

IV. Gamify This: FINRA and the SEC's Decision on Gamification Looms Large

A. Introduction

A key question that must be answered before diving into this article is: what is gamification and what does it mean in the online brokerage context? Gamification represents “the application of typical elements of game playing, such as point scoring, competition with others, and rules of play.”¹ Trading platforms, online retailers, and vendors apply these elements to “encourage engagement” with their products and services.² So how do online brokerages apply these elements and what gamification features do they typically include on their platforms? It varies from brokerage to brokerage, but typically gamification features include “so-called leaderboards highlighting the top traders of the day, Wheel of Fortune-like games promising trading incentives or digital confetti celebrating trades placed.”³

Online brokerages have undoubtedly drawn the ire of major regulatory bodies, who have especially homed in on the gamification features that are so prevalent on these platforms. This Article will discuss the following: (1) Robinhood, the most controversial online brokerage, and its early failures; (2) the Financial Industry Regulatory Authority’s (FINRA) response to gamification; (3) the United States Securities and Exchange Commission’s (SEC) response to gamification; and (4) my personal expectations for the regulatory response to online brokerages’ use of gamification features on their platforms.

¹ Sarah Aberg & Shane Killeen, *Game On: FINRA Hints at Upcoming Gamification Sweep*, JD SUPRA (June 2, 2021), <https://www.jdsupra.com/legalnews/game-on-finra-hints-at-upcoming-3930776/> [<https://perma.cc/3CFS-5X8X>].

² *Id.*

³ Al Barbarino, *FINRA to Seek Public Input on ‘Gamification’ of Stock Market*, LAW360 (May 19, 2021), <https://www-law360-com.ezproxy.bu.edu/articles/1386379?scroll=1&related=1>.

B. Brief History and Overview of Recent OCC Guidance

Founded in 2013, Robinhood Markets, Inc. (Robinhood) quickly turned the stock brokerage industry on its head.⁴ By allowing individuals to invest with as little as \$1, and with an extremely user-friendly interface, Robinhood has quickly amassed nearly 18 million active accounts.⁵ These accounts manage approximately \$80 billion across stocks, derivatives, and cryptocurrencies.⁶ And these accounts are not stagnant.⁷ The retail traders that have helped make Robinhood a household name now account for almost as much trading volume as mutual funds and hedge funds combined.⁸ Robinhood's grip on its user-base partially explains this trading volume: some users state that they check their app as often as their other social media accounts, up to 10

⁴ Annie Massa & Tracy Alloway, *Robinhood's Role in the 'Gamification' of Investing*, BLOOMBERG (Dec. 19, 2020), <https://www.bloomberg.com/news/articles/2020-12-19/robinhood-s-role-in-the-gamification-of-investing-quicktake> (stating the year Robinhood was founded).

⁵ *Id.* (providing background information on Robinhood, including the number of users, app design, and how much money investors need to start investing).

⁶ Maggie Fitzgerald, *Robinhood Has 18 million Accounts with \$80 Billion in Assets After Rapid Growth, IPO Filing Shows*, CNBC (July 1, 2021), <https://www.cnbc.com/2021/07/01/robinhood-has-18-million-accounts-managing-80-billion-after-rapid-one-year-growth-ipo-filing-shows.html> [<https://perma.cc/62R6-LTEH>] (stating how much money Robinhood users manage on the platform and the asset classes they invest in).

⁷ See Katie Martin & Robin Wigglesworth, *Rise of the Retail Army: The Amateur Traders Transforming Markets*, FINANCIAL TIMES (Mar. 9, 2021), <https://www.ft.com/content/7a91e3ea-b9ec-4611-9a03-a8dd3b8b8db5> (finding that “ordinary retail investors have on average accounted for 23 percent of all US Equity trading in 2021, more than twice the level of 2019.”).

⁸ See *id.* (stating that retail investors’ “stock market footprint is roughly as big as all hedge funds and mutual funds combined, and trail only behind high-frequency traders.”).

times per day.⁹ Furthermore, Robinhood users' extensive trading, despite only owning 0.2% of the market, has an outsized impact.¹⁰

Robinhood "has lowered the barrier to entry for millions of retail investors."¹¹ Robinhood offers commission-free trading and the option to purchase fractional shares.¹² Its goal is to "make buying and selling shares not just cheap, but seamless and even fun."¹³ It is unsurprising then that Robinhood primarily appeals to young investors who are often entering the markets for the first time.¹⁴ And the data backs this up: "[m]ore than half of people using the app are first-time investors."¹⁵ Robinhood has also tried to leverage network effects, instituting a referral program, and allowing users to "browse the 100 most-held stocks among fellow users."¹⁶

Given that it offers commission-free trading, how does Robinhood make money? Robinhood, and the rest of the online brokerage industry for that matter, relies on payment for order flow (PFOF) to drive its profits.¹⁷ However, what exactly is PFOF? Essentially, "[m]arket makers, such as Citadel Securities or Virtu, pay

⁹ Kelly Anne Smith, *Robinhood & Hertz: The Troubling Saga of a Bankrupt Stock*, FORBES (June 24, 2020), <https://www.forbes.com/advisor/investing/robinhood-bankrupt-hertz/> (finding that Robinhood's interface makes it hard to put the app down and that users treat Robinhood like a social media platform).

¹⁰ Massa & Alloway, *supra* note 4 (finding that "Robinhood traders drove 10% of the variation in returns from stocks in the second quarter of 2020.").

¹¹ Maggie Fitzgerald, *Robinhood Gets Rid of Confetti Feature Amid Scrutiny Over Gamification of Investing*, CNBC (Mar. 31, 2021), <https://www.cnbc.com/2021/03/31/robinhood-gets-rid-of-confetti-feature-amid-scrutiny-over-gamification.html> [<https://perma.cc/ZJ97-98SW>].

¹² Massa & Alloway, *supra* note 4 (listing various features of the services Robinhood offers).

¹³ *Id.*

¹⁴ *See id.* ("[Robinhood] has proved popular with investors who are young and dipping into markets for the first time.").

¹⁵ *Id.*

¹⁶ *See id.* (observing that investors who convince their friends to sign up "are offered a (tiny) chance of snagging a share of a high-price glamour stock such as Apple Inc.").

¹⁷ Kate Rooney & Maggie Fitzgerald, *Here's How Robinhood Is Raking in Record Cash on Customer Trades—Despite Making It Free*, CNBC (Aug. 13, 2020), <https://www.cnbc.com/2020/08/13/how-robinhood-makes-money-on-customer-trades-despite-making-it-free.html> [<https://perma.cc/CE63-T374>] (finding that Robinhood and its peers rely on payment for order flow "as their profit engine in lieu of commissions").

e-brokers like Robinhood for the right to execute customer trades.”¹⁸ The market makers then pay an additional “small fee for the shares that are routed, which can add up to millions when customers [actively] trade.”¹⁹ Robinhood has relationships with numerous market makers, who all pay Robinhood the same rate.²⁰ Despite the uniform rate, Robinhood has negotiated favorable agreements with market makers, helping drive their profits higher.²¹ Furthermore, Robinhood claims that the reason it maintains relationships with multiple market makers, even though each of them pays the same rate, is to “optimize speed and execution quality.”²²

Robinhood, like many companies, has not been free of punishment, controversy, and failure.²³ In June 2021, FINRA levied its largest-ever penalty against Robinhood, extracting “a nearly \$70 million penalty from the company for a sweeping set of allegations, including misleading investors about trading with borrowed money and lacking sufficient controls in its technology and its options trading approval process.”²⁴ Robinhood’s lack of sufficient controls in its options trading approval process was never more evident than in 2020. Tragically, “a 20-year-old University of Nebraska student ... took his own life ... after the Robinhood interface displayed a massive options trading debt in his account.”²⁵

Unsurprisingly, various states have responded by starting to act against Robinhood. Massachusetts announced in April 2021 that it would seek to “ban Robinhood from doing any business at all in the state.”²⁶ Additionally, lawmakers have repeatedly criticized Robinhood’s infamous confetti animation, which used to appear when users purchased stock (Robinhood removed the feature in March 2021), as well as its free stock incentives for referring new users.²⁷ In the face of public backlash, Robinhood has attempted to address its

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See Id.* (describing the dynamic that exists between Robinhood and market makers).

²¹ *See Id.* (reporting that “Robinhood attracts the highest rate for equity trades ... at 17 cents per hundred shares.”).

²² *Id.*

²³ Massa & Alloway, *supra* note 4 (detailing penalties Robinhood has faced).

²⁴ *Id.*

²⁵ Smith, *supra* note 9.

²⁶ Barbarino, *supra* note 3.

²⁷ Massa & Alloway, *supra* note 4 (listing some of Robinhood’s most famous features, including the confetti animation and referral program).

shortcomings by removing game-like features and offering an expanded set of educational services to its clients.²⁸

Robinhood continues to make efforts to clean up its act. Robinhood has removed controversial features, built up its customer support staff, and bolstered its educational resources for investors.²⁹ Until FINRA and the SEC make their final decision, there is no telling whether there will be additional regulations and rules that affect Robinhood's use of gamification features.

C. FINRA's Response to Gamification

FINRA's mission is to "protect investors and promote market integrity."³⁰ Recently, FINRA has been especially focused on app-based and online brokerages like Robinhood.³¹ It comes as no surprise, given the "surge in retail investors" that have joined the stock-trading ranks via "online brokerages."³² What concerns FINRA is that these online brokerages "bring sophisticated trading capabilities to inexperienced,

²⁸ *Id.* (stating that the confetti animation was "scrapped"); Vlad Tenev & Baiju Bhatt, *Commitments to Improving our Options Offering*, ROBINHOOD (June 19, 2020), <https://blog.robinhood.com/news/2020/6/19/commitments-to-improving-our-options-offering> [<https://perma.cc/B32C-L5YC>] (stating that Robinhood is expanding its educational content related to options trading).

²⁹ Maggie Fitzgerald, *Robinhood to Pay \$70 million for Outages and Misleading Customers, the Largest-Ever FINRA Penalty*, CNBC (June 30, 2021), <https://www.cnbc.com/2021/06/30/robinhood-to-pay-70-million-for-misleading-customers-and-outages-the-largest-finra-penalty-ever.html> [<https://perma.cc/VD7F-F4K8>] (stating that Robinhood has "approximately 2,700 customer support staff ... more than triple the staff it had during March of 2020.").

³⁰ Robert W. Cook, President and Chief Exec. Officer, Financial Indus. Regul. Auth., Statement Before the Financial Services Committee U.S. House of Representatives (May 6, 2021) (transcript available at https://www.finra.org/media-center/speeches-testimony/statement-financial-services-committee-us-house-representatives#_ftnref23) [<https://perma.cc/3Z7X-LUK3>].

³¹ Aberg & Killeen, *supra* note 1 (stating that FINRA is "investigating how Robinhood displays cash and buying power to customers and its options trading approval process.").

³² Al Barbarino, *FINRA Report Puts 'Game-Like' Trading Apps on Notice*, LAW360 (Feb. 2, 2021), <https://www-law360-com.ezproxy.bu.edu/articles/1350865/finra-report-puts-game-like-trading-apps-on-notice>.

everyday investors.”³³ However, as far as FINRA is concerned, the broad access to complex trading capabilities is just the tip of the iceberg. FINRA is additionally wary of allegations that online brokerages are “luring young or inexperienced investors in by offering easy-to-use apps, no-fee approaches and incentives to earn free stocks.”³⁴ In February 2021, FINRA declared that it would enhance its “oversight of app-based trading platforms featuring ‘interactive’ or ‘game-like’ features.”³⁵ FINRA is primarily focused on the “risks associated with app-based platforms with interactive or ‘game-like’ features that are intended to influence customers, their related forms of marketing, and the appropriateness of the activity that they are approving clients to undertake through those platforms.”³⁶

Although it has not drafted any formal rules to address online brokerages, FINRA has made clear its expectations. FINRA has urged “online brokerages to evaluate whether they are complying with Regulation Best Interest, adequately disclosing risks, fees and other costs, or are making false or misleading statements.”³⁷ Additionally, FINRA also expects that online brokerages will “meet know-your-customer-type obligations when opening customer accounts, particularly those that deal with more sophisticated trades including options; monitor potential red flags; and maintain books and records of all communications.”³⁸

A few months later, FINRA opted to seek “public feedback on the so-called gamification used by some stock trading platforms, an effort that could lead to new rules or guidance on the controversial tactics.”³⁹ FINRA wants to better understand whether users of such trading platforms are being influenced by gamified user experiences to ultimately take actions that go against their financial interests.⁴⁰ And FINRA’s desire to understand these practices makes perfect sense, especially given the “potential sales abuses” these practices pose by “appeal[ing] to investors’ natural attraction to competition.”⁴¹

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Barbarino, *supra* note 3.

⁴⁰ *See id.* (discussing FINRA’s concern that traders are being incentivized to act emotionally and “contrary to their financial goals”).

⁴¹ Aberg & Killeen, *supra* note 1.

Furthermore, online brokerages' tactics have attracted enough attention to the point that FINRA's Chairman, Robert W. Cook, was asked to speak before the Financial Services Committee of the U.S. House of Representatives about these gamification features.⁴² Cook provided a relatively balanced view of gamification features, even noting some of the benefits they offer.⁴³ However, he primarily emphasized the risks posed to customers, noting that gamification features may "encourag[e] actions misaligned with customers' investment objectives or risk tolerance or distract customers from the financial consequences of trading decisions in favor of winning competitions or achieving social status."⁴⁴

But why exactly was Cook asked to appear before the Financial Services Committee? Cook appeared before the Financial Services Committee to discuss FINRA's 2021 report on its "key risk monitoring activities and examination priorities."⁴⁵ As part of his statement, Cook introduced the notion that online brokerages' customer communications may be subject to Regulation Best Interest (Reg BI) in addition to FINRA's communications rules.⁴⁶ As a result, the report alerted member firms to carefully evaluate the "use of gamification features" to determine "whether the use of a feature may constitute a 'recommendation' under Reg BI."⁴⁷

Some have speculated that FINRA's approach to gamification would focus on the following questions:

- Do communications to users constitute a "recommendation" such that the broker-dealer is required to act in the customer's best interest and comply with Regulation Best Interest and Form CRS?

⁴² Cook, *supra* note 30 (discussing FINRA's 2021 report and its "ongoing targeted review of firms with a zero-commission model, including the potential impact on compliance with such firms' best execution obligations.").

⁴³ *See id.* (stating that gamification features "may educate investors, enhance retail market participation and encourage increased savings and investment.").

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (stating that a "broker dealer's customer interface that promotes trading activity is not only subject to FINRA's communications rules but is also potentially subject to Reg BI ...").

⁴⁷ *Id.* (stating that member firms that use gamification features must "ensure that they meet all applicable regulatory obligations," including those stemming from Reg BI).

- Are users being influenced to make emotional rather than rational trading decisions, either through rewards, leaderboards or direct comparison to other customer's performance or activity?
- What kind of prompts or nudges do customers receive from the platform? Are these prompts educational or positive? Are they designed to influence good decision making?⁴⁸

However, FINRA has made it abundantly clear that it will not lead the charge against online brokerages and gamification features.⁴⁹ Therefore, we must wait and see what the SEC does before we receive any guidance from FINRA.

D. The SEC's Response to Gamification

The SEC has also taken note of this gamification and the behavioral prompts that online brokerages utilize to push people to trade.⁵⁰ SEC Chair Gary Gensler is concerned that app-based trading platforms can mislead investors, offering rosy projections of profit without adequate risk disclosures.⁵¹ And misleading investors is not the only concern. A conflict of interest clearly exists between online brokerages and their customers, as "online brokerages generate profits when their customers trade more often."⁵² SEC Chair Gensler has elaborated on this conflict, stating that finance platforms' "legal duties may conflict with such platforms' ability to optimize for their own revenue."⁵³ In other words, some may argue that Robinhood does not

⁴⁸ Aberg & Killeen, *supra* note 1.

⁴⁹ Barbarino, *supra* note 3 (stating that "any future rulemaking, guidance or regulatory actions would be pursued in lockstep with the U.S. Securities and Exchange Commission.").

⁵⁰ Thomas Franck & Maggie Fitzgerald, *SEC Steps Up Research into Brokers' 'Gamification' of Trades, Chair Gary Gensler Says*, CNBC (Aug. 27, 2021), <https://www.cnbc.com/2021/08/27/sec-steps-up-research-into-gamification-of-trading-with-online-brokers-gary-gensler-says.html> [<https://perma.cc/H7UF-AVXG>] (stating that the SEC is investigating "gamification and behavioral prompts used by online brokerages [that encourage trading].").

⁵¹ *See id.* (discussing Gensler's view that new financial tech has the potential to mislead investors).

⁵² *See id.*

⁵³ Dean Seal, *SEC Chair Wary of Conflicts, Bias in Predictive Data Tools*, LAW360 (Oct. 12, 2021), <https://www-law360->

care whether traders are making well-advised trades in their best financial interests; all Robinhood wants is for its users to trade, trade, and then trade some more. If Robinhood users simply bought once a quarter and held, Robinhood would be worth a fraction of its current market capitalization.⁵⁴ Therefore, it is no surprise that the SEC is primarily concerned with making sure investors are adequately protected when they trade or receive investment advice.⁵⁵

In late August 2021, the SEC began soliciting public commentary on the use of digital engagement practices (DEPs) to assist the agency in drafting a new regulation.⁵⁶

These tools include behavioral prompts, differential marketing, game-like features (commonly referred to as gamification), and other design elements or features designed to engage with retail investors on digital platforms (e.g., websites, portals, and applications), as well as the analytical and technological tools and methods⁵⁷

The SEC has identified that these tools perpetuate conflicts of interest, noting that they “encourage investors to trade more often, invest in different products, or change their investment strategy.”⁵⁸ Through its request for public comment on the use and development of DEPs by firms on their digital platforms, the SEC’s hopes to:

com.ezproxy.bu.edu/articles/1430151/sec-chair-wary-of-conflicts-bias-in-predictive-data-tools (quoting Gensler’s comments that online brokerages “have to comply with investor protections through specific duties — things like fiduciary duty, duty of care, duty of loyalty, best execution and best interest.”).

⁵⁴ See Kent Thune, *6 Different Ways Robinhood Makes Money*, SEEKING ALPHA (Nov. 11, 2021), <https://seekingalpha.com/article/4447377-how-does-robinhood-make-money> (stating that as of July 2021, Robinhood’s biggest source of revenue is its users’ transactions).

⁵⁵ Press Release, Securities and Exch. Comm’n, SEC Requests Information and Comment 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 (Aug. 27, 2021), <https://www.sec.gov/news/press-release/2021-167> [<https://perma.cc/4VLY-RY3D>] (stating that the new technologies “raise questions as to whether we as investors are appropriately protected when we trade and get financial advice”).

⁵⁶ See *id.* (announcing that the SEC is “requesting information and public comment on matters related to the use of digital engagement practices by broker-dealers and investment advisers.”).

⁵⁷ *Id.*

⁵⁸ *Id.*

- [a]ssist the Commission and its staff in better understanding and assessing the market practices associated with the use of DEPs by firms, including: (1) the extent to which firms use DEPs; (2) the types of DEPs most frequently used; (3) the tools and methods used to develop and implement DEPs; and (4) information pertaining to retail investor engagement with DEPs, including any data related to investor demographics, trading behaviors, and investment performance;
- [p]rovide a forum for market participants (including investors), and other interested parties to share their perspectives on the use of DEPs and the related tools and methods, including potential benefits that DEPs provide to retail investors, as well as potential investor protection concerns; [and]
- [f]acilitate an assessment by the Commission and its staff of existing regulations and consideration of whether regulatory action may be needed to further the Commission’s mission, including protecting investors and maintaining fair, orderly, and efficient markets in connection with firms’ use of DEPs and related tools and methods.⁵⁹

Gary Gensler hopes that the public will answer two questions: (1) “how the financial regulator should protect investors against a potential conflict of interest”; and (2) “if brokerages’ game-like or predictive prompts assume optimal outcomes and impact how often customers trade, should the regulator consider those in-app prompts as formal investment recommendations or investment advice?”⁶⁰

The SEC’s public commentary solicitation period formally closed on October 1, 2021.⁶¹ As of the closing date, the SEC has received well over 2,000 responses.⁶² However, in early September, the Securities Industry and Financial Markets Association (SIFMA) asked

⁵⁹ *Id.*

⁶⁰ Franck & Fitzgerald, *supra* note 50.

⁶¹ See Al Barbarino, *SIFMA Wants More Time to Give SEC ‘Gamification’ Input*, LAW360 (Sept. 9, 2021), <https://www-law360-com.ezproxy.bu.edu/articles/1420228/sifma-wants-more-time-to-give-sec-gamification-input> (stating that the deadline to respond was October 1, 2021).

⁶² Al Barbarino, *Toomey, SIFMA Say No To New SEC ‘Gamification’ Regs*, LAW360 (Oct. 1, 2021), <https://www-law360-com.ezproxy.bu.edu/articles/1427346/toomey-sifma-say-no-to-new-sec-gamification-regs> (noting that the SEC has “its hands full sifting through the responses”).

the SEC to extend the comment period to November 1, 2021.⁶³ In its letter, SIFMA argued that the SEC's "30-day deadline on its recent request for public comments on the so-called gamification of trading is not enough time given the 'complexity and scale' of the request."⁶⁴ SIFMA is concerned that this short comment period will impose a significant burden on retail investors, one of the primary groups the SEC is seeking input from.⁶⁵ Retail investors are a primary group, because they are online brokerages' end users. You will not find CalPERs trading on Robinhood. Clearly, retail investors are the ones affected and influenced by these gamification features and digital engagement practices. Therefore, it makes sense why SIFMA is concerned that this 30-day deadline would prevent retail investors' voices from being heard.

In early October 2021, SIFMA sharpened its stance, arguing to the SEC that "so-called DEPs can both provide benefits to retail investors and present risks, but ... existing regulatory frameworks already have them covered."⁶⁶ When it comes to DEPs, SIFMA's view is that the existing regulatory framework preserves their benefits, while mitigating and managing their potential risks.⁶⁷ Expounding on its view, SIFMA noted that Reg BI "covers potential recommendations made through DEPs, while FINRA rules cover potentially misleading communications."⁶⁸ The American Securities Association (ASA) agrees; its CEO, Christopher A. Iacovella, noted that potential violations involving the use of predictive analytics can be tackled through existing regulations.⁶⁹

⁶³ Barbarino, *supra* note 60 (explaining that SIFMA's Associate General Counsel "asked the agency to extend the deadline to respond by an additional 30 days, from Oct. 1 to Nov. 1.").

⁶⁴ *Id.*

⁶⁵ *See id.* (stating that "the 30-day time frame may impose a particular burden on retail investors who may not be able to devote the time and resources to respond.").

⁶⁶ Barbarino, *supra* note 61.

⁶⁷ *Id.* (noting that the SEC's "existing, robust regulatory regime . . . amply addresses firms' use of DEPs today, preserving their well-documented benefits, while appropriately managing potential risks").

⁶⁸ *Id.*

⁶⁹ *Id.* (stating that while Iacovella believes the SEC should focus on predictive analytics, "any violations can be addressed through existing regulations, like Reg BI.").

Opposition to the SEC's further regulation of trading apps and online brokerages is even gaining support in the United States Senate.⁷⁰ Senator Pat Toomey, in a letter to the SEC, argued that "in the absence of 'predatory' behavior ... the agency should not 'inappropriately regulate' mobile trading apps or characterize their features as so-called gamification just because they make investing 'easy and enjoyable.'"⁷¹ In his argument, Toomey emphasized how app-based trading platforms have made investing far more accessible, and that the government should not interfere with Americans' ability to make their own investment decisions.⁷² Toomey warned the SEC that it "should proceed cautiously and remember that adults investing their own money should be free to decide how to do so."⁷³

Potentially foreshadowing its plan to introduce new regulations, the SEC recently contemplated the idea that Reg BI is inadequate in the face of gamification features.⁷⁴ There are concerns that Reg BI is not equipped to handle "self-directed or otherwise 'unsolicited transactions,' which could exempt online trading platforms that use gamification tactics."⁷⁵ And it becomes increasingly murky when gamification features and DEPs "blur the line between solicited and unsolicited transactions."⁷⁶

How do gamification features and DEPs blur the line? Well, DEPs can nudge users to trade specific securities, or may prompt a user to increase their trading activity without recommending any specific securities.⁷⁷ The SEC's investor advocate has essentially provided the

⁷⁰ *Id.* (explaining that Senator Pat Toomey firmly opposes any SEC regulation of trading apps).

⁷¹ *Id.*

⁷² *Id.* (arguing the benefits of app-based trading platforms and discouraging government interference).

⁷³ *Id.*

⁷⁴ Al Barbarino, 'Gamification' Exposes Major Reg BI Flaw, *SEC Official Says*, LAW360 (Oct. 13, 2021), <https://www-law360-com.ezproxy.bu.edu/articles/1430578/-gamification-exposes-major-reg-bi-flaw-sec-official-says> (questioning "whether Regulation Best Interest was 'worth the effort,'" and arguing that "the landmark investor protection rule could fail to protect investors from online trading platforms that use 'gamification.'").

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* ("DEPs may subtly nudge investors to trade specific securities or ... be designed to increase a retail investor's trading activity generally, even when not appearing to recommend a specific security ...").

SEC with an ultimatum as it relates to Reg BI: “the commission must make clear that ‘recommendations’ include instances where broker-dealers use DEPs to nudge investors ‘in a way that reasonably could be viewed as encouraging trading.’”⁷⁸ Otherwise, the investor advocate believes it is time for the SEC to go back to the drawing board and start fresh.⁷⁹

In mid-October 2021, the SEC released a 45-page report stating that gamification features “on stock-trading apps could lead investors to trade more than they would have otherwise and need to be further examined.”⁸⁰ However, the SEC did not provide any specific regulatory recommendations or actions, punting on the issue for the time being.⁸¹ The SEC additionally reiterated that it would focus primarily on DEPs and the incentives inherent in PFOF business models.⁸²

E. Conclusion

At this point in time, it is difficult to predict whether the SEC will take further regulatory action to mitigate the risks that app-based trading platforms present. The public comment solicitation period ended less than two weeks ago. At the time of this writing, the SEC has not had enough time to review the more than 2,000 responses and make a decision on how to move forward. Given the recent pushback from SIFMA, ASA, and Senator Pat Toomey, and their arguments that the existing regulatory framework already covers any potential violations, the SEC may opt not to take further regulatory action. At the same time, the potential inadequacy of Reg BI may prompt a reevaluation of how

⁷⁸ *Id.*

⁷⁹ *Id.* (stating that if Reg BI cannot protect investors, “the commission should go back to the drawing board so that its critical investor protections no longer rise and fall on whether the broker-dealer made a specific recommendation ...”).

⁸⁰ Hailey Konnath, *SEC Says 'Game-Like' Trading Apps Need More Examination*, LAW360 (Oct. 18, 2021), <https://www-law360-com.ezproxy.bu.edu/articles/1432171/sec-says-game-like-trading-apps-need-more-examination>.

⁸¹ *Id.* (stating that the SEC’s report did not include “any specific regulatory recommendations,” but that “additional consideration is warranted in several areas.”).

⁸² *See id.* (stating that “game-like features ... may lead investors astray,” and that “payment for order flow ... may cause broker-dealers to find novel ways to increase customer trading,” including by using DEPs).

Reg BI should be applied and whether it needs to be amended, revised, or otherwise replaced.

Over the coming months, all eyes will be on FINRA and the SEC to see what kinds of regulations and protections they will enact. Although there is no exact timetable for rules or regulations to be drafted, commented on, and adopted, there could be some developments throughout fall 2021 and early 2022.

Michael Pioso⁸³

⁸³ Student, Boston University School of Law (J.D. 2023).