

Cabinet Commentary

GameStop: Regulators Should Focus Less on “Solving the Problem”; More on “Improving the Situation”¹

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This memorandum represents the views of the author(s) only.

The hullabaloo surrounding the run-up in the price of GameStop (“GME”) and the activities of Robinhood Markets, Inc. (together with subsidiaries, as applicable, “Robinhood”) have generated front page news, calls for action, and allegations of wrongdoing. The press release announcing congressional hearings on GameStop used the terms “predatory conduct,” “indefensible,” “predatory short selling,” “vulture strategies,” “manipulative conduct,” “abusive practices,” “gamification,” and “unethical conduct.”² The hearings seem to be based on the presumption that everyone involved in the GME price run-up is guilty of some misconduct or, if no existing rules have been broken, some additional rules must be adopted that would have been broken.

It remains possible that there was fraudulent misconduct; there is some indication of rule-breaking, though seemingly well short of fraud. Investigation is certainly appropriate, and the Securities and Exchange Commission (“SEC”) should pursue enforcement actions to the extent it uncovers market manipulation or other fraudulent misconduct.

Any investigation should allow the SEC to gain a better understanding of how retail investors trade and access information in the age of zero-commission trading and social media. But there is a meaningful risk that legislative or regulatory actions will be taken that are not relevant to any

¹ The hyperlinks in the memorandum are generally to the Cadwalader Cabinet (www.FindKnowDo.com) and are in some cases password-protected for Cabinet subscribers. If you wish to sign up for our free daily newsletter, you may do so at the bottom of the www.FindKnowDo.com home page. Nonsubscribers interested in a demonstration or trial of the Cabinet may contact Cheryl Kuntz at email address Cheryl.Kuntz@cwt.com. See some of our awards and honors: <https://www.findknowdo.com/endorsements>.

² Congresswoman Maxine Waters, [Press Release: Waters Announces February Hearing on Recent Market Volatility Involving GameStop, Other Stocks](#) (Feb. 1, 2021); [Press Release: Following Recent Market Instability, Waters Announces Hearing on Short Selling, Online Trading Platforms](#) (Jan. 28, 2021).

problem, or that are counterproductive. In fact, there are a number of regulatory changes intended to protect retail investors that likely contributed, albeit indirectly, to the GameStop drama.³

So when we say that regulators should focus less on “solving the problem,” and more on “improving the situation,” what do we mean? The “problem” is that one investor’s recommendation on a somewhat obscure stock led to a crazy run-up in the stock price, much of it divorced from any financial logic, causing some investors to make, and other investors to lose, a lot of money, depending on which side of the market they were on and when they got into or out of the stock. The “situation” requiring improvement is that, although many retail investors are financially unsophisticated, the regulatory system has likely served to encourage them to obtain information from non-traditional (largely unregulated sources) like the Reddit.com subreddit wallstreetbets (“WSB”), because it does not provide a way for regulated broker-dealers to serve these clients profitably, either through the production of research or conversations with a registered representative.⁴

A Brief Selective Chronology of the GME Run-Up⁵

In July 2020 (according to reports), an individual investor by the name of Keith Gill⁶ produced a short video that was posted on YouTube and shared on WSB in which he expressed his view that GameStop was a good buy at the then-current price, which was about \$4 a share.⁷ For those who

³ This memorandum is focused on financial regulation. Portions of this memorandum are drawn from a separate piece, published by the Center for Financial Stability, which was in good part concerned with macroeconomics and the manner in which governmental policies have contributed to market volatility. See Lawrence Goodman, Steven Lofchie & Robin L. Lumsdaine *et al.*, *Robinhood and GameStop: Essential Issues and Next Steps for Regulators and Investors*, CENTER FOR FINANCIAL STABILITY (Feb. 4, 2021), http://www.centerforfinancialstability.org/research/GME_Robinhood_020421.pdf.

⁴ As one measure of the decline in brokerage activity, the number of registered broker-dealers declined from about 4,000 in 2014 to about 3,500 in 2020, with declines in every intervening year. See *2020 Evolution Revolution: A Profile of the Investment Adviser Profession*, INVESTMENT ADVISER ASSOCIATION, located at CADWALADER CABINET, <https://www.findknowdo.com/news/11/20/2020/iaa-and-nrs-report-state-investment-adviser-industry>. Meanwhile, the number of investment advisers increased. However, for small retail investors, the cost of hiring an adviser may be too high. Conversely, for investment advisers, a 1% fee on a small retail account, may not cost justify. See also *Proposing Release, Regulation Best Interest*, 83 FED. REG. 21574 (May 9, 2018) (“We also share concerns raised by commenters about retail customers losing access to advice they receive through recommendations from broker-dealers, or if advice from broker-dealers is effectively eliminated, particularly as not all such customers have the option to move to fee-based accounts.”) The proposing release for Regulation Best Interest states further: “We recognize that as a result of the enhanced obligations that would apply, some broker-dealers may determine that it is not cost-effective to continue to recommend certain products or services to retail customers.” *Id.* at 21584. Whether services to retail clients have been diminished is something that the SEC should explore.

⁵ This is not intended to be a full chronology of all events surrounding the GameStop run-up, but only of those that are important to this memorandum.

⁶ It appears that Mr. Gill may work for a broker-dealer (as further discussed below). Even assuming that to be the case, it appears that Mr. Gill’s trading is for his own account, not for his employer or a significant fund.

⁷ Roaring Kitty, *100% Short Interest in GameStop Stock (GME) – Fundamental & Technical Deep Value Analysis*, YOUTUBE (July 27, 2020), <https://www.youtube.com/watch?v=GZTr1-Gp74U>. Mr. Gill made various posts on WSB regarding GME, going as far back as 2019. See also *GME YOLO Month-End Update – July 2020*, REDDIT (July 2020),

have not seen the video, Mr. Gill comes across as bright, thoughtful, open-minded, and self-effacing – not to mention telegenic.⁸ In investment style, Mr. Gill is focused on the fundamentals: the issuer's balance sheet, business plan, management, and place in the product cycle. In many ways, he is a Warren Buffet for the social media age. Beyond that, he appears to have been right on the fundamentals: the stock subsequently rose considerably in value, and even as it falls from its run-up heights, the consensus view is that it will not fall anywhere near as low as it was when Mr. Gill made his initial video.

Prior to Mr. Gill's webcast, and continuing after that, a number of hedge funds and other investors sold short considerable amounts of GameStop stock, based on the view that the company was not well-managed and that it was doomed because it was selling a physical product that was moving online. This negative view of GameStop stock was not obviously wrong, which Mr. Gill acknowledged in his webcast, although Mr. Gill argued that it was overstated.

At some point in 2021, the stock of GameStop rose appreciably and other users of WSB picked up on Mr. Gill's online thesis and began buying GameStop stock. Presumably, although we won't really know until there is some investigation, most of these purchases were by retail investors buying small amounts of stock; however, the aggregate number of these small purchases made for a tremendous trading volume, driving up the price of GameStop shares considerably.⁹

The contributors to WSB include some reasonably sophisticated investors (as well as those that are not), even if they are retail; and they were well aware, through public sources, of the size of short positions in the GameStop stock. Further, they realized that the retail purchases that were driving up the price of the stock were creating tremendous pressure on the short sellers. At some point, the reasons for buying and holding GameStop likely changed, as evidenced by the posts on WSB, from believing in the fundamental value of the stock to squeezing the short sellers.¹⁰

Many of the purchases of GameStop by retail investors were effected through Robinhood, an SEC-registered broker-dealer that does not charge commissions and that makes the bulk of its revenue

https://www.reddit.com/r/wallstreetbets/comments/i1wvqu/gme_yolo_monthend_update_july_2020/; *GME YOLO Update Following the Q2 Earnings Report Described as a "Chernobyl Experience"*, REDDIT (Sept. 11, 2019), https://www.reddit.com/r/wallstreetbets/comments/d31bke/gme_yolo_update_following_the_q2_earnings_report/.

⁸ Some television show or network really needs to hire this guy. He has all of the above qualities, plus a ready-made audience.

⁹ It seems that many of these purchasers were buying call options, which potentially have an outsized impact on the share price relative to the amount of money spent purchasing such options due to the common practice by call option writers of buying shares of the stock as a hedge.

¹⁰ See, e.g., Mr. Gill's video of August 21, 2020, in which he talked somewhat briefly about squeezing the short positions. Roaring Kitty, *The Big Short Squeeze from \$5 to \$50? Could GameStop Stock (GME) Explode Higher??? Value Investing!*, YOUTUBE (Aug. 21, 2020), <https://www.youtube.com/watch?v=alntJzgOUm4&t=11s> (near the end of the video at about 3:30).

through payment for order flow. (Robinhood does not have any ties to GameStop or to Mr. Gill; nor did Robinhood publish research on the company.)

On about January 28, 2021, Robinhood ceased accepting buy orders for the stock and for a number of other securities that had shot up in value based on a sudden influx of purchases by retail investors.¹¹ Although it was not publicly known when Robinhood took this action, it has since been reported that the Depository Trust Company (“DTC”), which is the “middle man” in the settlement of publicly traded equities in the United States, had required that Robinhood post a very significant amount of margin with it to protect DTC against credit risk arising from unsettled trades. As the reasons for Robinhood suspending its trading services were not publicly known, the retail investors on the WSB subreddit expressed a lot of anger at Robinhood, as their inability to purchase stock through the firm made it more difficult to run up the stock price and further squeeze the shorts.¹² (Robinhood has since obtained additional external financing that will assist it in meeting margin calls from DTC and has resumed offering trading in the stock.)¹³

As of February 12th, the stock of GameStop has declined from a high of \$483 at one point on January 27th to \$49.51 at the close on February 16. When the price settles down, there are some investors that will have made a good amount of money and some that will have lost. There will be found among the winners and losers both hedge funds and retail investors. Of course, the losses to the retail investors are more problematic than those suffered by the hedge funds, which might have been wrong on the fundamentals and got themselves into an overcrowded trade, and then were crushed by a weird social-media phenomenon.

So that brings us to the aftermath and to the regulatory reaction.

Things that Don't Seem a Problem

Short Selling. One cause of the pop in GME was that short sellers were forced to buy in their short positions, thus raising the argument that short sellers were responsible for the GME volatility. Issuers and corporate managers don't like short selling because it drives the price of their securities down. Those who don't understand financial markets think that short selling seems weird: how can

¹¹ Robinhood was not alone in suspending or imposing limitations on trading; other broker-dealers took similar actions.

¹² At least one lawyer filed a class action suit, claiming that Robinhood engaged in market manipulation, a position which was also supported or echoed by a number of elected officials. See, e.g., *Nelson v. Robinhood Financial LLC et al.*, No. 21 Civ. 00777 (S.D.N.Y. Jan. 28, 2021), <https://www.courtlistener.com/recap/gov.uscourts.nysd.553175/gov.uscourts.nysd.553175.1.0.pdf>. See also Rashida Tlaib (@RashidaTlaib), TWITTER (Jan. 28, 2021, 10:03 AM), <https://twitter.com/RashidaTlaib/status/1354807292667981828>. Robinhood issued a statement on January 28 explaining some of their actions. Robinhood, *An Update on Market Volatility*, ROBINHOOD BLOG (Jan. 28, 2021), <https://blog.Robinhood.com/news/2021/1/28/an-update-on-market-volatility>.

¹³ Robinhood, *Robinhood Raises \$3.4 Billion to Fuel Record Customer Growth*, ROBINHOOD BLOG (Feb. 1, 2021), <https://blog.Robinhood.com/news/2021/2/1/Robinhood-raises-34-billion-to-fuel-record-customer-growth>.

you sell something you don't own? On the other hand, economists agree that short selling is healthy for the markets because it allows investors to express a negative view, thereby permitting the expression of negative as well as positive sentiments as to a security. Short selling also gives investors and research analysts a motive to search for fraud or other negative facts regarding an issuer. It's not so long after the financial crisis of 2008-2009 that we should forget that the "hero" of The Big Short was a short seller.

We should also be mindful that short selling is risky. Unlike longs, shorts can lose an infinite amount, and they are subject to squeezes, as in the case of GME. In light of the risks that short sellers already bear, and the value that short sellers bring to the market, making short selling more risky than it already is, and so further discouraging it, can only be bad for the market in the long run.

Failure of WSB Investors to File Under Section 13(d). Speaking very generally, a group of investors that are acting "in concert" are required to file reports disclosing their identity and intentions under Section 13(d) of the Securities Exchange Act of 1934. A few commenters have advanced the theory that the WSB readers trading in GME were acting in concert and thus should have made a Section 13(d) filing.

As a starting matter, even assuming the law-school argument that thousands of individual investors making individual decisions might in theory be acting in "concert" for purposes of Section 13(d), there would obviously be no real-world way that they could jointly make a filing. Beyond that, what purpose would be served? The point of the Section 13(d) filing requirements is to force investors to show their hand. The WSB investors were quite transparent: their views were posted on WSB.¹⁴

An Individual Investor Expressing His Views on the Market and the Value of GameStop. Based on what we have seen so far, Keith Gill seems a bright guy. It's a great thing that an individual investor can do the work and reach a wide audience – isn't that what the internet is for? There is nothing inherently wrong with a private citizen saying "I bought this stock; I like it; and you should buy it too." In fact, given the way the SEC regulates the production of investment research (as discussed briefly below), it may be one of the only ways to make money producing "research." (However, we will note that this manner of running an investment business does give rise to an opportunity for "pump and dump" schemes. Policing such schemes is going to be an even greater challenge for the SEC in the wake of GameStop.)

¹⁴ Note that WSB is a publicly accessible forum currently with 8.8 million community members, on one of the top 10 most visited websites in the U.S. according to various sources. See generally *Top 100: The Most Visited Websites in the US*, SEMRUSH (Dec. 2020), <https://www.semrush.com/blog/most-visited-websites/>; *Top Sites in the United States*, ALEXA (2021), <https://www.alexa.com/topsites/countries/US>. This was not a small group of individuals on a private forum in some dark corner of the web.

As further discussed below, it may be that Keith Gill did not comply with his employer's compliance procedures or with FINRA requirements. Even if that is the case, to say that there were some FINRA rules broken does little to explain the GME events. It is a distraction from what is interesting and important about the story: a regular guy without boatloads of resources made what was probably a great call on a stock (even if not as great as believed by those who bought anywhere remotely near the GME high), moved the markets, and generated millions of dollars of losses and gains, much of it from investors whose principal source of financial information is social media.

Robinhood Stopping Trading in GameStop. Even if all of Robinhood's customers paid for their securities in advance, Robinhood could be (and was) subject to a margin demand from DTC for trades that were not yet settled. Under the securities laws, Robinhood could not use the customer money that had been prepaid to purchase GameStop stock until the actual settlement date. Further, DTC has no way of knowing whether GameStop's purchasers had prepaid for their stock, or whether Robinhood had credit exposure to its customers. This means that, as between DTC and GameStop, DTC could have been reasonably worried about Robinhood's credit and reasonably demanded more margin. And because Robinhood would not have been able to access its customers' funds until the settlement date to meet the margin call, Robinhood would have been subject to a liquidity squeeze.

One can also imagine that Robinhood would have been nervous that regulators would blame it for losses by retail investors trading in GameStop. That would not be a crazy concern (in fact, it's entirely realistic).¹⁵ (That said, at least based on the reported news, the margin call was the driver behind Robinhood stopping or limiting GameStop purchases.)

In any case, broker-dealers are not obligated to "accept" orders from their clients, although they are obligated to execute orders promptly once they are actually accepted. It appears Robinhood immediately rejected GameStop orders that it would not execute, and thus Robinhood would have been acting legally.

Things that Will Be Looked At

Payment for Order Flow. The receipt by a retail broker (Robinhood) of payment for order flow is at most tangentially relevant to the GameStop saga.¹⁶ However, because Robinhood is a central player in the saga, and its business model is based on payment for order flow, this has become a

¹⁵ For example, as will be further discussed below, the Massachusetts State securities regulator has brought a large-scale regulatory claim against Robinhood, alleging in part that the firm's services provided to its clients were in violation of the firm's obligations to its customers.

¹⁶ The term "payment for order flow" generally refers to a broker-dealer, such as Robinhood, that has retail clients, sending its order flow to a designated market maker that pays the retail broker-dealer a small fee for sending each retail customer order to it.

common discussion point. For those interested in a description of payment for order flow, see Matt Levine's column *Money Stuff*.¹⁷ While we are big fans of Matt Levine (he is basically the only columnist who really seems to understand the markets), the explanation is probably a little simplistic as it assumes away any arguments against the practice. While the regulatory treatment of payment for order flow may be a reasonable topic for further consideration, the practice of payment for order flow had no impact on the GME run-up.

Were There Too Many Unsettled Short Sales in GameStop? Investors are only permitted to sell short if they can reasonably expect to borrow securities to make delivery. Ironically, if there were short sellers who oversold and were not able to borrow successfully, they ended up hurting themselves by creating an overcrowded trade which facilitated the short squeeze.

Gamification of Trading. FINRA's 2021 Report on Risk Monitoring and Examination Activities noted that some online broker-dealers' apps include "interactive and game-like features, as well as related forms of advertising and marketing."¹⁸ FINRA stated that these features may present increased risks to customers, if they are not designed with appropriate compliance considerations. There is no law against "gamification"; and part of FINRA's report may be read as complaining that online broker-dealers provide an attractive user experience, in the same way that do other large and successful technology firms.¹⁹

The real "problem" that the regulators are facing is that many retail investors are not sophisticated. But is the solution to that to regulate broker-dealers in a manner that discourages firms from providing services to retail investors? Might it be that regulators are effectively driving retail investors away from regulated entities and into social media? This is a question to which we will return.

¹⁷ Matt Levine, *People are Worried About Payment for Order Flow*, BLOOMBERG: MONEY STUFF (Feb. 5, 2021), <https://www.bloomberg.com/opinion/articles/2021-02-05/robinhood-gamestop-saga-pressures-payment-for-order-flow>.

¹⁸ See, e.g., Conor Almquist, Comment, *FINRA Identifies 2021 Risk Monitoring and Examination Priorities*, CADWALADER CABINET (Feb. 2, 2021), https://www.findknowdo.com/news/02/02/2021/finra-identifies-2021-risk-monitoring-and-examination-priorities?utm_source=Newsletter&utm_medium=Email&utm_campaign=Cabinet+Newsletter.

¹⁹ The "gamification" complaint has also been advanced in a regulatory complaint filed by the Massachusetts Securities Division against Robinhood. See Complaint at 2, 4, In re Robinhood Financial, LLC, No. 2020-0047 (Mass. Commw. Ct. 2021), available at <https://www.sec.state.ma.us/sct/current/sctRobinhood/MSD-Robinhood-Financial-LLC-Complaint-E-2020-0047.pdf> (the "Massachusetts Complaint"). The complaint argued, in part, that Robinhood violated Massachusetts law through use of aggressive tactics to attract new and inexperienced investors, failed to implement policies and procedures to prevent and respond to outages and disruptions of the platform, and used the strategy of "gamification to encourage and entice continuous and repetitive use of its trading application." The complaint elaborates on the "gamification" strategy as an "application of typical elements of game playing," and uses examples of "colorful confetti raining down [customers'] screens after executing trades" and rewards for customers who interact daily with the application. More on the Massachusetts Complaint below.

Keith Gill's Status as a Registered Representative of a Broker-Dealer. According to FINRA's BrokerCheck,²⁰ Keith Gill is a registered representative of MML Investors Services, LLC, a Massachusetts-based broker-dealer. As a registered representative, Mr. Gill would have been required to get approval from his employer to do his webcasts and to effect personal securities trades.²¹ We do not know whether he did so; some recent articles quoting his employer indicate he did not.²²

Assuming Mr. Gill did break some rules, there is the possibility that the “officially-sanction lesson” of this saga will be “Keith Gill broke a rule” and this whole incident resulted from rule-breaking, and we need more rules and more enforcement. That would be unfortunate, because it would entirely miss what is significant about this story: that there are numerous retail investors who get their market information from WSB and who share stock price views on WSB, and their numbers will undoubtedly increase in the aftermath of the publicity generated by GameStop.

Even if we assume that Mr. Gill broke some rules as a registered representative in making his videos and Reddit posts, it is clear that he is not someone with the resources of a major institution behind his research.²³ He is not some big shot backed by a high level firm. He was successful, however, despite these limitations in producing what seems like a very thoughtful piece of market-moving research that was on the other side of the trade from some very big and successful players. Indeed, in many ways he seemed to have acted honorably: for example, he appears not to have sold out his GameStop stock at a time when he might have cashed out for a reasonable sized fortune.²⁴ (Likely the investigation will reveal what his trading and holding pattern was.)

Things that Should Be Looked At

Clearing Corporation Demands for Margin and Clearing Risk. Because they are the middle men in the settlement of securities trades, futures, and now swaps, clearing corporations are vital to the

²⁰ BrokerCheck Report: Keith Patrick Gill, BROKERCHECK, <https://brokercheck.finra.org/individual/summary/6054636> (last accessed Feb. 15, 2021).

²¹ See FINRA Rule 2210 (“Communications with the Public”), <https://www.findknowdo.com/us/finra/rules/2210>; FINRA Rule 3270 (“Outside Business Activities of Registered Persons”), <https://www.findknowdo.com/us/finra/rules/3270>.

²² See Dave Michaels, *GameStop Trader 'Roaring Kitty' and Former Employer May Face Federal Regulatory Scrutiny*, WALL ST. J. (Feb. 5, 2021), <https://www.wsj.com/articles/gamestop-trader-roaring-kitty-and-former-employer-may-face-federal-regulatory-scrutiny-11612553349?mg=prod/com-wsj> (“MassMutual has told Massachusetts regulators that it wasn’t aware of his online activities, according to Debra O’Malley, a spokeswoman for William Galvin, Massachusetts’ secretary of the commonwealth.”).

²³ See *supra* note 7 and accompanying text. At least from his Youtube series regarding GameStop, Mr. Gill presented his argument as a summary of existing materials, going so far as providing links to various existing disclosures and analysis and saying that it was unnecessary to watch his videos if you just read his source materials.

²⁴ See *supra* note 7 and accompanying text. Indeed, Mr. Gill has been transparently posting his holdings in GameStop since 2019.

workings of our financial system. They must maintain sufficient margin from their clearing members (in this case the broker-dealers such as Robinhood) so that they do not themselves get into trouble. On the other hand, clearing corporations, by having the right to demand seemingly unlimited margin with little notice, have the power to keep themselves safe by putting others at risk. Further, in the case of a general market downturn, the power of the clearing firms to demand more margin sucks liquidity out of the system and puts the entire market at risk, even while it keeps the clearing houses safe. (Not to stray too far from the point, but this is at least a part of the story of the market downturn in the early days of the pandemic.)²⁵

In the GameStop case, Robinhood reports that it was surprised by the size and timing of DTC's demand for margin. That shows something is amiss, even if it does not tell us what that is. At a minimum, transparency as between the clearing house and its members should be such that members are not surprised by demands for more margin.

Shortening the Settlement Cycle. Each day that a trade stays unsettled creates greater credit risk between the buyer and the seller, because each open day gives the value of the asset more time to diverge from the purchase price, creating an incentive for one party to default. Recently, regular-way trade settlement was reduced from three days to two. Query whether one-day trade settlement is operationally possible in the equity market?

Dealing with the Problem or Improving the Situation?

This brings us to the main point. When regulators adopt rules, they need to consider whether they are “solving the problem” or “improving the situation.” To put it differently, restrictive regulations that eliminate a problem may do so at the cost of improving the situation.²⁶ As we head into what is expected to a regulatory-heavy administration, this is a concern to bear in mind.

The two regulations (or sets of regulations) on which we focus are (i) those governing the publication of research by broker-dealers and (ii) Regulation Best Interest, along with its state law copycats.

²⁵ See, e.g., *ISDA Looks at Risk Management During the Pandemic*, CADWALADER CABINET (Jan. 6, 2021), <https://www.findknowdo.com/news/01/06/2021/isda-looks-ccp-risk-management-during-pandemic>; *FIA Considers Effects of CCP Margin Demands During the Pandemic*, CADWALADER CABINET (Oct. 30, 2020), <https://www.findknowdo.com/news/10/30/2020/fia-considers-effects-ccp-demands-more-margin-during-pandemic>; *SEC Reports on Credit Market Performance During the Pandemic*, CADWALADER CABINET (Oct. 6, 2020), <https://www.findknowdo.com/news/10/06/2020/sec-reports-us-credit-market-performance-light-covid-19-pandemic>.

²⁶ Just to be clear, we do not argue for the abolition of rules or every person or person-self. But rules are like medicine: even the healthful ones are generally better in moderation.

As background to the discussion, here are several questions. Why was Mr. Gill (bright and telegenic as he seems to be) so influential? What were the circumstances that made one person's views on GME so market moving?

Burdens on the Production of Research. Back in 2002, a number of major investment banks were accused of producing biased research reports that tended to paint an overly rosy picture of the business prospects of companies (particularly technology companies) to which the investment banks wanted to sell services. In short, the quid pro quo was supposed to be: investment bank produces research praising the issuer, and issuer directs transactions to the investment bank. When this came to light, the offending parties were hit with substantial fines and the SEC adopted rules that were intended to prevent investment banks from producing biased research. These rules are detailed, complicated, burdensome, and expensive to comply with.²⁷

Did the SEC solve the problem (less biased research being provided to retail investors) or did the SEC improve the situation (more and better research to institutional investors)? The short answer is that there is now not much money in the production and distribution of research. No doubt there were beneficial aspects of this crackdown; however, the heavy regulatory requirements have made it far more difficult for brokerage firms to produce research profitably, and so the expanded rules likely resulted in an overall diminution in the quantity of research. That, we think, is a significant loss to the market.

To put this another way, the regulators may ask why so many investors obtain investment information from social media rather than more traditional, or at least more regulated, sources.

Regulation Best Interest. Recently, the SEC adopted Regulation Best Interest, which imposes a quasi-fiduciary duty on brokers that recommend securities to investors that are human beings (as opposed to funds and other legal entities). While Regulation Best Interest was generally heralded as providing greater protections for retail investors, the effect of the regulation may very well be to make it less worthwhile for broker-dealers to make recommendations to retail investors. (Note our previous memorandum on the issue.²⁸) Rather than offer retail investors "better" recommendations, brokers would simply stop offering them any recommendations, or else direct them to advisory accounts that might be more expensive than a retail investor can really afford.

In other words, perhaps the regulators were solving the problem of biased recommendations, but they were not necessarily improving the situation if they were killing the economics of broker-

²⁷ For a good, long and detailed description of the research rules, see the chapter on research in *Lofchie's Guide to Broker-Dealer Regulation*. See Steven Lofchie, *Research*, LOFCHIE'S GUIDE TO BROKER-DEALER REGULATION, CADWALADER CABINET (June 1, 2016), located at <https://www.findknowdo.com/us-federal/cadwalader/law-firm-analysis/bd-guide-research>.

²⁸ Steven Lofchie et al., *Choose One: Best Interest or Full Service*, CADWALADER (Apr. 26, 2018), <https://www.cadwalader.com/resources/clients-friends-memos/choose-one-best-interest-or-full-service>.

dealers providing some level of guidance and recommendations to retail investors. Seeing the large number of investors who are obtaining their information from WSB seems to evidence that the question that we were raising is not a trivial one.

At the time of the adoption of Regulation Best Interest, various regulators and legislators published “research” or made statements purporting to demonstrate that transacting with regulated broker-dealers cost investors money. But if the regulators have chased retail investors away from supposedly self-interested sales people (thereby “solving” the problem), have they improved investors’ access to information or to guidance by chasing them to social media (improved the situation)? It is not obvious.²⁹

Massachusetts Version of Regulation Best Interest and the Massachusetts Complaint. The State of Massachusetts adopted its own, even tougher, version of Regulation Best Interest that imposes a quasi-fiduciary duty on broker-dealers making “recommendations” to investors in the State of Massachusetts.³⁰ This state law version of Regulation Best Interest is the basis of a Massachusetts Complaint. The complaint makes a number of charges against Robinhood, most of which are outside the scope of this memorandum; e.g., that Robinhood’s technology was insufficient. Perhaps the most aggressive charge that the complaint makes against the firm is that Robinhood’s provision of various lists to its customers constituted “recommendations” that imposed a quasi-fiduciary duty on Robinhood.

If providing a list of securities to a retail investor constitutes a recommendation that imposes a fiduciary duty, and makes the broker responsible for the customer’s losses, the regulators are effectively saying, “don’t provide retail investors with any information as you will be held to owe obligations to them that entail more cost than the revenue of the relationship can possibly bear.” Once again, the regulators may be solving what they perceive as a problem, but they are doing it by effectively depriving the investors of any source of information other than social media.

²⁹ See, Steven Lofchie, Comment, *SEC Adopts “Retail Best Interest” Rulemaking Package*, CADWALADER CABINET (June 5, 2019), <https://www.findknowdo.com/news/06/05/2019/sec-adopts-retail-best-interest-rulemaking-package>.

³⁰ See *Massachusetts Securities Division proposed Fiduciary Conduct Standard*, CADWALADER CABINET (Dec. 18, 2019), <https://www.findknowdo.com/news/12/18/2019/massachusetts-securities-division-proposes-fiduciary-conduct-standard>. See also Steven Lofchie, Comment, *SIFMA CEO Urges Massachusetts Securities Division to Defer on SEC Reg. BI*, CADWALADER CABINET (Jan. 7, 2020), <https://www.findknowdo.com/news/01/07/2020/sifma-ceo-urges-massachusetts-securities-division-defer-sec-reg-bi>; Steven Lofchie, Comment, *NASAA President Offers Recommendations to Improve SEC Regulation Best Interest*, CADWALADER CABINET (March 14, 2019), <https://www.findknowdo.com/news/03/14/2019/nasaa-president-offers-recommendations-improve-sec-regulation-best-interest>.

Investor Education and Index Investing. Studies indicate that the average American is financially illiterate.³¹ In the immediate aftermath of the GameStop run-up, the SEC published a short thoughtful piece as to the dangers of investing in hot stocks.³² The likelihood that anyone who would benefit from the SEC's article will read the SEC's article is small, and the likelihood that the article will change behavior is smaller still.

At the same time, the Wall Street Journal published an article as to how ordinary people are providing under a minute explainers as to market events on TikTok.³³ Perhaps, the SEC should be reviewing those TikTok lessons, finding the good ones and republishing them, or maybe working with their creators to improve them so as to figure out how reach investors and make them smarter.³⁴

If the regulators have an answer to this problem (i.e., investor stupidity) to date, it is arguably to drive retail investors into investing in index mutual funds. There are some real safety benefits to this, but also some losses, including to the economy, as it makes it more difficult for smaller companies, not in the index, to raise money. It also deprives investors of the opportunity to have a substantial "win."³⁵ And we would say that another problem with this regulatory solution is that it gives up on educating investors, and just presumes that they are incurably stupid, so that the only solution is to

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- ³¹ See, e.g., SECURITIES AND EXCHANGE COMMISSION, OFFICE OF INVESTOR EDUCATION AND ADVOCACY, STUDY REGARDING FINANCIAL LITERACY AMONG INVESTORS (Aug. 2012), <https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf>.
- ³² Securities and Exchange Commission, Investor Alert and Bulletin, *Thinking About Investing in the Latest Hot Stock?* (Jan. 30, 2021), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/risks-short-term-trading-based-social-media-investor-alert>.
- ³³ Here is a link to the TikTok that the WSJ particularly singled out: Brianna Parkins (@briannaparkins), TikTok (Jan. 28, 2021), https://www.tiktok.com/@briannaparkins/video/6922832369216949510?is_copy_url=1&is_from_webapp=v2&lang=en. We wouldn't say it's perfectly right, but it's ok and it's 195.1K views as of today, which is likely more than the SEC's piece will have readers.
- ³⁴ Here a couple of other TikToks that we thought were pretty amusing: Taylor Price (@pricesstay), TikTok (Jan. 28, 2021), https://www.tiktok.com/@pricesstay/video/6922807592750238982?is_copy_url=1&is_from_webapp=v1&lang=en; Your Rich BFF (@yourrichbff), TikTok (Feb. 7, 2021), https://www.tiktok.com/@yourrichbff/video/6926555011073707269?is_copy_url=1&is_from_webapp=v2&lang=en. That said, some of the TikToks are really off, not because they are intending to be misleading; they just don't get it close to right.
- ³⁵ Approximately a year ago, SEC Commissioner Hester Peirce dissented from the SEC's refusal to allow the exchange-listing of a fund that would hold Bitcoin. See *SEC Rejects Proposal to List and Trade Bitcoins on Regulated Exchange*, CADWALADER CABINET (Feb. 26, 2020), <https://www.findknowdo.com/news/02/26/2020/sec-rejects-proposal-list-and-trade-bitcoins-regulated-exchange>. Commissioner Peirce argued that the SEC's refusal, while purportedly based on legal grounds, was really a decision to discourage investors from a product perceived to be overly risky. In the last year, Bitcoin is up almost 50%. This is not to argue that Bitcoin is not a very risky investment; it is. Rather, the question is how protective should the regulators be, and what are the costs of that protection?

forbid them from making decisions or taking risks, channeling them, instead, into investments that require no individual thought.³⁶

Conclusion

If the legislators and the regulators follow their ordinary course, they will investigate all that happened around GameStop in the expectation that they will find anyone that they can tar as a bad apple, and maybe even multiple bad apples. In addition to that, the regulators will look to adopt rules to prevent the GameStop scenario from happening again – rules to which more individuals are subject, and that can be eventually broken, and so allow for subsequent enforcement actions. In short, they will look to solve a “problem.”

But the regulators would do better if, instead of trying to solve the problem, they looked to improve the situation.³⁷ Here are some questions that they might ask in this regard:

1. Was Mr. Gill's video on GME one of the best bits of investment information available to retail investors? If so, how did it come about that an individual working without big backing could produce and publicize on social media better information than is generally available to retail investors?
2. Has the SEC's regulation of investment research made for better investment research being available to retail investors or just less research?
3. Will Regulation Best Interest, and the state law follow-ups, kibosh the ability of many retail investors to obtain any guidance from their regulated salespersons and just drive them to other channels including social media?
4. Is there more that the SEC or other regulators can do to educate retail investors so that they are less stupid? Turning out thoughtful essays that no one reads is not going to do it. Is a TikTok approach, or some other social media the better way?
5. Can the regulators use the interest in the markets created by GameStop as a teaching moment?

³⁶ See Jordan Peterson, 12 RULES FOR LIFE, 46 (“And if it were possible to banish everything threatening (and therefore, everything challenging and interesting) – that would mean only that another danger would emerge: that of permanent human infantilism and absolute uselessness . . . How dull and contemptible would we become if there was no longer reason to pay attention?”). See also Steven Lofchie, Comment, *SEC Commissioner Piowar Criticizes DOL Fiduciary Rule*, CADWALADER CABINET (July 26, 2017), <https://www.findknowdo.com/news/07/26/2017/sec-commissioner-piowar-criticizes-dol-fiduciary-rule>.

³⁷ We note that the potential for over-regulation, if one will concede that such a thing is possible, is not limited to the protection of retail investors. Many will argue that traditional issuer initial public offerings have been replaced by SPACs and direct listings because of the burdens associated with a traditional IPO.

It would be a shame if the only “benefit” of the public interest in GameStop is another set of prohibitions, rather than regulatory focus on the opportunity to educate retail investors as to risks—and opportunities. As a new administration takes hold and we enter into a more regulation-intensive era, it is useful to recognize that problem solving through the adoption of more prohibitions does not always result in improving the situation.

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