

II. *To the Moon: Finfluencers, Meme Stocks, and Regulatory Response*

A. Introduction

“Finfluencers” are online personalities who share financial advice, particularly on social media.¹ The trend of financial influence through social media has exploded in recent years on platforms such as Tik Tok, Instagram, Reddit, Twitter, and YouTube.² The increasing popularity of finfluencing has led to great increases in young investors, including Gen Z (those born between 1997 and 2011) and Millennials (those born between 1981 and 1996).³ Another contributing factor is the 2019 “stampede” to eliminate stock-trading fees at investment advisory firms such as Fidelity and TD Ameritrade following Robinhood’s uptick in popularity.⁴ The increase from 4.5 to 6 million members overnight on r/WallStreetBets, a popular investing subreddit, further evidences the increasing number of young people investing.⁵ While increasing the accessibility of investing via the internet and social media allows younger investors to access the market, regulators have highlighted and, to some extent, addressed concerns that come with the finfluencer market and the uptick in online investment access.⁶

¹ Misyrlena Egkolfopoulou, *Wall Street Influencers Are Making \$500,000, Topping Even Bankers*, BLOOMBERG WEALTH (Sept. 17, 2021, 12:01 AM EDT), <https://www.bloomberg.com/news/articles/2021-09-17/social-media-influencers-income-advertising-wall-street-products> [https://perma.cc/A6GN-RF4T].

² Sarah Ponczek, *Gen Z and Millennials Really Are Trading More in the COVID Era*, BLOOMBERG (Aug. 19, 2020), <https://www.bloomberg.com/news/articles/2020-08-19/gen-z-and-millennials-really-are-trading-more-in-the-covid-era>.

³ *Id.*

⁴ Jeff Cox, *Fidelity Joins the Stampede to Eliminate Fees for Online Trading*, CNBC (Oct. 10, 2019, 7:56 AM EDT), <https://www.cnbc.com/2019/10/10/fidelity-joins-the-stampede-to-eliminating-fees-for-online-trading.html> [https://perma.cc/G4WP-YD8B].

⁵ Shona Ghosh, *Reddit Group WallStreetBets Hits 6 Million Users Overnight After a Wild Week of Trading Antics*, BUSINESS INSIDER (Jan 29, 2021, 8:14 AM), <https://www.businessinsider.com/wallstreetbets-fastest-growing-subreddit-hits-58-million-users-2021-1> [https://perma.cc/WDX7-D4CV].

⁶ *See, e.g.*, SEC and FINRA Investor Alerts, *infra* notes 44, 45.

Social media influencer activity may be permissible under the FTC's online advertising rules; however, multiple areas of financial influence appear to be in violation of securities regulations prohibiting unauthorized investment advising.⁷ Three main issues affecting influencers and securities regulators today include the recent uptick in "meme stocks," which often results in market manipulation, sometimes at the hands of previously registered investment advisers; celebrity endorsements of their special purpose acquisition companies ("SPACs"); and the unregulated distribution of unauthorized investment advisory services from cryptocurrency influencers.

Several securities industry regulators including the SEC and FINRA have announced plans to address and remedy these alarming increases in fintech securities law violations.⁸ SEC chair Gary Gensler has announced plans to address gaps in cryptocurrency regulation and SPAC endorsements in particular.⁹ However, little has been done to actually address and account for these violations or legal loopholes. For instance, SPACs have been on a gigantic uptick throughout 2020, yet Congress, the SEC, and FINRA have not passed any laws to date regulating the use of SPACs as a means of going public.¹⁰

This Article will discuss the need for further influencer regulation through three case studies: meme stocks, celebrity SPAC endorsements, and cryptocurrency influencer advice.

⁷ FED. TRADE COMM'N, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> [<https://perma.cc/8PHR-AQRQ>].

⁸ See Bob Pisani, *Gary Gensler Has a Full Agenda as He Gets Set to Take Over the SEC*, CNBC (Apr. 14, 2021, 7:39 AM EDT), <https://www.cnbc.com/2021/04/14/gary-gensler-has-a-full-agenda-as-he-gets-set-to-take-over-the-sec.html> [<https://perma.cc/8QYL-WG7J>] (discussing Gensler's focus on addressing gaps in cryptocurrency regulation and the gamification of stock trading following the GameStop stock market frenzy).

⁹ *Id.*; see also Avi Salzman, *Gary Gensler Says SEC is Focusing on SPACs and Retail Trading Apps*, BARRON'S (June 23, 2021 11:01 AM ET), <https://www.barrons.com/articles/gary-gensler-says-sec-is-focusing-on-spacs-and-retail-trading-apps-51624460483> [<https://perma.cc/Y8C6-V5XH>].

¹⁰ Avi Salzman, *Gary Gensler Says SEC is Focusing on SPACs*.

B. Meme Stocks and Social Media Finfluencers

“Meme stocks” such as GameStop have become commonplace due to the eager investing and discussion promulgated by the subreddit r/WallStreetbets.¹¹ The rise and fall of GameStop stock, while in part due to the involvement of hedge funds and other institutional investors, was largely influenced by the activities of individual retail investors engaging in candid discussions of the stock market.¹² User u/deepfuckingvalue, a Massachusetts resident named Keith Gill, was a large proponent of GameStop stock during its great rise and fall.¹³ While he appeared to be a retail investor and a “man of the people,” it was later discovered that he actually served as an asset manager in the financial services industry for several years, a role that implicates fiduciary duties to investors.¹⁴

From 2012 to 2014, Keith Gill was a registered investment adviser working for Lucidia, LLC.¹⁵ In 2019, just two years before the GameStop price surge, Keith began working for MassMutual as a Financial Wellness Education Director and MML as a Registration Representative.¹⁶ Because of his role supporting investment advisers and his continued distribution of investment advice through Reddit and YouTube, Gill may have been breaching various fiduciary duties promulgated by the SEC and FINRA.¹⁷ Shortly after the GameStop price surge in January 2021, Christian Iovin brought a civil class action

¹¹ Paulina Likos, *How Meme Stocks Changed Investing*, U.S. NEWS (Oct. 8, 2021, 3:13 PM), <https://money.usnews.com/investing/articles/how-meme-stocks-changed-investing>.

¹² Taylor Tepper, *The Rise and Fall of the GameStop Meme Stocks*, FORBES (Feb. 4, 2021, 3:47 PM), <https://www.forbes.com/advisor/investing/gamestop-meme-stocks-bb-amc-nok/> [<https://perma.cc/YF3C-BCPA>].

¹³ Mina Corpuz, *Brockton Native Keith Gill Among Those Sued for \$5M for Role in GameStop Stock Frenzy*, THE ENTERPRISE (Feb. 18, 2021, 3:24 PM), <https://www.enterpriseneews.com/story/business/finance/2021/02/18/keith-gill-gamestop-gme-stock-market-shares-reddit-iovin-lawsuit-class-action-damages-mass-mutual/6784673002/> [<https://perma.cc/5Z6Z-5PKZ>].

¹⁴ *Id.*

¹⁵ SEC, Investment Adviser Public Disclosure, “Keith Patrick Gill,” CRD No. 6054636 (last visited Oct. 13, 2021), <https://adviser.info.sec.gov/individual/summary/6054636>.

¹⁶ *Id.*

¹⁷ Complaint at 5-6, *Iovin v. Gill*, (D. Mass. 2021) (Case 1:21-cv-10264), accessed at https://securities.stanford.edu/filings-documents/1076/MISL00_01/2021216_f01c_21CV10264.pdf.

against Keith Gill in the District Court of Massachusetts.¹⁸ Iovin alleged Keith Gill caused inflated stock prices that violated various securities laws.¹⁹ The initial complaint reads, in pertinent parts:

In order to disguise that the aim of [Gill's] social-media campaign was simply to increase the worth of his GameStop shares by creating a demand for the stock, Gill took on the fake persona of an amateur, everyday fellow, who simply was looking out for the little guy. He exaggerated and misrepresented the prospects of GameStop and made bold predictions about its future.

...

He incited a market frenzy by advocating revenge on the big hedge funds by buying GameStop shares to drive up the price and "squeeze" short sellers who would be forced to cover their short positions at greatly inflated prices. Because of Gill's conduct, in a matter of days, the price of GameStop shares went up by more than 1,600% to a record \$483 a share, causing huge losses for both short sellers and those who purchased GameStop shares at artificially inflated prices.

...

Gill, however, is no amateur ... For many years, he actively worked as a professional in the investment and financial industries. He holds extensive securities licenses and qualifications, including a securities principal and supervisory management license and a Chartered [sic] Financial Analyst license. Indeed, at the time Gill was inciting the market frenzy with his fake persona, he was licensed by MML as a registered representative (i.e., a securities broker), and he was employed by MassMutual as a "Financial Wellness Director."

...

At the time Gill was engaging in this wrongful conduct, MML and MassMutual had legal and regulatory obligations to supervise Gill to prevent this very conduct. They failed to do so even though Gill's conduct was continuing and highly public.²⁰

Based on the facts set forth in the complaint, Iovin alleged that Gill violated FINRA Rules 2010, 2020, 2111, 2210, and 3210.²¹ Iovin further alleged that Gill violated 15 U.S.C. §78i(a)(2), 15 U.S.C. §78i(a)(3), 15 U.S.C. §78i(a)(4), 15 U.S.C. §78i(a), and 17 C.F.R. §240.10b-5.²² Finally, he alleged that MML and MassMutual violated

¹⁸ *Id.*

¹⁹ *Id.* at 3.

²⁰ *See generally id.*

²¹ *Id.* at 5–6.

²² *Id.*

Section 20(a) of the Exchange Act in their failure to supervise Keith Gill, who was their employee during the time he encouraged thousands of retail investors to invest in GameStop.²³ The Massachusetts Securities Division is also investigating Keith Gill and one of his employer's firms, although the SEC does not disclose which firm is being investigated.²⁴ The investigations began in January 2021 and are ongoing.²⁵ In March 2021, the Division subpoenaed and subsequently heard from Keith Gill, although the session was closed to the public.²⁶ In September 2021, Gill's firm MassMutual paid a \$4 million fine based on the Massachusetts Securities Division's finding that they failed to supervise Keith Gill's social media activity.²⁷

Even when influencers are not trained financial professionals as Keith Gill was, the increase in the accessibility of investing can lead to harmful consequences. For instance, 20-year-old Alex Kearns saw a negative balance of \$730,000 after buying options contracts on Robinhood.²⁸ He committed suicide that day, leaving a note on his desk that read "How was a 20-year-old with no income able to get assigned almost a million dollars' worth of leverage?"²⁹ Although it is unknown if Kearns himself was a member of r/WallStreetBets, young people like him get involved in investing in securities they do not necessarily understand. This becomes even more apparent in the world of SPACs, as this Article will discuss.

²³ *Id.*

²⁴ SEC, Investment Adviser Public Disclosure, "Keith Patrick Gill."

²⁵ *Id.*

²⁶ Nate Raymond, *Massachusetts Regulator Subpoenas GameStop Bull 'Roaring Kitty,'* REUTERS (Feb. 10, 2021, 11:54 PM), <https://www.reuters.com/article/us-retail-trading-roaringkitty-idUSKBN2AA2K2> [<https://perma.cc/6E5C-544G>].

²⁷ Sean P. Murphy, *MassMutual Settles Case Involving 'Roaring Kitty' with \$4 Million Fine,* BOSTON GLOBE (Sept. 16, 2021, 11:55 AM), <https://www.bostonglobe.com/2021/09/16/business/massmutual-settles-case-involving-roaring-kitty-with-4-million-fine/>.

²⁸ Antonia Noori Farzan, *A 20-Year-Old Died by Suicide, Thinking He'd Lost More Than \$730,000 on Robinhood. Now His Family is Suing.,* WASH. POST (Feb. 9, 2021, 4:14 AM EST), <https://www.washingtonpost.com/nation/2021/02/09/robinhood-wrongful-death-lawsuit/> [<https://perma.cc/X2J3-Y7BR>].

²⁹ *Id.*

C. Celebrity Endorsements and the Rise of SPACs

The uptick in financial influencing activity has expanded so much so that celebrities have begun utilizing social media for their own financial benefit, most notably in their endorsement of their own special purpose acquisition companies (“SPACs”).³⁰ These celebrity endorsements appear to target the general public and retail investors, who are much less likely to understand how SPACs function and the propensity of SPACs to lose money when the newly acquired company goes public.³¹ Celebrities also typically do not have the requisite experience in the financial services industry to offer investment and securities advice to retail investors, who are particularly vulnerable to ineffective financial advice.³²

Shaquille O’Neal is a notable celebrity and case study of SPAC endorsements. O’Neal has worked on two SPACs, Forest Road Acquisition Corp. I and II.³³ Shaq served as a “strategic adviser,” Martin Luther King III served as director, and three former Disney executives served as strategic advisory committee and served as chief financial officer once the first SPAC acquired a new company.³⁴ O’Neal served as a strategic advisor because the SPAC’s named areas of interest to acquire a new company included media and entertainment, which O’Neal has business connections in.³⁵ However, O’Neal is not involved in financial services; thus, he should not make promises regarding the SPAC’s success.³⁶ This is problematic because SPAC management is known for making forward looking promises to investors because of a loophole in the Private Securities Litigation Reform Act (“PSLRA”).³⁷

³⁰ SEC, Investor Alert, “Celebrity Involvement with SPACs” (Mar. 10, 2021), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/celebrity-involvement-spacs-investor-alert> [<https://perma.cc/Z8Z8-WM4E>].

³¹ *Id.*

³² *Id.*

³³ Kori Hale, *Shaq Moves into SPACs with Former Disney Execs & MLK Jr. ’s Son*, FORBES (Oct. 20, 2020, 11:50 AM), <https://www.forbes.com/sites/korihale/2020/10/20/shaq-moves-into-spacs-with-former-disney-execs--mlk-jrs-son/?sh=c7680876c772>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ “Celebrity Involvement with SPACs,” *supra* note 30.

³⁷ Ran Ben-Tzur & Jay Pomerantz, *House Releases Draft Legislation Eliminating SPAC Safe Harbor for Forward Looking Statements*, FENWICK & WEST LLP, (June 7, 2021), <https://corpgov.law.harvard.edu/2021/06/07/house->

Under PSLRA, SPAC sponsors have safe harbor that grants protection from liability for forward-looking statements so long as their projections are made in good faith and are accompanied by meaningful cautionary language, although they cannot make material misstatements or omissions.³⁸ SPAC sponsors also have little responsibility in terms of disclosures to their shareholders, contrasted with the traditional IPO and its abundance of disclosures and paperwork to the SEC and shareholders.³⁹ Two proposed pieces of legislation seek to exclude SPACs from safe harbor under PSLRA and increase mandatory disclosures from SPAC management teams, respectively.⁴⁰

Multiple news sources have highlighted the importance of experienced SPAC management teams as well as the fact that SPAC investment vehicles feel like an inside joke for the super-rich and for celebrities.⁴¹ Taking this into account, it seems vital that regulators and legislators increase oversight on celebrity endorsements of SPACs.⁴² Notably, the SEC and FINRA have released Investor Alerts because of the social media and celebrity endorsements leading to SPAC “hype.”⁴³ The SEC released two Investor Alerts entitled “What You Need to Know About SPACs” and “Celebrity Involvement with SPACs.”⁴⁴

releases-draft-legislation-eliminating-spac-safe-harbor-for-forward-looking-statements/ [https://perma.cc/BM8S-ZVY4].

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ House Proposal, Certain Special Purpose Acquisition Companies Excluded from Safe Harbor for Forward-Looking Statements, https://financialservices.house.gov/uploadedfiles/5.24_bills-117pih-hr____.pdf [https://perma.cc/DU2B-YBTL]; House Proposal, Enhanced Disclosures for Blank Check Companies During IPO and Pre-Merger Stages, https://www.kennedy.senate.gov/public/_cache/files/8/c/8c5a665c-b7e8-48ce-a2bf-6cd1dbc504c3/A1E8BB9BDA5EB64CB106B92056D91B57.the-sponsor-promote-and-compensation-act-spac-act-.pdf [https://perma.cc/47G8-V9TT].

⁴¹ Matt Egan, *Celebs Including A-Rod and Ciara Are Getting into SPACs. What Could Go Wrong?*, CNN BUSINESS (Feb. 23, 2021, 3:12 PM), <https://www.cnn.com/2021/02/23/investing/spac-arod-kaepernick-celebrities/index.html> [https://perma.cc/5YFZ-BGHG].

⁴² *Id.*; see also Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, YALE J. ON REGUL., accessed at https://ecgi.global/sites/default/files/working_papers/documents/klausnerohlroggeruanfinal.pdf.

⁴³ “Celebrity Involvement with SPACs,” *supra* note 30.

⁴⁴ *Id.*

FINRA released an Investor Insight entitled “Investing in a SPAC.”⁴⁵ The SEC’s celebrity endorsement Investor Alert reads, in relevant part:

[C]elebrity involvement in a SPAC does not mean that the investment in a particular SPAC or SPACs generally is appropriate for all investors. Celebrities, like anyone else, can be lured into participating in a risky investment or may be better able to sustain the risk of loss. It is never a good idea to invest in a SPAC just because someone famous sponsors or invests in it or says it is a good investment.

...

SPAC sponsors generally acquire equity in the SPAC at more favorable terms than investors in the IPO or subsequent investors on the open market. As a result, the sponsors will benefit more than investors from the SPAC’s completion of a business combination and may have an incentive to complete a transaction on terms that may be less favorable to you.

...

Never invest in a SPAC based solely on a celebrity’s involvement or based solely on other information you receive through social media, investment newsletters, online advertisements, email, investment research websites, internet chat rooms, direct mail, newspapers, magazines, television, or radio.⁴⁶

Although these regulatory entities have alerted investors to some extent through these online bulletins, more oversight is needed.⁴⁷ Celebrity endorsement of SPACs increases the likelihood that their fan base, mainly retail investors, will invest in a SPAC without understanding the investment vehicle, how it functions, and its propensity to lose money once the SPAC acquires a target company.⁴⁸ Celebrity endorsements, like cryptocurrency influencers, often involve using influence to target retail investment audiences that may not fully understand their investment vehicles, as I will discuss below.

⁴⁵ FINRA, Investor Insight, “Investing in a SPAC” (Mar. 29, 2021), <https://www.finra.org/investors/insights/spacs> [<https://perma.cc/FP83-T3TD>].

⁴⁶ “Celebrity Involvement with SPACs,” *supra* note 30.

⁴⁷ House Proposal, Enhanced Disclosures, *supra* note 40; Klausner, Ohlrogge & Ruan, *supra* note 42.

⁴⁸ “Celebrity Involvement with SPACs,” *supra* note 30.

D. Cryptocurrency and Unregulated Investment Adviser Activity

Another instance of dangerous investment advice is in the case of cryptocurrency finfluencers across various platforms. Due to the gap in cryptocurrency regulation (that is, the fact that cryptocurrency is not necessarily a traditional currency or a traditional securities offering and thus is severely underregulated)⁴⁹, several finfluencers have begun offering tailored investment advice surrounding individuals' cryptocurrency portfolios.⁵⁰ This advice takes on all of the hallmarks of unregistered investment advice, including the adviser receiving a fee and giving tailored advice to an individual retail investor on their investment portfolio.⁵¹ However, because of the gap in cryptocurrency regulation, state and federal securities regulators are either unable or unwilling to enforce these alleged violations of securities laws.⁵² In Massachusetts, the distribution of unauthorized investment advisory services or broker-dealer activity constitutes a violation of both Mass. Gen Laws Ch. 110A § 102(a) and (c):

§ 201. Registration Requirement

...

(a) It is unlawful for any person to transact business in this commonwealth as a broker-dealer or agent unless he is registered under this chapter.

...

(c) It is unlawful for any person to transact business in this commonwealth as an investment adviser or as an investment adviser representative unless he is so registered under this chapter.⁵³

Some cryptocurrency finfluencers offer individuals tailored advice on their portfolios, with payments ranging from \$50 to \$100 for

⁴⁹ Pisani, *supra* note 8.

⁵⁰ See, e.g., CoinBureau, <https://www.youtube.com/c/CoinBureau>; Crypto Lifer, <https://www.youtube.com/c/CryptoLifer>.

⁵¹ Vanessa Pombo Nartallo, 'Finfluencers': *Financial Education and Regulator Surveillance*, BBVA (Oct. 8, 2021) <https://www.bbva.com/en/finfluencers-financial-education-and-regulator-surveillance/>.

⁵² Pisani, *supra* note 8.

⁵³ Mass. Gen. Laws Ch. 110A § 102(a), § 102(c).

an hour of personalized advice.⁵⁴ Communities of cryptocurrency traders often begin on YouTube or TikTok and gradually move to offering individual services in addition to their social media presence.⁵⁵ In those social media communities, audience members have the ability to “super chat” their favorite finfluencer, which essentially acts as a payment to receive tailored advice and content throughout the finfluencer’s live streams.⁵⁶ Many finfluencers, especially cryptocurrency finfluencers, also accept commissions from various coin offering teams and cryptocurrency investing platforms, where they receive a small amount of money for each link clicked or purchase made by one of their followers.⁵⁷ Additionally, some cryptocurrency finfluencers do brand deals with individual coin offerings, supporting them publicly and encouraging their followers to invest.⁵⁸

Because the United States has not yet closed the gap in cryptocurrency regulation, there is no case of criminal or civil remedy involving cryptocurrency finfluencers to date. Nevertheless, New Zealand provides a case study of civil remedy for unauthorized cryptocurrency advising.⁵⁹ A New Zealand man brought a civil action against Alex Saunders, a cryptocurrency finfluencer, for enticing him to invest in cryptocurrencies and ultimately lose his investment capital.⁶⁰ Saunders did not respond to the complaint, and the Supreme Court of Victoria entered a default judgment against him for \$491,961.41, including payment of the investor’s losses, interest, and legal costs.⁶¹

FINRA is conducting sweeps on social media influencers as of this September.⁶² However, FINRA did not make specific reference to cryptocurrency finfluencers, nor would it have power to stop

⁵⁴ Crypto Lifer, <https://www.youtube.com/c/CryptoLifer>.

⁵⁵ Nartallo, *supra* note 51.

⁵⁶ Crypto Lifer, <https://www.youtube.com/c/CryptoLifer>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Sarah Danckert, ‘Finfluencer’ Follower Wins Nearly \$500,000 in Court Over Failed Investment, THE SYDNEY MORNING HERALD (Oct. 15, 2021, 5:14 PM) <https://www.smh.com.au/business/markets/finfluencer-follower-wins-nearly-500-000-in-court-over-failed-investment-20211015-p59094.html>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Targeted Exam Letter, *Social Media Influencers, Customer Acquisition, and Related Information Protection*, FINRA (Sept. 2021) <https://www.finra.org/rules-guidance/guidance/targeted-examination-letters>.

cryptocurrency influencers from giving unauthorized investment advice under current regulations.⁶³

Many of these practices are problematic for retail investors' well-being. The primary demographic of cryptocurrency investing is young men, many of whom do not understand the risk involved in investing in volatile cryptocurrencies, which is especially true for emerging initial coin offerings.⁶⁴

E. Conclusion

The issues surrounding influencers, including influencers promoting meme stocks, celebrity endorsements of investment vehicles such as SPACs, and cryptocurrency advisers providing tailored investment advice, all can be remedied with increased regulatory oversight. Regulatory oversight remains the only practical solution in a highly regulated industry such as the financial industry. In some instances, particularly with respect to SPACs, increased regulation seems imminent.⁶⁵ However, other areas, particularly cryptocurrency investing, remain highly unregulated, and whether regulators will close the gap in regulation at this point is highly speculative.⁶⁶

Megan Miller⁶⁷

⁶³ *Id.*

⁶⁴ Nartallo, *supra* note 51.

⁶⁵ *See, e.g.*, House Proposals, *supra* note 40; Klausner, Ohlrogge & Ruan, *supra* note 42.

⁶⁶ Pisani, *supra* note 8.

⁶⁷ Student, Boston University School of Law (J.D. 2023).