. and Fidelity Investments, among others.”).

individual investors—not always to the investor’s benefit. As a result of utilizing Robinhood’s gamified application, individual investors have traded more frequently and suffered disproportionate losses. This Note has argued, given the effects of gamification on individual investors, gamification should constitute a recommendation under Regulation BI. However, as it stands today, broker-dealers’ obligations under Regulation BI are not currently triggered through gamification.

This Note has proposed the SEC should clarify and provide guidance as to what constitutes a recommendation. With gamification considered a recommendation under Regulation BI, broker-dealers’ would have additional obligations to individual investors. Specifically, broker-dealers would have to ensure their interests are not placed ahead of the interests of the individual investor. In the alternative, this Note has proposed that Indiana could enact a fiduciary rule like the one Massachusetts recently enacted. Through these measures, Indiana could take a stronger regulatory stance toward broker-dealers and ensure that Hoosier investors are protected.