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## The Perfect Storm: A Look at the Robinhood Shutdown and the Shady Security Practices of Payment for Order Flow, Gamification, and Clickwrap Agreements

Justin M. Taylor

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# **The Perfect Storm: A Look at the Robinhood Shutdown and the Shady Security Practices of Payment for Order Flow, Gamification, and Clickwrap Agreements**

Justin M. Taylor

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## **ABSTRACT:**

SEC guidelines and Federal Courts have stated, and recently upheld, that broker-dealers do not owe a fiduciary duty to retail investors if they do not provide them with investment advice, but this opens up retail investors to significant and costly mistreatment by financial institutions with no avenue for recourse. Using payment for order flow, gamification, and click-wrap agreements by broker-dealers creates a conflict of interest between themselves and the retail investors they act on behalf of. This article argues that retail investors should have an avenue of recourse against financial institutions when they breach their duty to these investors by failing to act in their best interest. This article will focus on the Robinhood shutdown, the recent Best Interest regulation, and how the practices mentioned above can harm retail investors if misused. Additionally, this article will explore the current SEC standing on these practices and certain financial institutions' perceptions of them. Lastly, it will pose the implementation of a broad fiduciary duty on those financial institutions and brokers that use these practices.

## **AUTHOR'S NOTE:**

B.A., Saint Leo University; J.D. Candidate, 2024, University of Massachusetts School of Law. This article represents the blessings that come from a relentless pursuit of your dreams. Being a dark horse can be difficult, but to anyone reading this, never give up and continuously pursue your passions. This article is dedicated to my family and friends; thank you for all the love and support over the years. Thank you to the *UMass Law Review* for all their hard work in turning this piece into what it is today. Lastly, a special thank you to Molly. Your unwavering belief in me has carried me through more than you can imagine. I'll leave everyone with this quote that guided me more than I can state: "I was never afraid of flying too close, I never feared the sun, I dreamed of this battle, and in that dream, I won" - Icarus.

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## I. WHERE TO BEGIN?

On January 26, 2022, the United States District Court for the Southern District of Florida held that retail investors had no claim for breach of fiduciary duty against the investment trading company Robinhood.<sup>1</sup> This decision left retail investors with no recourse against the company that restricted their trading during the height of the “meme stock” craze in early 2021.<sup>2</sup> While disappointing for investors, this ruling was not unexpected; the U.S. Securities and Exchange Commission (SEC) guidelines and federal courts have consistently stated that broker-dealers, like Robinhood, *do not* owe a fiduciary duty to retail investors unless they provide investment advice.<sup>3</sup> Thus, in the absence of a fiduciary duty, broker-dealers are beyond reproach even when they fail to act in the “best interest” of a self-directed retail investor’s account.<sup>4</sup>

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<sup>1</sup> The district court held that the plaintiffs’ claim for breach of fiduciary duty failed under California and Florida tort-law principles because Robinhood’s Customer Agreement informed plaintiffs that their accounts were self-directed, thus allowing the company to restrict trading. The court further held that Robinhood did not provide plaintiffs with investment advice. Thus, neither states’ laws establish a fiduciary duty under these facts. *In re January 2021 Short Squeeze Trading Litig.*, 584 F. Supp. 3d 1161, 1190-95 (S.D. Fla. 2022). Retail investors are non-professional investors who buy and sell securities through online brokerage firms, like Robinhood, or other types of investment accounts. Adam Hayes, *Retail Investors: Definition, What They Do, and Market Impact*, INVESTOPEEDIA, <https://www.investopedia.com/terms/r/retailinvestor.asp> [<https://perma.cc/JT2E-PMKG>] (last updated Feb. 17, 2021).

<sup>2</sup> *In re January 2021*, 584 F. Supp. 3d at 1205. Maggie Fitzgerald, *Robinhood restricts trading in GameStop, other names involved in frenzy*, CNBC, <https://www.cnbc.com/2021/01/28/robinhood-interactive-brokers-restrict-trading-in-gamestop-s.html> [<https://perma.cc/Y66X-Q7B8>] (last updated Jan. 28, 2021, 5:34 PM). The “meme stock” craze surrounded companies liked GameStop, AMC Entertainment, and Blackberry. See Joseph Choi, *Federal court dismisses lawsuit against Robinhood for restricting ‘meme stock’ trades*, THE HILL (Jan. 27, 2022, 4:29 PM), [thehill.com/policy/technology/591715-federal-court-dismisses-lawsuit-against-robinhood-for-restricting-meme/](https://thehill.com/policy/technology/591715-federal-court-dismisses-lawsuit-against-robinhood-for-restricting-meme/) [<https://perma.cc/8LB6-DW46>].

<sup>3</sup> See e.g., *In re January 2021*, 584 F. Supp. 3d at 1190-92; Regulation Best Interest 17 C.F.R. § 240.151-1 (2019).

<sup>4</sup>

Self-directed investing allows [retail] investors to research, buy, and sell through their own initiative . . . . The biggest difference between self-directed investing and conventional investing is who is making the decisions. Conventional investing requires the use of an advisor and more traditional financial institutions to make investments on [retail

The financial market and its institutions are a highly regulated and scrutinized industry with high barriers to entry, especially for those with little or no background in finance or investing.<sup>5</sup> To lower this barrier to entry, Robinhood created its own unique financial institution; it touted no trading fees and zero account minimums as the new form of trading.<sup>6</sup> These methods lowered the amount necessary to start trading, thus making it easier for low-income and first-time investors to enter the market.<sup>7</sup> However, to quote the Socrates affiliate Phaedrus, “[t]hings are not always what they seem.”<sup>8</sup> Among the main reasons Robinhood can offer zero account minimums and no trading fees are its use of payment for order flow (“PFOF”), digital-engagement practices (DEPs), and

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investors’] behalf . . . . Self-directed investing puts [retail investors] directly at the wheel . . . .

IRAR Trust Company, *What is Self-Directed Investing?*, IRAR TR. CO. (Apr. 15, 2022), <https://www.iraresources.com/blog/what-is-self-directed-investing> [<https://perma.cc/7HLX-LBQG>]. Some states, such as Massachusetts, have been so concerned with this that they have enacted a fiduciary standard at the state level. See Richard F. Kerr et al., *Massachusetts Finalizes State Fiduciary Standard Amid Regulation Best Interest*, K&L GATES (Mar. 4, 2020), <https://www.klgates.com/Massachusetts-Finalizes-State-Fiduciary-Standard-amid-Regulation-Best-Interest-03-04-2020> [<https://perma.cc/V5ML-2PBK>].

<sup>5</sup> These “high barriers to entry” include the high price of desirable stocks as well as expensive commission fees. See generally Gordon Severson, *Stock market revolution: How new apps like Robinhood are changing the game*, KAREE, <https://www.kare11.com/article/money/stock-market-revolution-how-new-apps-like-robinhood-are-changing-the-game/89-1f70d1b6-bbd5-43d9-890a-ce005c08f990> [<https://perma.cc/NC86-2TSC>] (last updated Jan. 29, 2021, 4:15 PM). See also *Finding Balance: The Post Covid-COVID Landscape For Financial Institutions*, BAKER MCKENZIE, <https://www.bakermckenzie.com/en//media/files/insight/publications/2021/01/baker-mckenzie—finding-balance—increasing-regulatory-scrutiny-of-financial-institutions.pdf> [<https://perma.cc/WZ3V-YZSE>] (last visited Mar. 15, 2023).

<sup>6</sup> Nathaniel Popper, *Robinhood Has Lured Young Traders, Sometimes With Devastating Results*, NY TIMES, <https://www.nytimes.com/2020/07/08/technology/robinhood-risky-trading.html> [<https://perma.cc/C2CE-EWNF>] (last updated Sept. 25, 2021).

<sup>7</sup> *How Robinhood Makes Money*, CBINSIGHTS (July 8, 2021), <https://www.cbinsights.com/research/report/how-robinhood-makes-money/#> [<https://perma.cc/MPX9-DCSA>].

<sup>8</sup> Andrew Schroer, *Schroer: Things are not always what they seem*, LONGVIEW NEWS J., [https://www.news-journal.com/features/religion/schroer-things-are-not-always-what-they-seem/article\\_ac717884-e8a6-11ea-8cac-9341d6fa354f.html](https://www.news-journal.com/features/religion/schroer-things-are-not-always-what-they-seem/article_ac717884-e8a6-11ea-8cac-9341d6fa354f.html) [<https://perma.cc/XBN2-SVHH>] (last updated Oct. 19, 2022).

clickwrap agreements.<sup>9</sup> These practices, which will be explained in Section II, have a high susceptibility for abuse by broker-dealers. Doubtless are the benefits of these practices, but broker-dealers face a conflict of interest when caught between their goal of maximizing profits and their fiduciary obligation to act in a retail investor's best interest.<sup>10</sup> However, as the District Court for the Southern District of Florida's decision demonstrated, this fiduciary obligation is limited.

The new Regulation Best Interest (Reg BI), promulgated by the SEC in 2020, lays out the current duties broker-dealers owe to investors.<sup>11</sup> The Financial Industry Regulatory Authority (FINRA) explained the new rule by stating that “[t]he SEC’s Regulation Best Interest (Reg BI) under the Securities Exchange Act of 1934 establishes a ‘best interest’ standard of conduct for broker-dealers and associated persons when they make a recommendation to a retail customer.”<sup>12</sup> The Reg BI is a new standard imposed to help further regulate broker-dealers.<sup>13</sup>

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<sup>9</sup> See Matthew Johnston, *How Does Robinhood Make Money?*, INVESTOPEDIA, <https://www.investopedia.com/articles/active-trading/020515/how-robinhood-makes-money.asp> [<https://perma.cc/GUD5-NBFQ>] (last updated Dec. 7, 2022); *Fact Sheet: A Real Robin Hood On Wall Street: Democratizing Equity Markets Without Exploitation*, BETTER MARKETS (July 29, 2022), <https://bettermarkets.org/analysis/fact-sheet-a-real-robin-hood-on-wall-street-democratizing-equity-markets-without-exploitation/> [<https://perma.cc/YW5U-YPBX>] [hereinafter *Fact Sheet*]; *Can Robinhood’s Terms of Service Stop a Class Action Lawsuit?*, IRONCLAD, <https://ironcladapp.com/journal/contracts/robinhood-terms-of-service/> [<https://perma.cc/D6KK-STQF>] (last visited Mar. 11, 2023). For an overview of payment for order flow see *infra* Section II.A. For an overview of DEPs, or gamification, see *infra* Section II.B. For an overview of contracts that qualify as clickwrap agreements, see *infra* Section II.C.

<sup>10</sup> OFF. OF COMPLIANCE INSPECTIONS AND EXAMINATIONS, U.S. SEC. & EXCH. COMM’N, SPECIAL STUDY: PAYMENT FOR ORDER FLOW AND INTERNALIZATION IN THE OPTIONS MARKETS, U.S. SEC. & EXCH. COMM’N (2000)[hereinafter SPECIAL STUDY].

<sup>11</sup> Katharine George, *Fiduciaries, Broker-Dealers, and Regulation BI*, WEALTH STREAM ADVISORS (Feb. 24, 2021), <https://www.wealthstreamadvisors.com/insights/fiduciary-vs-broker-dealer> [<https://perma.cc/7HC7-5XED>]. Regulation Best Interest 17 C.F.R. § 240.151-1 (2019).

<sup>12</sup> Regulation Best Interest 17 C.F.R. § 240.151-1 (2019). *SEC Regulation Best Interest (Reg BI)*, FINRA, <https://www.finra.org/rules-guidance/key-topics/regulation-best-interest> [<https://perma.cc/VK5N-7GXP>] (last visited Mar. 9, 2023)

<sup>13</sup> *What to Expect from SEC Enforcement: Regulation Best Interest*, QUINN EMANUEL TRIAL LAWYERS (Dec. 16, 2021), <https://www.quinnemanuel.com/the-firm/publications/what-to-expect-from-sec-enforcement-regulation-best-interest/> [<https://perma.cc/L23T-QD8H>].

However, Reg BI is weak and bears a stark resemblance to FINRA's suitability requirement already regulating brokers.<sup>14</sup> Given Reg BI's subjectivity, as discussed herein, it will fail to mitigate the harms retail investors face, and broker-dealers will continue to exploit securities practices without violating the Reg BI. The SEC's failure to impose a robust fiduciary duty on broker-dealers has led to a confusing and unbalanced regulatory system for protecting financial markets. Furthermore, it allowed for the creation of abusive financial institutions that do not act in the retail investor's best interest.

This note argues that the SEC should elevate a broker-dealer's duty to that of a fiduciary, as is required of advisors, and provide a private right of action for retail investors in self-directed accounts. These changes will arm retail investors with an avenue for recourse against broker-dealers if they breach their duty to act in the retail investors' best interest. Part II of this note discusses the inherently exploitable practices of payment for order flow, DEPs, and clickwrap in detail, including their potential for abuse. It will examine how Robinhood uses these practices for its benefit. Part III focuses on the Robinhood shutdown and explains why the company was able to shut down trading as well as their reasoning for it. It further discusses the class action lawsuit filed by the retail investors harmed by the shutdown and the court's rationale for denying investors relief. Part IV analyzes the Reg BI in more detail and describes the intended goals of the SEC's new regulation and how it fails to protect retail investors. This section also explains the current duties applied to broker-dealers under current regulations. Finally, Part V recommends the implementation of a broad and uniform fiduciary duty on brokers that would give retail investors an avenue for recourse and better reflect the needs of the public and the financial community.

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<sup>14</sup> Regulation Best Interest 17 C.F.R. § 240.151-1 (2019). Alan Wolper, *FINRA's First Reg BI Enforcement Actions Stuns Industry With Its Adoption of a Standard of Conduct That . . . Is Exactly Like the Old Standard*, ULMER ATTORNEYS (Nov. 2, 2022), <https://www.bdlawcorner.com/2022/11/finras-first-reg-bi-enforcement-action-stuns-industry-with-its-adoption-of-a-standard-of-conduct-that-is-exactly-like-the-old-standard/> [<https://perma.cc/WPF6-3P6D>]; FINRA Rule 2111 was amended to exclude conduct now governed by Reg BI due to the strong similarities they had. *Regulatory Notice 20-18: Reg BI-Related Changes to FINRA Rules*, FINRA (June 19, 2020), <https://www.finra.org/sites/default/files/2020-06/Regulatory-Notice-20-18.pdf> [<https://perma.cc/G9Y2-XBAT>]. See generally George, *supra* note 11.

## II. SELF-SERVING SECURITY PRACTICES

While not illegal, many standard practices used by financial institutions and broker-dealers often benefit the financial institutions at the expense of the retail broker.<sup>15</sup> The Robinhood shutdown in January 2021 and subsequent lawsuits against the company showcase the results for retail investors when they are harmed by these practices.<sup>16</sup> Payment for order flow, gamification, and clickwrap agreements are three financial practices used by broker-dealers that are highly susceptible to misuse and exploitation by broker-dealers.<sup>17</sup> This note will demonstrate that, while each practice on its own may not pose a grave threat to retail investors, when combined, they create an opportunity for broker-dealers to ignore the best interests of the retail investor and face little to no repercussions.<sup>18</sup>

### A. Payment for Order Flow

One of the more controversial practices utilized by Robinhood is payment for order flow (“PFOF” or “order flow”).<sup>19</sup> Order flow “is a form of compensation, usually in terms of fractions of a penny per share, that a brokerage firm receives for directing orders for trade execution to a particular market maker or exchange.”<sup>20</sup> A broker-dealer, like

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<sup>15</sup> See SPECIAL STUDY, *supra* note 10. See also Johnston, *supra* note 9; *Fact Sheet*, *supra* note 9.

<sup>16</sup> See *Taking from the Poor and Giving to the Rich? What is Robinhood’s Exposure in the GameStop Saga?*, THE LYNCH LAW GRP. (Feb. 2, 2021), [https://lynchlaw-group.com/taking-from-the-poor-and-giving-to-the-rich-what-is-robinhoods-exposure-in-the-gamestop-saga/\[https://perma.cc/B4B3-KZAP\]](https://lynchlaw-group.com/taking-from-the-poor-and-giving-to-the-rich-what-is-robinhoods-exposure-in-the-gamestop-saga/[https://perma.cc/B4B3-KZAP]) [hereinafter *Taking from the Poor and Giving to the Rich?*]; Megan Leonhardt, *Robinhood now faces roughly 50 lawsuits after GameStop trading halt – here’s how customers might actually get their day in court*, CNBC, <https://www.cnbc.com/2021/02/17/robinhood-faces-lawsuits-after-gamestop-trading-halt.html> [https://perma.cc/THC2-EAYR] (last updated Aug. 31, 2021, 12:17 PM).

<sup>17</sup> See Johnston, *supra* note 9; *Can Robinhood’s Terms of Service Stop a Class Action Lawsuit?*, *supra* note 9. See also *Fact Sheet*, *supra* note 9.

<sup>18</sup> See *In re January 2021 Short Squeeze Trading Litig.*, 584 F. Supp. 3d 1161, 1205 (S.D. Fla. 2022) (concluding retail investors could not find relief from Robinhood’s use of these practices in tandem).

<sup>19</sup> Theresa W. Carey, *Payment for Order Flow (PFOF): Definition, How It Works*, INVESTOPEDIA, <https://www.investopedia.com/terms/p/paymentoforderflow.asp> [https://perma.cc/3U6B-25YD] (last updated July 4, 2022).

<sup>20</sup> Market makers provide liquidity in the financial market. Retail investors do not work directly with market makers. Rather, the brokers act as the middleman between the two. *Id.*



Robinhood or TD Ameritrade, is paid by market makers to send retail investors' trades to them for execution.<sup>21</sup> Market makers are firms, such as JP Morgan and Goldman Sachs,<sup>22</sup> which are always "ready to buy or sell a stock for a publicly quoted price."<sup>23</sup> This payment is controversial because it incentivizes broker-dealers to send trades to "market makers that execute[] trades at inferior prices, in exchange for unusually high order-flow payments from the market makers," which is against retail investors' best interest.<sup>24</sup>

To better understand why payment for order flow is so enticing to brokerage firms, it is crucial to know how the financial market evolved to allow its use. Bernie Madoff, the infamous Ponzi schemer, pioneered the concept of payment for order flow in the 1990s.<sup>25</sup> The

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<sup>21</sup> *Id.*

<sup>22</sup> *Ultimate Guide to Market Makers*, CTR.POINTSEC., <https://centerpointsecurities.com/market-makers/> [<https://perma.cc/4TV7-VMG4> ] (last visited Mar. 11, 2023); *List of market makers and authorized primary dealers*, FIN. CONDUCT AUTH. (Dec. 16, 2022), <https://www.fca.org.uk/publication/documents/market-makers-authorised-primary-dealers.pdf> [<https://perma.cc/Q3GW-RY4Z>] (listing market makers that function in the UK).

<sup>23</sup> *Executing an Order*, U.S. SEC. & EXCH. COMM'N, <https://www.investor.gov/introduction-investing/investing-basics/how-stock-markets-work/executing-order> [<https://perma.cc/GNZ5-UBWT>] (last visited Mar. 3, 2023). These stocks are listed on public exchanges, such as the New York Stock Exchange or the NASDAQ. *See Understanding stocks*, CHARLES SCHWAB, <https://www.schwab.com/stocks/understand-stocks#20> [<https://perma.cc/5Y22-M499>] (last visited Mar. 3, 2023).

<sup>24</sup> Bill Alpert, *What Is Payment for Order Flow? Behind the Trading Controversy at Robinhood and Other Brokers*, BARRONS, <https://www.barrons.com/articles/payment-for-order-flow-robinhood-51623412441> [<https://perma.cc/595M-WV6H>] (last updated Aug. 31, 2021). An inferior market maker is one that executes trades at a prices lower than those of other market makers at the time the trade is executed. *Id.* For example, suppose an investor wanted to sell a share of Alpha for \$1.00 and chose to submit a trade request through Robinhood. Robinhood can then send that trade request to a market maker that will execute it for \$0.99 or a market maker that will execute if for \$1.01. The market maker quoting the \$0.99 is considered an inferior market maker for that trade execution. *See generally* Paul G. Mahoney & Gabriel Rauterberg, *The Regulation of Trading Markets: A Survey and Evaluation*, 2017 UNIV. OF VA. SCH. OF L. 1, 43 (explaining that retail investors can be harmed when a trading venue permits an order to be completed via a market maker that posts a price that is no longer the best-quoted price available on the market).

<sup>25</sup> Tomio Geron, *Payment for order flow made Robinhood huge. Now everyone's arguing about it.*, PROTOCOL (Apr. 27, 2021), <https://www.protocol.com/fintech/payment-for-order-flow-explained> [<https://perma.cc/9DH8-35CH>].

idea was centered around the structure and mechanics of market makers, which “provide liquidity and depth to markets “;<sup>26</sup> they hold positions in their inventory and immediately sell their position once a trade is routed through them, thus satisfying the requested trade.<sup>27</sup> This allows market makers to complete the order quickly by making it simpler to buy and sell securities which “facilitates a smoother flow of the financial markets.”<sup>28</sup> Market makers derive profit from this system by quoting two-sided markets—they provide the purchase and sale prices and the market size for each security they hold.<sup>29</sup>

The concept and practice of payment for order flow arose to help supplement a market maker’s liquidity. PFOF allows market makers to pay brokers to route trades through them, providing the market maker with a higher volume of transactions which, in turn, offers more profit.<sup>30</sup> This payment by market makers attracts broker-dealers to PFOF; in 2020, the ten leading broker-dealers were paid roughly \$2.75 billion for their order flow, which grew to \$3.62 billion in 2021.<sup>31</sup> Brokers use these payments as a source of income, passing the potentially significant revenue stream and its benefits onto the retail investor in the form of lower commissions, increased market liquidity, and price improvement.<sup>32</sup> Broker-dealers capitalize on these benefits when

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<sup>26</sup> Andrew Bloomenthal, *Market Maker Definition: What It Means and How They Make Money*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/marketmaker.asp> [<https://perma.cc/XW6R-E5P5>] (last updated Aug. 31, 2021).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* For example, suppose a market maker has stock Alpha; it gives a bid (buy) price of \$5.00 at 100 shares and an ask (sell) price of \$5.50 at 200 shares. The market maker profits from the difference between the bid and ask prices. The \$0.50 difference, while small, can add up to significant profits for a market maker due to the high volume of trades they execute daily. *Market Maker*, CFI, <https://corporatefinanceinstitute.com/resources/wealth-management/market-maker/> [<https://perma.cc/CGZ8-3WPA>] (last updated Mar. 19, 2023).

<sup>30</sup> See Alpert, *supra* note 24.

<sup>31</sup> Alexander Voigt, *Payment for Order Flow, Data, Analysis and Insights*, DAYTRADINGZ, <https://daytradingz.com/payment-for-order-flow/> [<https://perma.cc/YW4R-PYXN>] (last visited Mar. 3, 2023).

<sup>32</sup> Joshua Rodriguez, *What Is Payment for Order Flow (PFOF)?*, MONEY CRASHERS (Dec. 7, 2021), (available at [<https://perma.cc/7SS7-EQTX>]). Price improvement is a benefit a retail investor receives when their trade is filled at a price which is better than the National Best Bid and Offer. See *Price Improvement*, CHARLES SCHWAB, <https://www.schwab.com/execution-quality/price-improvement> [<https://perma.cc/2R2U-A2QR>] (last visited Mar. 3, 2023).

defending their use of PFOF, claiming it allows them to provide better prices, open up new markets, and reduce trading costs overall.<sup>33</sup> They further argue that reducing or banning the practice will lead to the loss of these benefits and hurt the retail investor because broker-dealers will need to find a new source of income, which usually comes in the form of trading commissions and other fees.<sup>34</sup> Though order flow can greatly benefit retail investors, there are two sides to every story.

PFOF is highly controversial because of the way broker-dealers receive order flow payments via markers; critics of the PFOF practice argue that it creates a conflict of interest,<sup>35</sup> leads to inferior pricing when trading larger blocks of shares, and is not in the investor's best interest.<sup>36</sup> PFOF proponents appear to have been outmatched by the critics; the SEC launched an investigation into the practice in 2020 and released a special study in response to a flood of complaints from retail investors.<sup>37</sup> The concern surrounding the potential conflict of interest is not limited to retail investors; rather it is shared by brokerage firms as well. In the 2020 study, the SEC found that four of the twenty-four firms it reviewed did not accept payment for order flow.<sup>38</sup> Two of these firms stated that doing so would directly conflict with their fiduciary obligation to their customers, while the two others said that they avoid the practice because they want to prevent the appearance of a conflict of interest.<sup>39</sup>

The SEC is exploring potential reforms to address the practice, including eliminating it entirely.<sup>40</sup> Given the benefits that PFOF provides, the SEC will likely avoid banning the practice and instead look to other means to improve the market.<sup>41</sup> In sum, broker-dealers that

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<sup>33</sup> *Payment for Order Flow*, CORP. FIN. INST. 1, 2 (2016), <https://www.cfainstitute.org/-/media/documents/issue-brief/payment-for-order-flow> [https://perma.cc/M7Y4-63LE].

<sup>34</sup> Voigt, *supra* note 31.

<sup>35</sup> *Id.* See also Rodriguez, *supra* note 32.

<sup>36</sup> Rodriguez, *supra* note 32.

<sup>37</sup> *Id.* SPECIAL STUDY, *supra* note 10.

<sup>38</sup> SPECIAL STUDY, *supra* note 10.

<sup>39</sup> *Id.*

<sup>40</sup> Wayne Duggan, *Could The SEC End Payment For Order Flow?*, FORBES ADVISOR (Aug. 22, 2022, 8:42 AM), <https://www.forbes.com/advisor/investing/payment-for-order-flow/> [https://perma.cc/XHS6-QKMK].

<sup>41</sup> Lydia Beyoud & Katherine Doherty, *SEC Set to Let Wall Street Keep Payment-for-Order-Flow Deals*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2022-09-22/sec-poised-to-let-wall-street-keep-payment-for-order-flow-deals> [https://perma.cc/GTR9-DBRL] (last

accept PFOF wields a double-edged sword: they capitalize on a new way to transact that may benefit retail investors while conversely exposing them to risks if used exploitatively.<sup>42</sup>

## B. Gamification

Digital-engagement practices (DEPs), or gamification, “is the application of game-design elements and game principles in non-game contexts” aimed at encouraging interaction with a particular product or service.<sup>43</sup> In the financial context, gamification is the addition of game-like elements to an investment trading app that motivates retail investors to trade more frequently.<sup>44</sup> Though DEPs did not gain widespread usage until 2010, the use of DEPs has since become a mainstream practice among stock trading companies, with an industry value of roughly \$5.5 billion in 2018.<sup>45</sup> Gamification gained substantial popularity among companies due to its ability to engage users, improve financial literacy, and create an overall positive experience for retail investors;<sup>46</sup> DEPs amplify a person’s behavioral biases, which in turn affect their investing

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updated Sept. 22, 2022, 2:52 PM). The SEC could improve the market by revising their current guidance and reporting standards or they could require brokers to report date on their trade executions to ensure that the best interest standard is being followed. Rich Steiner, *Should the SEC put a stop to payment for order flow?*, RBC CAP. MKT. (May 25, 2022), [https://www.rbccm.com/en/insights/story.page?dcr=templatedata/article/insights/data/2022/05/should\\_the\\_sec\\_put\\_a\\_stop\\_to\\_payment\\_for\\_order\\_flow](https://www.rbccm.com/en/insights/story.page?dcr=templatedata/article/insights/data/2022/05/should_the_sec_put_a_stop_to_payment_for_order_flow) [<https://perma.cc/WF7X-8CL3>].

<sup>42</sup> See Gary Gensler, Chairman, SEC, “Market Structure and the Retail Investor:” Remarks Before the Piper Sandler Global Exchange Conference (June 8, 2022) (transcript available at <https://www.sec.gov/news/speech/gensler-remarks-piper-sandler-global-exchange-conference-060822> [<https://perma.cc/7VFR-76DY>]); Beyond & Doherty, *supra* note 41.

<sup>43</sup> Zachary Fitz Walter, *What is Gamification?*, GAMIFY, <https://www.gamify.com/what-is-gamification> [<https://perma.cc/2ABB-MBBC>] (last visited Mar. 3, 2023).

<sup>44</sup> *Gamification*, INVESTOPEDIA, <https://www.investopedia.com/terms/g/gamification.asp> [<https://perma.cc/H4FG-GQQB>] (last updated July 19, 2021); Nick Gallo, *Robinhood and the Gamification of Investing*, FINMASTERS, <https://finmasters.com/gamification-of-investing/#gref> [<https://perma.cc/GW8M-Z3Y5>] (last updated June 29, 2022).

<sup>45</sup> John Shannon, *The History of Gamification – Journey from 1896 to the 21st Century*, GAMIFY, <https://www.gamify.com/gamification-blog/the-history-of-gamification> [<https://perma.cc/4N28-32GA>] (last visited Mar. 3, 2023).

<sup>46</sup> SIVANANTH RAMACHANDRAN, CFA INSTITUTE, *FUN AND GAMES: INVESTMENT GAMIFICATION AND IMPLICATIONS FOR CAPITAL MARKETS 1* (2022).

conduct and experience.<sup>47</sup> Amplification is achieved through default options that take advantage of society's status quo bias or the use of anchoring and contrast effects to influence our decisions on what stocks to purchase.<sup>48</sup>

Gamification has the potential to benefit young and inexperienced investors.<sup>49</sup> Financial investing has historically been limited to a minority of people due to the complex nature of traditional financing, the lack of information that new investors have, and the cost associated with investing.<sup>50</sup> With the emergence of new technology, more people than ever can access the financial markets. For instance, during the COVID-19 pandemic, an estimated thirteen million people invested for the first time.<sup>51</sup> By using DEPs to simplify investing, more people can enter the stock market and profit from it; in fact, the stock market had greater annual returns over the past one hundred years than other types of financial investments, such as savings accounts and real estate.<sup>52</sup>

Gamification also helps retail investors satisfy their long-term financial goals when used appropriately.<sup>53</sup> "Gamification can help consumers placate their 'present' self by allowing individuals to experience pleasurable psychological responses typical of games such as mastery, competition and escapism."<sup>54</sup> A study conducted by the University of London's Bayes Business School found that gamification could help retail investors overcome bias and improve their ability to

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<sup>47</sup> Michael Wursthorn & Euirim Choi, *Does Robinhood Make It Too Easy to Trade? From Free Stocks to Confetti*, WALL ST. J., <https://www.wsj.com/articles/confetti-free-stocks-does-robinhoods-design-make-trading-too-easy-11597915801> [<https://perma.cc/R9QL-6M8W>] (last updated Aug. 20, 2020, 2:53 PM).

<sup>48</sup> RAMACHANDRAN, *supra* note 46, at 1, 2, 5 (providing a comprehensive and in-depth analysis of how certain gamification techniques capitalize on psychological traits and biases that can influence investment behavior).

<sup>49</sup> See generally Ben Soppitt, *The Gamification Of Investing Brings Opportunity – And Risks*, FORBES (Jan. 8, 2021, 7:00 A.M.), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/01/08/the-gamification-of-investing-brings-opportunity—and-risks/?sh=3dc3b900c08e> [<https://perma.cc/5AP6-TVG8>].

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Mark Gilbert, *The Gamification of Finance May Be a Good Thing After All*, FUNGIBL, <https://fungibl.org/news/the-gamification-of-finance-may-be-a-good-thing-after-allthe-gamification-of-finance-may-be-a-good-thing-after-all/638> [<https://perma.cc/8XQA-WSJB>] (last visited Mar. 3, 2023).

<sup>54</sup> *Id.* (internal quotations omitted).

save for retirement.<sup>55</sup> The study concluded that “the immediate gratification of getting a concrete and instant reward offsets the intangibility of meeting a long-term goal.”<sup>56</sup> But when it comes to the use of DEPs in finance, it is not all fun and games.

Personality traits such as those associated with gambling addiction undoubtedly contribute to retail investor’s investment behaviors, and gamification has only facilitated financial exploitation by broker-dealers.<sup>57</sup> Robinhood unsurprisingly leads the way in incorporating this new method on its online trading platform.<sup>58</sup> Some examples of Robinhood’s use of DEPs include splashing confetti across a user’s screen after an investor executes a trade and “Netflix-style” stock-buying recommendations.<sup>59</sup> The harm in these practices is that they encourage more trading; research indicates that, “in aggregate, retail investors perform worse the more actively they trade.”<sup>60</sup> In addition, a study by the CFA Institute found that “92% of investors aged 25-34 trust digital nudges” and roughly 75% of those same investors reported that the app increased their trading frequency.<sup>61</sup> Broker-dealers that heavily utilize these practices, such as Robinhood, rely on behavioral psychology to dupe the retail investor into more frequent trading, on which broker-dealers capitalize via transaction-based compensation.<sup>62</sup> A complaint by Massachusetts regulators perfectly describes Robinhood’s abuse of this practice by highlighting the company’s

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<sup>55</sup> *Id.*; NETHAL HASIM ET AL., THINK FORWARD INITIATIVE, GAMIFICATION CAN HELP CONSUMERS REACH THEIR SAVINGS GOALS 4-5 (2021).

<sup>56</sup> Gilbert, *supra* note 53; HASIM ET AL., *supra* note 55.

<sup>57</sup> See Julian Jacobs, *Cracking down on the gamification of finance*, OMFIF (July 11, 2022), <https://www.omfif.org/2022/07/cracking-down-on-the-gamification-of-finance/> [<https://perma.cc/6UD9-TH5F>]; Wursthorn & Choi, *supra* note 47; RAMACHANDRAN, *supra* note 46.

<sup>58</sup> See Jacobs, *supra* note 57.

<sup>59</sup> Wursthorn & Choi, *supra* note 47.

<sup>60</sup> Kyle Langvardt & James Fallows Tierney, *On “Confetti Regulation”: The Wrong Way To Regulate Gamified Investing*, 131 YALE L.J. 717, 723-24 (2022).

<sup>61</sup> RAMACHANDRAN, *supra* note 46; Sara Cheng, *The Power of Nudges in Financial Advice*, CFA INST. BLOG (Oct. 21, 2020) <https://blogs.cfainstitute.org/marketintegrity/2020/10/21/the-power-of-nudges-in-financial-advice/> [<https://perma.cc/Y8RF-AWMF>] (“Whenever you are led to believe something is available only for a short period of time or in a limited quantity, you are being nudged to give it more importance and attention. This is one of several tools used to influence consumer behavior to buy something that otherwise may be ignored.”).

<sup>62</sup> Langvardt & Tierney, *supra* note 60, at 723-24; Cheng, *supra* note 61.

“aggressive tactics to attract inexperienced investors, [and] its use of gamification strategies to manipulate customers . . . .”<sup>63</sup>

A call for stricter regulations, motivated by the increase in gamification and its associated risks to retail investors, has induced FINRA and the SEC to take measures to limit the harm caused by DEPs.<sup>64</sup> Although the SEC has not taken a definitive stance on the practice, it has published a request for more information tailored to broker-dealers’ use of DEPs.<sup>65</sup> SEC Chairman Gary Gensler objected to brokerage apps that use DEPs to stimulate trading.<sup>66</sup> FINRA, on the other hand, took a more direct approach; it warned broker-dealers to be cautious of gamification features on their trading platforms.<sup>67</sup> FINRA indicated that it would hone in “on whether broker-dealers are making actual recommendations to customers” when providing them with prompts or nudges.<sup>68</sup> Massachusetts regulators have gone even further, alleging in an administrative proceeding “that gamification violates state fiduciary-duty rules, unethical practices rules, and supervision rules,” clearly demonstrating that at least one state aims to enforce broker-dealers’ obligations to retail investors.<sup>69</sup> Though gamification may benefit retail investors and the market when used properly, the features too closely resemble advice and have enough impact on an investor’s behavior to warrant the imposition of a fiduciary duty.<sup>70</sup>

### C. Clickwrap Agreements

A clickwrap agreement is a contract between a website user and a company whereby the user is required to click a box or button before

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<sup>63</sup> Maggie Fitzgerald, *Robinhood gets rid of confetti feature amid scrutiny over gamification of investing*, CNBC (Mar. 31, 2021, 9:05 AM), <https://www.cnbc.com/2021/03/31/robinhood-gets-rid-of-confetti-feature-amid-scrutiny-over-gamification.html> [<https://perma.cc/RK5F-WZCK>].

<sup>64</sup> *What Broker-Dealers Should Know About Gamification and Marketing Compliance*, INNREG (Feb. 6, 2022), <https://www.innreg.com/blog/marketing-compliance-gamification-fintech> [<https://perma.cc/6SDM-YKVF>] [hereinafter INNREG].

<sup>65</sup> James Fallows Tierney, *Investment Games*, 72 DUKE L.J. 353, 370 (2022).

<sup>66</sup> *Id.* at 369; Gensler, *supra* note 42.

<sup>67</sup> INNREG, *supra* note 64.

<sup>68</sup> *Id.*

<sup>69</sup> Tierney, *supra* note 65, at 372.

<sup>70</sup> *See generally id.*

they can access the website.<sup>71</sup> It works as a contractual tool to bind users of their platform to the terms and conditions of a contract.<sup>72</sup> The “click” or the checking of a box serves as a signature, indicating that the user agrees to the terms of the online contract.<sup>73</sup> These agreements help businesses limit their liability without hindering customer experience.<sup>74</sup> Unlike other online agreements, clickwrap agreements require the user to affirmatively assent to the contract by clicking the box.<sup>75</sup> This affirmative action provides the requisite intent and notice to bind the user to the agreement, which is why clickwrap agreements are most common with business-to-consumer companies.<sup>76</sup>

The use of clickwrap agreements is highly controversial due to the “take-it-or-leave-it” style of contracting.<sup>77</sup> Clickwrap agreements are presented to all users in standard, identical form, and the user has no power to bargain over or negotiate any of the terms.<sup>78</sup> This style of arrangement is often called an adhesion contract.<sup>79</sup> Adhesion contracts are common where there is disproportionate bargaining power between the two parties, and the party with less power must surrender to the terms of the contract to use the product.<sup>80</sup> Given the tendency of an adhesion contract to disproportionately shift control to one side, courts will thoroughly scrutinize the terms of the contract and potentially

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<sup>71</sup> *Clickwrap: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/clickwrap> [<https://perma.cc/NN36-8UMN>] (last updated July 15, 2020) [hereinafter *Clickwrap: Everything You Need to Know*].

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *What Is a Clickwrap Agreement?*, IRONCLAD, <https://ironcladapp.com/journal/contract-management/what-is-a-clickwrap-agreement/> [<https://perma.cc/Z57X-7QBN>] (last visited Mar. 3, 2023).

<sup>75</sup> Similar types of practices to clickwrap agreements exist in many forms, including browsewrap or sign-in-wrap agreements, which are accepted by the user when the user either logs in to the site or is just using the site. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Andreas Johansson, *The Enforceability of Clickwrap Agreements*, UMEA UNIV. 1, 18 (2014), <https://www.diva-portal.org/smash/get/diva2:807840/FULLTEXT01.pdf> [<https://perma.cc/N2ZP-S9W7>].

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; *Taking from the Poor and Giving to the Rich?*, *supra* note 16.

<sup>80</sup> *Adhesion contract*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/adhesion\\_contract](https://www.law.cornell.edu/wex/adhesion_contract) [<https://perma.cc/T2VN-H9BR>] (last visited Mar. 3, 2023); *Taking from the Poor and Giving to the Rich?*, *supra* note 16.



invalidate a provision if they find unfairness or unconscionability.<sup>81</sup> However, even under this heightened scrutiny, courts have repeatedly upheld the use of clickwrap agreements so long as the user has notice of the agreement<sup>82</sup> and it passes muster under the “doctrine of reasonable expectations.”<sup>83</sup> The “doctrine of reasonable expectations” is a standard that provides an avenue for users to challenge adhesion contracts because the terms are beyond what a reasonable party would have expected when forming the contract.<sup>84</sup> Therefore, if a party has notice of the representations and consents to them, they will be bound to the terms even if they fail to read the agreement.<sup>85</sup>

Robinhood requires its users to enter a clickwrap agreement to use their mobile trading app.<sup>86</sup> In its agreement, Robinhood includes a mandatory arbitration clause (prohibiting actions in federal courts) as well as a term that allows Robinhood to “prohibit or restrict the [user’s] trading of securities . . . at its sole discretion and without prior notice to [the user].”<sup>87</sup> These terms have subjected Robinhood to dozens of lawsuits, most recently around their trading shutdown in January of 2021.<sup>88</sup> By failing to properly follow the industry’s security practices, Robinhood again has found itself on the wrong side of what is in the best interest for retail investors.

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<sup>81</sup> *Taking from the Poor and Giving to the Rich?*, *supra* note 16; Ezer Williamson, *What is an Adhesion Contract?*, EZER WILLIAMSON, <https://ezerwilliamsonlaw.com/what-is-an-adhesion-contract/> [<https://perma.cc/KR54-LZV7>] (last visited Mar. 3, 2023); *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168-69 (2d Cir. 1997).

<sup>82</sup> *Klos*, 133 F.3d at 169; *Clickwrap: Everything You Need to Know*, *supra* note 71.

<sup>83</sup> Williamson, *supra* note 81.

<sup>84</sup> *Id.*

<sup>85</sup> Johansson, *supra* note 77, at 24.

<sup>86</sup> *Taking from the Poor and Giving to the Rich?*, *supra* note 16; *Can Robinhood’s Terms of Service Stop a Class Action Lawsuit?*, *supra* note 9.

<sup>87</sup> *Taking from the Poor and Giving to the Rich?*, *supra* note 16; *Can Robinhood’s Terms of Service Stop a Class Action Lawsuit?*, *supra* note 9; Maria Nikolova, *Robinhood’s trading restrictions go beyond contractual discretion, traders say*, *FNG* (Nov. 6, 2021), <https://fxnewsgroup.com/forex-news/retail-forex/robinhoods-trading-restrictions-go-beyond-contractual-discretion-traders-say/> [<https://perma.cc/X9UQ-H53A>].

<sup>88</sup> *Taking from the Poor and Giving to the Rich?*, *supra* note 16.

### III. THE ROBINHOOD DEBACLE

Robinhood was the first investment company to push the limits of what the self-serving practices of payment for order flow, gamification, and clickwrap agreements can do. The following events give retail investors and regulators a glimpse into the harm that will ensue if these practices are left unchecked.

On January 27, 2021, David beat Goliath. Reddit users bested Wall Street when GameStop's share price hit a record high, up nearly 1,800% from a few weeks prior.<sup>89</sup> The backbone of this attack on Wall Street was fueled by a forum on Reddit called "Wall Street Bets."<sup>90</sup> Under the pseudonym "Roaring Kitty," a Reddit user posted to this forum that big investment firms were "shorting" GameStop.<sup>91</sup> Shorting is a financial tool investment firms use when they believe a company's current share price is overvalued and its stock price will fall.<sup>92</sup> In other words, firms assume that the price is overvalued and will fall.<sup>93</sup> Firms profit off this prediction by borrowing a security from a brokerage, selling it immediately, and waiting for the price to drop so they can rebuy the security at a lower price before returning the borrowed security to the broker and pocketing the difference.<sup>94</sup> This type of trading is highly speculative and risky and sometimes can lead to a "short" squeeze.<sup>95</sup> Firms must then repurchase such securities at higher prices if they wish to reduce their ultimate losses, forcing the security price to increase even further.<sup>96</sup>

Opportunists watching this trend saw the unique profit potential and artificially increased the prices of "shorted" securities such as GameStop, thus capitalizing on the misfortune of hedge funds that

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<sup>89</sup> Ephrat Livni, *Robinhood faces lingering issues a year after meme-stock mania*, N.Y. TIMES (Jan. 27, 2022), <https://www.nytimes.com/2022/01/27/business/robinhood-meme-stocks.html>[<https://perma.cc/NH72-E5HA>]; Samuel Barder, *Market Manipulation or Just Dumb Money? The GameStop Stock Spike and What Happens Next*, 26 ILL. BUS. L.J. 9, 10 (2021).

<sup>90</sup> Barder, *supra* note 89.

<sup>91</sup> *Id.* at 11.

<sup>92</sup> *Id.* at 12.

<sup>93</sup> *Id.*

<sup>94</sup> Lee Bohl, *Short Selling: The Risks and Rewards*, CHARLES SCHWAB (Aug. 9, 2022) <https://www.schwab.com/learn/story/ins-and-outs-short-selling> [<https://perma.cc/EB4J-XZQW>].

<sup>95</sup> In a "short squeeze," the security price goes up instead of down as predicted. *Id.*

<sup>96</sup> *Id.*

overextended “their short positions.”<sup>97</sup> These unexpected increases in stock prices sent investment firms scrambling to prematurely rebuy their shorted securities to minimize their losses, driving stock prices up even higher.<sup>98</sup> This “short” squeeze caused GameStop’s share price to skyrocket from \$17.25 to over \$500.00 within a single month.<sup>99</sup>

This attack on Wall Street led the charge of the so-called “meme stock” phenomenon, with other businesses like AMC and Bed Bath & Beyond also experiencing significant stock price increases.<sup>100</sup> This fairy tale, however, would not have a very happy ending; on January 28, 2021, Robinhood restricted user trading of these “meme stocks”, leaving investors with only the ability to sell their positions.<sup>101</sup> This caused the prices of the “meme stocks” to plummet, with GameStop, in particular, dropping 44% the day trading was restricted.<sup>102</sup> Following the shutdown, Robinhood released a statement justifying the stock freeze, citing protection of its customers in times of market volatility.<sup>103</sup> However, it was later revealed that Robinhood restricted trading because it could no longer pay the transaction fees *and* pay the ballooning payouts to investors while also posting additional cash to its

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<sup>97</sup> Barder, *supra* note 89, at 13.

<sup>98</sup> *Id.*; Peter Butler, *Meme Stock Meltdown: Tough Times for Bed Bath & Beyond, AMC and GameStop*, CNET (Sept. 2, 2022, 1:35 PM), <https://www.cnet.com/personal-finance/investing/stock-market/meme-stock-meltdown-bed-bath-beyond-craters-amc-goes-ape-and-stumbles/> [https://perma.cc/L9PB-AL5M].

<sup>99</sup> Butler, *supra* note 98.

<sup>100</sup> *Top Meme Stocks and Meme Stock Rallies*, FORBES (Sept. 2, 2022, 6:45 AM), <https://www.forbes.com/sites/qai/2022/09/02/top-meme-stocks-and-meme-stock-rallies/?sh=4d4529271b24> [https://perma.cc/2HBM-D8GQ].

<sup>101</sup> See Fitzgerald, *supra* note 2. See also Charles Forelle, *Employees Scrambled to Keep Robinhood Afloat in January 2021 Meme-Stock Frenzy, House Report Finds*, WALL ST. J., <https://www.wsj.com/articles/employees-scrambled-to-keep-robinhood-afloat-in-january-2021-meme-stock-frenzy-house-report-finds-11656185206> [https://perma.cc/N5UN-W3L2] (last updated June 25, 2022, 5:00 PM).

<sup>102</sup> Fitzgerald, *supra* note 2.

<sup>103</sup> *An Update on Market Volatility*, ROBINHOOD BLOG (Jan. 28, 2021), <https://blog.robinhood.com/news/2021/1/28/keeping-customers-informed-through-market-volatility> [https://perma.cc/FS8F-RTX5]; Rachel McIntosh, *Could Robinhood Shut down? Traders & Regulators Raise Questions & Criticism*, FIN MAGNATES (Jan. 2, 2021, 11:30 GMT), <https://www.financemagnates.com/cryptocurrency/news/could-robinhood-shut-down-traders-regulators-raise-questions-criticism/> [https://perma.cc/66Q3-NNRK].

clearing facility to protect itself from potential losses.<sup>104</sup> Robinhood's explanation was met with criticism from those who found suspect the company's close ties to the large-scale liquidity provider Citadel.<sup>105</sup> From the skepticism arose speculation that Citadel may have put pressure on Robinhood to limit trading to prevent further losses for short-sellers like Citadel.<sup>106</sup>

In response to the skepticism and harm surrounding the Robinhood shutdown, an action was instituted against the company in the United States District Court for the Southern District of Florida under the name *In re January 2021 Short Squeeze Trading Litigation*.<sup>107</sup> This case consolidated several claims by Robinhood's customers who sued the broker in the aftermath of the January 2021 shutdown.<sup>108</sup> Among these claims were negligence, breach of fiduciary duty, tortious interference with contract and business relationship, and civil conspiracy.<sup>109</sup> Analysis of the entire complaint warrants its own discussion. Thus, the scope of this note is limited to the fiduciary duty claim. In its review of this claim, the Court analyzed the customer agreement terms under California and Florida state law<sup>110</sup> and ultimately found that Robinhood effectively limited its fiduciary obligations to retail investors through its clickwrap agreement.<sup>111</sup> Additionally, it was found that Robinhood did not owe these customers any fiduciary obligations because Robinhood did not provide them with financial advice.<sup>112</sup> The Court further stated that Robinhood's assumed duties went no further than those associated with carrying out customers' orders, meaning that Robinhood's broad fiduciary duty alleged by the plaintiffs was not warranted by its "limited role."<sup>113</sup> The count for breach of fiduciary duty was ultimately

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<sup>104</sup> McIntosh, *supra* note 103.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *In re January 2021 Short Squeeze Trading Litig.*, 584 F. Supp. 3d 1161, 1169 (S.D. Fla. 2022).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1177.

<sup>110</sup> *Id.* at 1190-95.

<sup>111</sup> *Id.* at 1191-95 (S.D. Fla. 2022).

<sup>112</sup> *Id.* at 1192-94.

<sup>113</sup> *In re January 2021 Short Squeeze Trading Litig.*, 584 F. Supp. 3d 1161, 1191, 1194 (S.D. Fla. 2022).

dismissed with a holding that “general fiduciary duties ‘do not arise’” for self-directed brokerages.<sup>114</sup>

The January 2021 shutdown was not the only time Robinhood has drawn attention for its questionable business decisions. On June 30, 2021, FINRA fined Robinhood \$57 million—the largest penalty FINRA has ever imposed—for a series of violations, including communicating inaccurate and misleading information to customers.<sup>115</sup> Additionally, FINRA’s investigation found that Robinhood’s monitoring of technology was inadequate and crucial to its services.<sup>116</sup> Robinhood had also failed in its required reporting to FINRA to disclose customer complaints numbering in the tens of thousands.<sup>117</sup> However, Robinhood’s most grievous indiscretion was its failure to adequately screen inexperienced retail investors and approving such investors to option and margin trade.<sup>118</sup> Robinhood’s critical shortcomings led one customer, Alexander E. Kearns, to take his own life<sup>119</sup> after he traded high-risk options on a vast margin that showed a negative account balance of \$730,165.72 just prior to his suicide.<sup>120</sup> This is just one of many harms resulting from Robinhood’s failure to adequately protect retail investors and act in their best interest.<sup>121</sup>

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<sup>114</sup> *Id.* at 1192, 1195.

<sup>115</sup> Michelle Ong et al., *FINRA Orders Record Financial Penalties Against Robinhood Financial LLC*, FINRA (June 30, 2021), <https://www.finra.org/media-center/newsreleases/2021/finra-orders-record-financial-penalties-against-robinhood-financial> [<https://perma.cc/K3GH-UZRL>].

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; *BNSK’s lawsuit against Robinhood for the wrongful death of Alex Kearns*, BNS&K, <https://bnsklaw.com/lawsuit-against-robinhood-for-the-death-of-alex-kearns/> [<https://perma.cc/P668-LNJG>] (last visited Mar. 3, 2023).

<sup>120</sup> John R. Fallon, *Equal Access To Investments: At Whose Expense?*, 21 WAKE FOREST J. BUS. & INTELL. PROP. L. 431, 432 (2021); *BNSK’s lawsuit*, *supra* note 119.

<sup>121</sup> Many instances involve customers whose losses contributed to the total sum of tens of millions of dollars referenced by the SEC. *SEC Charges Robinhood Financial With Misleading Customers About Revenue Sources and Failing to Satisfy Duty of Best Execution*, U.S. SEC. & EXCH. COMM’N (Dec. 17, 2020), <https://www.sec.gov/news/press-release/2020-321> [<https://perma.cc/6NNW-YKAN>] [hereinafter *SEC Charges Robinhood*].

Robinhood's series of abuses has led to a significant backlash from retail investors and others.<sup>122</sup> The January 2021 shutdown even drew attention from members of Congress. Democratic Representative Alexandria Ocasio-Cortez tweeted that Robinhood's parameters were "unacceptable" and that she would support a Financial Services Committee hearing on the matter.<sup>123</sup> Republican Senator Ted Cruz also weighed in, fully supporting the statement made by Rep. Ocasio-Cortez.<sup>124</sup> One law review article states, "Robinhood appears to have more of the trappings of the Sheriff of Nottingham than its namesake."<sup>125</sup> The article further states that Robinhood's lofty claims of "democratization" are, in reality, "manipulation and exploitation" that simply provide another channel for the already rich and powerful to profit off of novice traders.<sup>126</sup> Despite such harsh criticism, it remains a strong investment app and is still touted on reputable websites, such as CNBC<sup>127</sup> and Business Insider, as the "best investment app for active traders."<sup>128</sup> Nevertheless, the chaos at Robinhood is just a microcosm that showcases the potential abuse that retail investors can face in the broader financial markets.<sup>129</sup>

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<sup>122</sup> See, e.g., Ong et al., *supra* note 115 (highlighting that there were "tens of thousands" of complaints by customers between January 2018 and 2020). Turner Wright, *Robinhood to face class action lawsuit from meme stock debacle: Report*, COINTELEGRAPH, (Aug. 11, 2022), <https://cointelegraph.com/news/robinhood-to-face-class-action-lawsuit-from-meme-stock-debacle-report> [<https://perma.cc/MAU6-ENW9>].

<sup>123</sup> Fitzgerald, *supra* note 2; Tucker Higgins, *Lawmakers from AOC to Ted Cruz are bashing Robinhood over its GameStop trading freeze*, CNBC, <https://www.cnbc.com/2021/01/28/gamestop-cruz-ocasio-cortez-blast-robinhood-over-trade-freeze.html> [<https://perma.cc/U5E4-EVLG>] (last updated Jan. 28, 2021, 5:17 PM).

<sup>124</sup> Fitzgerald, *supra* note 2; Higgins, *supra* note 123.

<sup>125</sup> Dennis Kelleher et al., *Securities—Democratizing Equity Markets With And Without Exploitation: Robinhood, GameStop, Hedge Funds, Gamification, High Frequency Trading, and More*, 44 W. NEW ENG. L. REV. 52, 57 (2022).

<sup>126</sup> *Id.*

<sup>127</sup> See e.g., Elizabeth Gravier, *The top 4 investing apps to help newbies and experts build their wealth from anywhere*, CNBC, <https://www.cnbc.com/select/best-investing-apps/> [<https://perma.cc/DB2E-D2HU>] (last updated Mar. 1, 2023).

<sup>128</sup> Tanza Loudonback & Rickie Houston, *The 7 Best Investment Apps of March 2023*, BUS. INSIDER, <https://www.businessinsider.com/personal-finance/what-are-the-best-investment-apps> [<https://perma.cc/P3TU-UG5Y>] (last updated Feb. 1, 2023, 12:52 PM).

<sup>129</sup> See, e.g., David Vos, *ESMA warns retail investors of risks of committing market abuse when trading in volatile stocks*, LEXOLOGY (Feb. 22, 2021),

## IV. NEW REGULATIONS AND CURRENT STANDARDS

### A. The SEC's Regulation Best Interest

The meltdown of the financial sector in 2008 showcased major cracks in the system charged with regulating that industry, cracks that permitted large swaths of the financial system to function without government monitoring or guidance and allowed millions of Americans to become unemployed, causing the devastating loss of trillions of dollars in wealth.<sup>130</sup> In response to this crisis, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) into law in order to prevent the type of conduct that led to the financial crisis and to give American families more protection by building a financial system less prone to catastrophic events like those seen in 2008.<sup>131</sup> Under Section 913 of the Dodd-Frank Act, the SEC was required to survey investment advisers and broker-dealers, as well as find weaknesses in the regulations guiding them.<sup>132</sup> To execute this statutory charge, Congress gave the SEC the authority to promulgate new regulations; however, this charge was not strong enough to address the potential findings or deficiencies.<sup>133</sup> Essentially, the power given to the SEC had “a gap of its own—a gap between the issues the study found and the tools the SEC had been provided to solve them.”<sup>134</sup>

Nevertheless, June 30, 2020, marked the compliance date for the SEC's Regulation Best Interest (“Reg BI”), adopted under authority from the Securities Exchange Act of 1934, to counteract this high

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<https://www.lexology.com/library/detail.aspx?g=5b2d1b61-acba-4986-80d0-ac46f93ce817> [https://perma.cc/98XP-UXGS] (discussing how what happened with GameStop could happen in the European markets – even with different market rules). *How to Spot an Investment Scam*, CHARLES SCHWAB (Oct. 15, 2021), <https://www.schwab.com/learn/story/how-to-spot-investment-scam> [https://perma.cc/5UHE-V484].

<sup>130</sup> *Wall Street Reform: The Dodd-Frank Act*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform/> [https://perma.cc/4MBB-RFXZ] (last visited Jan. 24, 2023).

<sup>131</sup> *Id.*

<sup>132</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1824-25 (2010) (codified as 15 U.S.C. 78).

<sup>133</sup> *Id.*; Ana Marcos, *Regulation Best Interest: Is the SEC Finally Choosing Main Street Over Wall Street?*, 29 U. MIA. BUS. L. REV. 143, 151 (2021); Regulation Best Interest 17 C.F.R. § 240.151-1 (2019).

<sup>134</sup> Marcos, *supra* note 133.

potential for abuse in and around financial markets.<sup>135</sup> Reg BI establishes a “best interest” style of conduct that broker-dealers must observe when making financial recommendations or offering investment strategies to retail customers.<sup>136</sup> The concept of “best interest” emerged from Dodd-Frank, a monumental act that assigned to the SEC a duty to evaluate the quality and success of the existing requirements of brokers and pinpoint any gaps in the effectiveness of those requirements.<sup>137</sup> The Reg BI attempts “to hold brokers to a higher standard” by requiring them to be more transparent with retail customers regarding brokers’ often misunderstood or inaccurate status as an “advisor.”<sup>138</sup> Furthermore, it mandates adherence to four obligations from brokers:

(i) *Disclosure obligation*. The broker . . . prior to or at the time of the recommendation, provides . . . full and fair disclosure . . . (ii) *Care obligation*. The broker . . . in making [a] recommendation, exercises reasonable diligence, care, and skill . . . (iii) *Conflict of interest obligation*. The broker . . . establishes, maintains, and enforces . . . policies and procedures [that address conflict of interest] . . . [and] (iv) *Compliance obligation* . . . [T]he broker . . . compli[es] with Regulation Best Interest.<sup>139</sup>

The goal of the regulation was “to raise standards in the investment advisory business”<sup>140</sup> via clarification of “the standards of conduct applicable to broker-dealers and investment advisers,” aiding retail

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<sup>135</sup> Jay Clayton, *Confirmation of June 30 Compliance Date for Regulation Best Interest and Form CRS*, U.S. SEC. & EXCH. COMM’N (June 15, 2020), <https://www.sec.gov/news/public-statement/clayton-compliance-date-regulation-best-interest-form-crs> [<https://perma.cc/4FXV-K65L>]; Securities Exchange Act of 1934, 15 U.S.C. §§ 78 (b-d) (2022); Regulation Best Interest 17 C.F.R. § 240.151-1 (2019).

<sup>136</sup> Regulation Best Interest 17 C.F.R. § 240.151-1 (2019).

<sup>137</sup> *SEC Files First Enforcement Action Alleging Violations of Best Interest Rule’s Care and Compliance Standards*, ROPES & GRAY (June 24, 2022), <https://www.ropesgray.com/en/newsroom/alerts/2022/06/SEC-Files-First-Enforcement-Action-Alleging-Violations-Best-Interest-Rule-Care-Compliance-Standards> [<https://perma.cc/UK86-9E3N>].

<sup>138</sup> Kelly Anne Smith, *What Regulation Best Interest Means For Your Financial Advisor*, FORBES ADVISOR, <https://www.forbes.com/advisor/investing/financial-advisor/regulation-best-interest/> [<https://perma.cc/TQ7W-BM76>] (last updated Mar. 5, 2021, 1:09 PM).

<sup>139</sup> *Id.* Regulation Best Interest 17 C.F.R. § 240.151-1 (2019) (emphasis in original).

<sup>140</sup> Smith, *supra* note 138.



investors in comprehending the services provided to them and supplying more consistent security against investment pitfalls.<sup>141</sup>

Since its enactment, however, the Reg BI has received mixed reviews. U.S. Senator Elizabeth Warren spoke out against the new Reg BI, stating that the term “best interest” is not defined in the new regulation; she noted that this would only confuse those on both sides of the market—brokers and investors alike.<sup>142</sup> Furthermore, she argued that this lack of clarity would leave the possibility open for “judges and corporate lawyers [to] chip away at the standard over time,” reducing its effectiveness.<sup>143</sup> Joining lawmakers in the harsh criticism of the Reg BI were attorneys general, hailing from seven states and the District of Columbia, who attempted to block its application in court.<sup>144</sup> The crux of their argument was that the SEC’s failure to require an appropriately high fiduciary standard on broker-dealers serving retail investors did not satisfy the intent of the Dodd-Frank Act.<sup>145</sup> Nevertheless, in *XY Planning Network, LLC v. United States SEC*, the United States Court of Appeals for the Second Circuit noted that the SEC “considered and rejected a uniform fiduciary standard for investment advisers and broker-dealers.”<sup>146</sup> According to the Second Circuit, the SEC did not adopt this approach because “a one size fits all approach would risk reducing investor choice and . . . a uniform fiduciary standard would [not] provide any greater investor protection.”<sup>147</sup> Broker-dealers, however, see the Reg BI in a better light. According to Mark Quinn, director of Regulatory Affairs for Cetera, “Regulation Best Interest was the right approach for the SEC to take. It’s better than what a lot of

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<sup>141</sup> *Regulation Best Interest, Form CRS and Related Interpretations*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/regulation-best-interest> [<https://perma.cc/GE3Q-VLVM>] (last updated Oct. 13, 2022).

<sup>142</sup> Elizabeth Warren, *Elizabeth Warren: Worried about broker conflicts? The SEC isn’t*, FIN. PLAN. (Aug. 6, 2018, 10:05 AM), <https://www.financial-planning.com/articles/elizabeth-warren-worried-about-broker-conflicts-the-sec-isnt> [<https://perma.cc/N26M-8VFX>].

<sup>143</sup> *Id.*

<sup>144</sup> Jonathan Levy, *State Attorneys General Seek Injunction Against SEC’s Implementation of Regulation Best Interest*, JD SUPRA (Sept. 25, 2019), <https://www.jdsupra.com/legalnews/state-attorneys-general-seek-injunction-37745/> [<https://perma.cc/K8P7-KQ9Q>].

<sup>145</sup> *Id.*

<sup>146</sup> *XY Planning Network, LLC v. United States SEC*, 963 F.3d 244, 250 (2d Cir. 2020).

<sup>147</sup> *Id.* (internal quotations omitted).

alternatives, particularly what the [Department of Labor] fiduciary rule would have been . . . .”<sup>148</sup> Overall, the Reg BI is a step in the right direction but arguably falls short of providing consumers with the necessary protections from the predatory tactics that can be used against them.

## B. Current Standards for Broker-Dealers

Two standards apply to broker-dealers under the Securities and Exchange Act of 1934. First, if the broker-dealer acts as a mere order taker, the broker’s only obligation or duty is to find “the most favorable terms reasonably available under the circumstances.”<sup>149</sup> Second, if the broker-dealer goes beyond this order-taker responsibility and performs additional functions, a fiduciary obligation is created and may burden the broker-dealer with heightened duties.<sup>150</sup> Determining whether the broker-dealer goes beyond the mere order taking responsibility is usually left to the courts. In analyzing broker-dealers and their obligations to retail investors, most courts applying common law find “that there is no blanket fiduciary relationship between a broker-dealer and a client as a matter of law.”<sup>151</sup> The crucial factor that leads to the creation of a new duty is whether the broker is “entrusted with particular matters such that a fiduciary obligation attaches” and “exercises discretion over those matters” concerning the client or their funds.<sup>152</sup> In these situations, the broker-dealer acts as a trustee for the customer’s

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<sup>148</sup> Cetera is a network collective consisting of more than 7,000 broker dealers. Smith, *supra* note 138. The Department of Labor’s (DOL’s) fiduciary standard required that retirement advisors put their client’s interest above their own. “It leaves no room for advisors to conceal any potential conflict of interest . . . [and] has been expanded to include any professional making a recommendation or solicitation in this area . . . .” See Katelyn Peters, *Everything You Need to Know About the DOL Fiduciary Rule*, INVESTOPEDIA, <https://www.investopedia.com/updates/dol-fiduciary-rule/#citation-24> [<https://perma.cc/7RBQ-8GCT>] (last updated Sept. 30, 2022).

<sup>149</sup> *Newton v. Merrill, Lynch, Pierce, Fenner & Smith*, 135 F.3d 266, 270 (3d Cir. 1998); Thomas Lee Hazen, *Are Existing Stock Broker Standards Sufficient? Principles, Rules, and Fiduciary Duties*, 2010 COLUM. BUS. L. REV. 710, 738 (2010).

<sup>150</sup> Hazen, *supra* note 149 at 736-38.

<sup>151</sup> *Id.* at 742 (footnote omitted).

<sup>152</sup> “In other words, ‘in the absence of discretionary trading authority delegated by the customer to the broker . . . a broker does not owe a general fiduciary duty to his client.’” *Press v. Chem. Inv. Servs. Corp.*, 988 F. Supp. 375, 386 (S.D.N.Y. 1997).

investments.<sup>153</sup> Ultimately, when a broker-dealer is working with a nondiscretionary account, the broker's duty is limited solely to the proper execution of the retail investor's transaction, and the obligation ends when the transaction is completed.<sup>154</sup>

A foundational standard, which now works in tandem with the current Reg BI to govern broker-dealers, is FINRA Rule 2111.<sup>155</sup> This rule requires that a broker-dealer "have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the [firm] or associated person to ascertain the customer's investment profile."<sup>156</sup> Under this rule, broker-dealers are held to a "suitability" standard which has "three main obligations: reasonable basis, customer-specific, and quantitative suitability."<sup>157</sup> The reasonable basis obligation means that the broker has to believe that "the recommendation might be suitable for at least some investors"; the customer-specific obligation means that the broker must determine if the investment is ideal for the specific customer, taking into account age, financial needs, and investment goals; and the quantitative obligation means that a broker cannot conduct excessive trading to generate more commissions.<sup>158</sup> Rule 2111 still governs broker-dealers even after the SEC's adoption of Reg BI,<sup>159</sup> however, Reg BI was so similar to Rule 2111 that FINRA amended the rule to exclude conduct governed by Reg BI.<sup>160</sup> This added more ambiguity because broker-dealers now have two weak standards to apply at different times, which

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<sup>153</sup> Hazen, *supra* note 149, at 746.

<sup>154</sup> *Id.*

<sup>155</sup> Financial Industry Regulatory Authority, Inc., *FINRA Rules: Rule 2111 (Suitability)*, FINRA (Jun. 30, 2020). The Financial Industry Regulatory Authority (FINRA) is a non-governmental and self-regulatory organization that regulates registered stockbrokers and "broker-dealer" firms within the United States. *About FINRA*, FINRA, <https://www.finra.org/about>[<https://perma.cc/W26H-3HPP>] (last visited Mar. 3, 2023).

<sup>156</sup> Financial Industry Regulatory Authority, Inc., *FINRA Rules: Rule 2111 (Suitability)*, FINRA (Jun. 30, 2020).

<sup>157</sup> *Id.*; Mark Henricks, *Understanding FINRA Rule 2111: Suitability*, SMART ASSET (Jan. 5, 2021), <https://smartasset.com/financial-advisor/finra-rule-2111> [<https://perma.cc/F7CW-X3JY>].

<sup>158</sup> Henricks, *supra* note 157; Financial Industry Regulatory Authority, Inc., *FINRA Rules: Rule 2111 (Suitability)*, FINRA (Jun. 30, 2020).

<sup>159</sup> Financial Industry Regulatory Authority, Inc., *FINRA Rules: Rule 2111 (Suitability)*, FINRA (Jun. 30, 2020); Henricks, *supra* note 157.

<sup>160</sup> *Regulatory Notice 20-18*, *supra* note 14.

leaves retail investors unaware of what standard applies and when. Furthermore, even with the slight protections afforded to retail investors via the Reg BI and FINRA Rule 2111, neither affords fiduciary duty protections, thus leaving retail investors open to the harms discussed above.<sup>161</sup>

## V. OUR PATH FORWARD

Wall Street and financial institutions have shown a pattern of abusive behavior.<sup>162</sup> The 2008 financial crisis was a prime example of how a poorly regulated financial market can significantly harm retail consumers.<sup>163</sup> This crisis created a general distrust among the public of both financial markets and their regulators.<sup>164</sup> 48% of Americans have “hardly any confidence” in Wall Street and government regulators, according to a 2017 study by the Cato Institute.<sup>165</sup> In the same survey, the Cato Institute found that 77% of Americans “believe bankers would harm [retail investors] if they thought they could make a lot of money doing so and get away with it.”<sup>166</sup> This sentiment is not wholly unfounded, but is due, in part, to the conflicts of interest that are highly prevalent in financial markets; subjective regulatory standards and

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<sup>161</sup> Regulation Best Interest 17 C.F.R. § 240.151-1 (2019). Financial Industry Regulatory Authority, Inc., *FINRA Rules: Rule 2111 (Suitability)*, FINRA (Jun. 30, 2020). Hazen, *supra* note 149, at 738.

<sup>162</sup> “One of the most famous . . . Michael Milken, who used junk bonds to finance mergers and leveraged buyouts. Another . . . Richard Whitney . . . president of the New York Stock Exchange . . . embezzled from several funds under his control. Bernard Ebbers, CEO of WorldCom, . . . used accounting fraud . . . to finance mergers and acquisitions.” Chris Seabury, *5 History-Making Wall Street Crooks*, INVESTOPEDIA, <https://www.investopedia.com/articles/stocks/09/criminals-of-wall-street.asp> [<https://perma.cc/4SFT-TE7Y>] (last updated Dec. 12, 2022). Luke Conway, *How the 2008 Crisis Changed How We Save and Invest*, INVESTOPEDIA, <https://www.investopedia.com/insights/how-2008-crisis-changed-how-we-save-and-invest/> [<https://perma.cc/MHV2-XA8K>] (last updated June 26, 2022).

<sup>163</sup> Manoj Singh, *The 2007-2008 Financial Crisis in Review*, INVESTOPEDIA, <https://www.investopedia.com/articles/economics/09/financial-crisis-review.asp> [<https://perma.cc/8PQQ-RRB4>] (last updated Sept. 18, 2022).

<sup>164</sup> Emily Ekins, *Wall Street vs. The Regulators: Public Attitudes on Banks, Financial Regulation, Consumer Finance, and the Federal Reserve*, CATO INST. (Sept. 19, 2017), <https://www.cato.org/survey-reports/wall-street-vs-regulators-public-attitudes-banks-financial-regulation-consumer#downloads> [<https://perma.cc/S8LX-ES4L>].

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

shady security practices allow financial institutions to take advantage of unknowing and inexperienced investors.<sup>167</sup> The abuse retail investors face from broker-dealers has created a need for more transparency and accountability among financial institutions and their regulators.

Robinhood attempted to solve this problem by offering investors a friendly and “approachable” access to financial markets.<sup>168</sup> Robinhood proclaims to “democratize finance for all,”<sup>169</sup> but repeatedly fails to protect investors’ best interests and deprives them of critical information when executing their trades.<sup>170</sup> To illustrate, consider the following two situations. First, on December 17, 2020, the SEC charged Robinhood for “repeated misstatements that failed to disclose” the company’s use of PFOF and failing to route their customers’ orders through the best execution.<sup>171</sup> Second, on January 28, 2021, Robinhood used its power under a clickwrap agreement to suspend trading on “meme” stocks, like GameStop, costing retail investors thousands of dollars each.<sup>172</sup> These two scenarios demonstrate how *one* company significantly harmed retail investors through skeptical security practices. As stated, the chaos that ensued before and during the Robinhood shutdown is a microcosm showcasing the harm that retail investors can suffer when PFOF, gamification, and clickwrap agreements are used against them.<sup>173</sup>

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<sup>167</sup> See George, *supra* note 11.

<sup>168</sup> *Our Mission*, ROBINHOOD, <https://robinhood.com/us/en/support/articles/our-mission/> [<https://perma.cc/K6R4-SDNM>] (last visited Mar. 10, 2022).

<sup>169</sup> *Id.*

<sup>170</sup> *SEC Charges Robinhood*, *supra* note 121.

<sup>171</sup> *Id.*

<sup>172</sup> Christy Bieber, *Why Did Robinhood Shut Down GameStop Trading?*, FOOL, <https://www.fool.com/the-ascent/buying-stocks/articles/why-did-robinhood-shut-down-gamestop-trading/> [<https://perma.cc/YH6R-Z49A>] (last updated July 21, 2021); *Can Robinhood’s Terms of Service Stop a Class Action Lawsuit?*, *supra* note 9. See generally Matt Krantz, *GameStop’s Free Fall is a Nonstop Disaster* (Nov. 3, 2022, 4:12 PM), INVESTORS BUS. DAILY, <https://www.investors.com/etfs-and-funds/sectors/gamestop-gme-stock-buy-now-nov-2022/> [<https://perma.cc/T5DC-98JY>] (“Investors who plunked down \$10,000 . . . a year ago lost more than half their money . . .”)

<sup>173</sup> This article does not examine other harm that Robinhood caused, such as giving inexperienced investors the ability to engage in options trading. For a more detailed analysis of these harms, see generally Rabab Ahsan, *The double edged sword of good UX: How Robinhood’s gamification of investing backfired during the market downturn*, TS (May 17, 2022), <https://tearsheet.co/marketing/the->

Robinhood habitually exploits these practices to its advantage. Robinhood capitalized on PFOF, and inexperienced investors, to consistently send trade executions to inferior market makers.<sup>174</sup> A statement issued by the Chief of the SEC Enforcement Division's Market Abuse Unit noted that "'Robinhood failed to seek to obtain the best reasonably available terms when executing customers' orders, causing customers to lose tens of millions of dollars . . . .'"<sup>175</sup> When faced with a conflict of interest between maximizing profits and seeking the "best execution" for retail investors,<sup>176</sup> Robinhood chose the former at the expense of the latter. It used DEPs to "[lure in] young and inexperienced investors" to make unlimited trades and "fail[ed] to adequately communicate [the] risk[s]."<sup>177</sup> But real people, like Alexander E. Kearns,<sup>178</sup> were harmed—a loss Robinhood could never repair. Additionally, Robinhood capitalized on its clickwrap agreement to take control of retail investors' accounts and restrict their trading during one of the most prominent short squeezes in history.<sup>179</sup> Further, when retail investors tried to bring action against Robinhood for their losses in court, Robinhood again exercised its power under the clickwrap agreement to shuffle many of these lawsuits into forced arbitration.<sup>180</sup> Robinhood saw the potential to abuse these practices and exploited them to their benefit. The combination of these three practices creates a perfect storm for the continued exploitation of retail investors by unchecked and unregulated broker-dealers who are entrusted with their customers' finances.<sup>181</sup> There is ample proof that broker-dealers

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double-edged-sword-of-good-ux-how-robinhoods-gamification-of-investing-backfired-during-the-market-downturn/ [https://perma.cc/ZS3R-AQD8].

<sup>174</sup> *SEC Charges Robinhood*, *supra* note 121.

<sup>175</sup> *Id.* (internal citations omitted).

<sup>176</sup> *Payment for Order Flow*, BETTER MARKETS (Feb. 16, 2021), [https://bettermarkets.org/wpcontent/uploads/2022/03/Better\\_Markets\\_Payment\\_for\\_Order\\_Flow\\_Long\\_02-21-2021.pdf](https://bettermarkets.org/wpcontent/uploads/2022/03/Better_Markets_Payment_for_Order_Flow_Long_02-21-2021.pdf) [https://perma.cc/C64F-LBC4].

<sup>177</sup> Ahsan, *supra* note 173.

<sup>178</sup> Ong et al., *supra* note 115; *BNSK lawsuit*, *supra* note 119.

<sup>179</sup> Kathryn Gaw, *What were the biggest short squeezes in history?*, IG, <https://www.ig.com/en/trading-strategies/what-were-the-biggest-short-squeezes-in-history—210507> [https://perma.cc/QP8Q-YWWR] (last visited Mar. 3, 2022); *Can Robinhood's Terms of Service Stop a Class Action Lawsuit?*, *supra* note 9.

<sup>180</sup> *Can Robinhood's Terms of Service Stop a Class Action Lawsuit?*, *supra* note 9; Leonhardt, *supra* note 16. *See supra* Section II.C.

<sup>181</sup> Lukas I. Alpert, *A framework for fraud: How FTX was a scam from the very beginning*, MKT. WATCH, <https://www.marketwatch.com/story/a-framework-for-fraud-how-ftx-was-a-scam-from-the-very-beginning-11671029303>

are not above abusing these shady practices for personal gain; from Bernie Madoff's historically large Ponzi scheme, to the 2008 financial crisis, the Robinhood shutdown, and the most recent collapse of crypto giant FTX, heavyweights in the financial market exploit their consumers without regard of the consequences.<sup>182</sup> Every time broker-dealers have abused industry practices to the detriment of retail investors, the controlling duties and regulations were not strong enough to deter them.

These "shady" financial practices, and Robinhood's abuse thereof, demonstrate the need for a more robust fiduciary duty on broker-dealers. For the reasons stated within this note, broker-dealers' duties to retail investors should be elevated to that of fiduciaries. Fiduciaries are "legally bound to *always* act in their client's best interest."<sup>183</sup> A more substantial duty on broker-dealers would help protect unknowing retail investors, like Alexander Kearns, from harm caused by broker-dealers that take advantage of the current subjective standards.<sup>184</sup> Furthermore, raising brokers to a fiduciary level would clear the waters for retail investors.<sup>185</sup> Financial professionals often serve as both registered investment advisors (RIA) and broker-dealers; with different standards for each, a retail investor might be confused or misled about what standard applies to their agent at different points in their relationship.<sup>186</sup> Unifying and objectifying the standard for broker-dealers will bring more security and trust to the financial markets and protect retail investors.

However, increasing the standards applied to broker-dealers is not without its critics. Many financial institutions counter against the imposition of a more robust duty because it would deprive investors of "access" and "choice."<sup>187</sup> These arguments, however, do not hold water

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[<https://perma.cc/F6WX-EQ2V>] (last updated Dec. 14, 2022, 10:39 AM). See *supra* Part II.

<sup>182</sup> *Financial Scandals – 8 of the biggest financial frauds, scandals and ponzi schemes of all time*, LEHNER INV., <https://www.lehnerinvestments.com/en/biggest-financial-scandals-fraud-ponzi-schemes/> [<https://perma.cc/3DWS-6RXA>] (last visited Mar. 18, 2023). See *supra* Part II. See also Alpert, *supra* note 181.

<sup>183</sup> George, *supra* note 11 (emphasis in original).

<sup>184</sup> *Id.* BNSK's lawsuit, *supra* note 119.

<sup>185</sup> George, *supra* note 11.

<sup>186</sup> *Id.*

<sup>187</sup> Micah Hauptman & Stephen Hall, *XY Planning Network, LLC v. SEC: Broker Conflicts of Interest, Regulation "Best Interest," and Investors' False Sense of Security*, THE FINREG BLOG (Mar. 5, 2020), <https://sites.duke.edu/thefinregblog/2020/03/05/xy-planning-network-llc-v-sec-broker-conflicts-of-interest->

because the opponents fail to showcase any evidence supporting these claims, and the SEC failed to determine for itself if the claims were valid.<sup>188</sup> Moreover, opponents to the imposition of a stronger duty on broker-dealers argue that retail investors can be made whole with SEC enforcement actions that obtain disgorged funds.<sup>189</sup> Although an enticing argument on its face, upon further inspection it is riddled with flaws. First, the funds obtained by the SEC cannot be paid back to all harmed investors, and those who do recover may receive “substantially less than their [actual] losses.”<sup>190</sup> Secondly, when a harmed investor is eligible for recovery, the process by which the money is disbursed to the retail investor is a drawn-out process that takes time.<sup>191</sup> Furthermore, retail investors that make it through the lengthy process are merely made whole; there is no avenue of recovery for expected future gains the investor may have obtained if not for the breach of trust.<sup>192</sup> In sum, the SEC can enforce securities laws and issue penalties to violators, but only in some instances does the money go to the harmed retail investor.<sup>193</sup>

As it currently stands, there is no private right of action under the Investment Company Act of 1940 (or any other act) against a financial institution that engages in fraudulent, deceptive, or manipulative conduct.<sup>194</sup> One way for investors to collect damages is through a

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regulation-best-interest-and-investors-false-sense-of-security  
[<https://perma.cc/7TNW-3SLB>].

<sup>188</sup> *Id.*

<sup>189</sup> *Investor Bulletin: How Victims of Securities Law Violations May Recover Money*, U.S. SEC. & EXCH. COMM’N (June 21, 2018), [https://www.sec.gov/oiea/investor-alerts-bulletins/ib\\_recovermoney.html](https://www.sec.gov/oiea/investor-alerts-bulletins/ib_recovermoney.html)[<https://perma.cc/3L38-9GG8>] [hereinafter *Investor Bulletin*]. Disgorged funds are obtained through illegal conduct and paid back to the harmed investor. Adam Hayes, *Disgorgement*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/disgorgement.asp>[<https://perma.cc/8KK2-MXYU>] (last updated Oct. 24, 2021).

<sup>190</sup> *Investor Bulletin*, *supra* note 189; Jennifer O’Hare, *Retail Investor Remedies under Rule 10b-5 1-2* (Vill. Univ. Charles Widger Sch. of L., Working Paper Series 89, 2007).

<sup>191</sup> *See Investor Bulletin*, *supra* note 189.

<sup>192</sup> *What Happens to the Fines Collected by the SEC?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/05/secfines.asp> [https://perma.cc/H57K-BWH5] (last updated May 12, 2022).

<sup>193</sup> *SEC Enforcement*, AMERICAN BAR ASS’N (Dec. 21, 2021), [https://www.americanbar.org/groups/business\\_law/publications/the\\_business\\_lawyer/find\\_by\\_subject/buslaw\\_tbl\\_mci\\_secenforcement/](https://www.americanbar.org/groups/business_law/publications/the_business_lawyer/find_by_subject/buslaw_tbl_mci_secenforcement/) [https://perma.cc/5BDR-WBWB].

<sup>194</sup> Robert A. Skinner & Amy D. Roy, *An Implied Private Right of Action Under the Investment Company Act*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 27,



private securities fraud class action; however, to be deemed a proper class, plaintiffs must show that everyone involved suffered similar harms,<sup>195</sup> which is often very difficult to prove. Additionally, even in approved class actions, retail investors are often disfavored compared to institutional investors.<sup>196</sup> The SEC attempted in the Reg BI to issue a standard to alleviate this conflict of interest and provide a more robust fiduciary standard. Instead, it created a rule that allows brokers to sustain their existing business models rather than one that demands brokers comply with a meaningful fiduciary standard.<sup>197</sup> Raising the standards imposed upon broker-dealers to that of a fiduciary would allow for retail investors to have a private right of action against them and thus open an avenue of recourse for those harmed by exploitive practices.

The Reg BI attempted to achieve clarity and uniformity but failed; it weakened the standard applied to fiduciaries and caused further confusion surrounding the standards that apply to broker-dealers.<sup>198</sup> The Reg BI still allows brokerage firms to use dangerous practices (i.e., gamification, PFOF, and clickwrap agreements) without providing retail investors any avenue for recourse.<sup>199</sup> In addition, the SEC has found inconsistent compliance with the Reg BI,<sup>200</sup> and its lack of clarity has led to continued conflicts of interest.<sup>201</sup> These difficulties ultimately led the regulation to be challenged in federal court by attorneys general of several states who challenged the regulation on grounds that it was arbitrary and capricious under the Administrative Procedures Act

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2019), <https://corpgov.law.harvard.edu/2019/08/27/an-implied-private-right-of-action-under-the-investment-company-act/>[<https://perma.cc/W48H-K4U9>] (“Section 47(b) of the ICA provides that “[a] contract that is made, or whose performance involves a violation of [the ICA] . . . is unenforceable by either party.”); Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(20) (1940).

<sup>195</sup> Leonhardt, *supra* note 16.

<sup>196</sup> O’Hare, *supra* note 190, at 2.

<sup>197</sup> Hauptman & Hall, *supra* note 187.

<sup>198</sup> George, *supra* note 11.

<sup>199</sup> Hauptman & Hall, *supra* note 187.

<sup>200</sup> Jake Martin, *FINRA, SEC Officials Outline Pitfalls for Firms in Reg BI Exams*, ADVISOR HUB (May 18, 2022), <https://www.advisorhub.com/finra-sec-officials-outline-pitfalls-for-firms-in-reg-bi-exams/> [<https://perma.cc/A598-UARY>].

<sup>201</sup> *Id.*; Hauptman & Hall, *supra* note 187.

(APA) and led to confusion.<sup>202</sup> However, in 2020, the U.S. Court of Appeals for the Second Circuit upheld the regulation, finding that the benefits of decreased costs and consumer choice favored adopting it.<sup>203</sup> The court stated that the claim was just a “preference for a uniform standard policy argument dressed up as an APA claim.”<sup>204</sup> The Court and SEC had opportunities to institute a uniform fiduciary rule upon broker-dealers, but each failed to do so at the cost of retail investor protection.<sup>205</sup> They feared the repercussions retail investors might face if a harsher standard was imposed, namely the increased agency cost passed on to the retail investors, which could lead to reduced consumer access.<sup>206</sup> However, this fear is unfounded, at the time of this publication, there are no studies that indicate a stricter standard will have an impact on broker-dealers and their ability to serve retail investors.<sup>207</sup> Regardless, *In re January 2021* showcases the weaknesses of the current standards.<sup>208</sup> The imposition of a fiduciary duty, outside of the one that exists for investment advice, would allow for a private right of action for bad faith trade executions, alleviate concerns of financial misconduct, and strengthen the Reg BI, thus bringing uniformity to—and confidence in—the financial markets.

As it currently stands, some states, like Massachusetts, already impose an unambiguous fiduciary standard on broker-dealers.<sup>209</sup> Under

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<sup>202</sup> Sandra D. Grannum et al., *The Second Circuit Upholds Reg BI*, BROKER DEALER L. BLOG (July 1, 2020), <https://www.brokerdealerlawblog.com/2020/the-second-circuit-upholds-reg-bi/> [<https://perma.cc/4R6N-Q7JU>]; *XY Planning Network, LLC v. United States*, 963 F. 3d 244, 255 (2d Cir. 2020).

<sup>203</sup> *XY Planning Network*, 963 F. 3d, at 256; Grannum et al., *supra* note 202.

<sup>204</sup> *XY Planning Network*, 963 F. 3d, at 255 (internal citations omitted); Grannum et al., *supra* note 202.

<sup>205</sup> *XY Planning Network*, 963 F. 3d, at 250, 256; Grannum et al., *supra* note 202.

<sup>206</sup> *XY Planning Network*, 963 F. 3d, at 256-57; Michael Finke & Thomas Langdon, *The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice*, FIN. PLAN. ASS'N (July 2012), <https://www.financialplanningassociation.org/sites/default/files/2020-09/JUL12%20JFP%20Finke.pdf> [<https://perma.cc/9L7G-8ASL>].

<sup>207</sup> Finke & Langdon, *supra* note 206.

<sup>208</sup> One weakness in particular is the lack of a stronger fiduciary duty on broker-dealers that led to retail investors having no chance to recover in this case. *In re January 2021 Short Squeeze Trading Litig.*, 584 F. Supp. 3d 1161, 1192, 1194, (S.D. Fla. 2022).

<sup>209</sup> Finke & Langdon, *supra* note 206 (stating that Missouri, California, South Carolina, and South Dakota all have “an unambiguous fiduciary standard.”); 950 MASS. CODE REGS. § 12.207 (2020). *Massachusetts Fiduciary Conduct Standard for Broker-Dealers and Agents Frequently Asked Questions & Answers*, SEC’Y OF

Massachusetts regulations, a broker-dealer is “subject to a fiduciary duty to a customer when providing investment advice or recommending an investment strategy, the opening of or transferring of assets to any type of account, or the purchase, sale, or exchange of any security.”<sup>210</sup> California common law also imposes an unambiguous fiduciary duty on broker-dealers,<sup>211</sup> holding that brokers owe the duty of utmost good faith, integrity, and loyalty to customers and a commitment to act primarily for the benefit of another.<sup>212</sup> Furthermore, Section 913(g) of the Dodd-Frank Act allows the SEC to impose a fiduciary duty on broker-dealers.<sup>213</sup> The SEC, however, failed to take this power far enough under the Reg BI; the increase in brokers’ control over investor funds and the increase in broker-dealers providing “advice” via DEPs offered the perfect opportunity to elevate a broker-dealer’s duty, which is what Congress intended when granting the SEC this power.<sup>214</sup>

Furthermore, a report by the North American Securities Administrators Association (NASAA) found that, under the newly implemented Reg BI, “most firms are operating in the same manner as they were under the suitability rule, especially when it comes to harmful compensation conflicts.”<sup>215</sup> This study indicated that the number of firms that offered risky products to retail investors rose by 11% after the

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THE COMMONWEALTH OF MASS. (May 1, 2020), (available at [<https://perma.cc/P MN6-2A4K>]).

<sup>210</sup> 950 MASS. CODE REGS. § 12.207 (2020). *Massachusetts Fiduciary Conduct Standard*, *supra* note 209.

<sup>211</sup> Finke & Langdon, *supra* note 206.

<sup>212</sup> *Hobbs v. Bateman Eichler, Hill Richards*, 164 Cal. App. 3d 174, 201 (Cal. Ct. App. 1985).

<sup>213</sup> Hazen, *supra* note 149, at 715; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1828-29 (2010) (codified as 15 U.S.C. 80b-11).

<sup>214</sup> Bob Pisani, *Brokers will have to tell you a lot more about what they are advising you to buy starting next week*, CNBC (June 25, 2020, 7:11 AM), <https://www.cnbc.com/2020/06/25/brokers-will-have-to-tell-you-a-lot-more-about-what-they-are-advising-you-to-buy-starting-next-week.html> [<https://perma.cc/FQS8-U9BH>].

<sup>215</sup> *NASAA Report Finds that Many Broker-Dealer Firms Still Place Their Financial Interests Ahead of Their Customers Despite Implementation of Regulation Best Interest*, NASAA (Nov. 4, 2021), <https://www.nasaa.org/60748/nasaa-report-finds-that-many-broker-dealer-firms-still-place-their-financial-interests-ahead-of-their-customers-despite-implementation-of-regulation-best-interest/> [<https://perma.cc/DM3U-J9DV>] (internal citations omitted).

implementation of Reg BI.<sup>216</sup> Additionally, 24 to 30% of firms still utilized products and services that amount to compensation conflicts, rarely seen in fiduciary firms.<sup>217</sup> The Chair of NASAA's Reg BI Implementation Committee stated, "Reg BI has a long way to go to close the investor protection gap separating broker-dealers from investment advisers when it comes to conflicted advice . . . ."<sup>218</sup>

It does not hurt to recapitulate the inherent conflicts within these practices. DEPs, in some cases, provide "nudges" to retail investors to engage in more trading,<sup>219</sup> which could be considered investment advice. Broker-dealers utilize these DEPs to "keep customers on the app and frequently trading."<sup>220</sup> This increase in trading volume allows broker-dealers to receive a higher profit through their use of PFOF.<sup>221</sup> Therefore, the more a broker-dealer can get a retail investor to use their app and trade, the more money the broker-dealer can make. Additionally, should an issue harm the broker-dealer, they can exercise their rights under their clickwrap agreement to avoid serious consequences by forcing arbitration or restricting customer trading.<sup>222</sup> This shifts the power and control to the broker-dealers because they can incentivize and capitalize on more frequent investor trading. When the retail investor raises concerns of abuse or gains an advantage, they are shuffled into arbitration in the former or, in the latter, their trading is restricted.<sup>223</sup> On top of all that, the broker-dealer can also fail to get the investor the best offer for their trade. Scary, right?

The practices highlighted throughout this note showcase that broker-dealers are advisors, even though the "advisor" is not in their titles. They provide advice through DEPs; investment advice is "a recommendation to hold or dispose of securities."<sup>224</sup> As stated above, DEPs "nudge" retail investors to trade in particular securities more frequently, and many

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Wursthorn & Choi, *supra* note 47.

<sup>220</sup> Kelleher et al., *supra* note 125, at 56.

<sup>221</sup> Carey, *supra* note 19.

<sup>222</sup> *Taking from the Poor and Giving to the Rich?*, *supra* note 16.

<sup>223</sup> *Id.*

<sup>224</sup> Maggie Juliano, *Exclusions From "Investment Advice": What Counts and Who is Counting?*, BCG (Apr. 21, 2021), <https://www.bcgbenefits.com/blog/investment-advice> [<https://perma.cc/95MQ-N389>].

trust and follow these nudges.<sup>225</sup> Furthermore, these “nudges” do not fall within any exceptions of communications, platform providers, or investment education.<sup>226</sup> Robinhood’s Chief Operating Officer defended their use of DEPs, stating “[t]he company was founded with the purpose of erasing barriers to investing and provides a range of *educational content* on trading through its website . . . .”<sup>227</sup> Under the definition of investment education, however, Robinhood’s advice is too specific to constitute “general financial or retirement information.”<sup>228</sup>

In addition to the advice broker-dealers provide, they also control retail investor funds.<sup>229</sup> *In re January 2021* affirmed that brokers do not owe a general fiduciary duty to clients with non-discretionary accounts.<sup>230</sup> In the case of non-discretionary accounts, brokers have no independent authority to execute trades;<sup>231</sup> the only thing brokers can do is buy and sell assets when their client’s instructions tell them to.<sup>232</sup> Brokers must do so at the National Best Bid Offer.<sup>233</sup> As Robinhood has demonstrated, however, they have more control over a retail investor’s account than is plainly stated. Through PFOF and clickwrap agreements, broker-dealers like Robinhood can significantly impact a retail investor’s trade by restricting trading<sup>234</sup> and executing trades that are inferior to other available options.<sup>235</sup> The SEC found that

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<sup>225</sup> RAMACHANDRAN, *supra* note 46; Cheng, *supra* note 61.

<sup>226</sup> Juliano, *supra* note 224.

<sup>227</sup> Wursthorn & Choi, *supra* note 47 (emphasis added).

<sup>228</sup> Juliano, *supra* note 224.

<sup>229</sup> 29 CFR 2550 § 408 (The Department of Labor Fiduciary Rule was an expansion of the Employee Retirement Act (ERISA). Participants or beneficiaries of ERISA can receive investment advice provided by fiduciary advisers under an eligible investment advice arrangement. An eligible investment advice arrangement is an arrangement that meets certain requirements set forth in 29 CFR 2550 § 408g-1(b)(3)).

<sup>230</sup> *In re January 2021 Short Squeeze Trading Litig.*, 584 F. Supp. 3d 1161, 1191 (S.D. Fla. 2022).

<sup>231</sup> Eric Reed, *Discretionary vs. Non-Discretionary Investment Accounts*, SMARTASSET (Aug. 25, 2022), <https://smartasset.com/investing/discretionary-vs-non-discretionary-investment-accounts> [<https://perma.cc/JX3A-E8FV>].

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*; *Price Improvement*, *supra* note 32.

<sup>234</sup> Danny Vena et al., *How Can Robinhood Restrict Trading on Some Stocks?*, THE MOTLEY FOOL (Feb. 6, 2021, 8:00 AM), <https://www.fool.com/investing/2021/02/06/how-can-robinhood-restrict-trading-on-some-stocks/> [<https://perma.cc/XQW6-LVJ4>].

<sup>235</sup> *SEC Charges Robinhood*, *supra* note 121.

Robinhood's inferior trade prices cost customers \$34.1 million.<sup>236</sup> These practices allow broker-dealers to control retail investors and their funds. Therefore, elevating broker-dealers to the status of a fiduciary would merely hold them to the standard to which they practice. Furthermore, it would bring clarity and security to retail investors that would, in the aggregate, only help the financial markets.<sup>237</sup>

## VI. CONCLUSION

Retail investors are often less experienced than the broker-dealers they entrust to execute their trades fairly. This lack of experience leads many retail investors to trust that the broker-dealers will act in the investor's best interest. Furthermore, the current regulatory scheme attempts to require broker-dealers to abide by a standard that fits this hope. Nevertheless, the ability for abuse and misrepresentation surrounding the relationship between retail investors and broker-dealers is apparent.<sup>238</sup> The use of payment for order flow, gamification, and clickwrap agreements, while not illegal or unwarranted, allows for a high potential of abuse that has already been shown to be easily exploited. The Robinhood shutdown and the actions Robinhood took in the past showcase that broker-dealers are not above exploiting the needs of retail investors to further their interests. Furthermore, the courts have failed to provide recourse to these harmed investors due to the unfounded fear of what would reverberate through the financial markets if they did.<sup>239</sup>

Overall, retail investors require more protection than what they are currently afforded. More specifically, adopting an unambiguous fiduciary duty, similar to the standards already imposed by some states, puts broker-dealers on the same level as financial advisors or fiduciaries. The SEC failed to adopt this standard for the sake of protecting retail investors' interest in zero commission fees and access to trading; failing to protect the retail investor for the sake of the retail investor, however, doesn't quite make sense. Nevertheless, the adoption of the Reg BI, along with the current steps the SEC is taking to analyze broker-dealers and their actions, are promising maneuvers toward a

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<sup>236</sup> *Id.*

<sup>237</sup> Finke & Langdon, *supra* note 206.

<sup>238</sup> *See supra* Part II.

<sup>239</sup> XY Planning Network, LLC v. United States SEC, 963 F.3d, 244, 253-57 (2d Cir. 2020).

more transparent financial system that provides protection and security for both the knowing and the unknowing.