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Finfluencers in the Wild

A CALL FOR REGULATION ADDRESSING THE GROWTH OF ONLINE INVESTMENT ADVICE

INTRODUCTION

In a span of less than fifteen years, the portion of adults in the United States who use some form of social media skyrocketed from just 5 percent to 79 percent.¹ Social media, now a household phrase, refers to “forms of electronic communication . . . through which users create online communities to share information, ideas, personal messages, and other content.”² According to a 2021 study by Pew Research Center, although there are generational differences in regard to the most popular platforms, roughly seven out of ten Americans use some form of social media.³ While this percentage has now remained relatively consistent over the last few years, the world of social media has significantly transformed with the development of new technologies and heightened public interest in different topics.⁴

The rise of “[f]ourth screen’ technology,” which includes smartphones and tablets, shifted both the way we, as a society, communicate in general as well as how mobile platforms approach the world of social networking.⁵ Another large change within the realm of social media relates to the underlying purposes and primary uses of various platforms. Originally many of these sites developed as a means for social networking,⁶

¹ Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media> [https://perma.cc/WX73-GMCE].

² *Social Media*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/social%20media#h1> [https://perma.cc/N8TY-NDSC].

³ Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/> [https://perma.cc/UBX3-VPCR].

⁴ *Id.*

⁵ Saqib Shah, *The History of Social Networking*, DIGITAL TRENDS (May 14, 2016), <https://www.digitaltrends.com/features/the-history-of-social-networking/> [https://perma.cc/N4JL-E2C6].

⁶ Social networking first appeared in the 1970s with the “Bulletin Board System,” an online meeting platform “often run by hobbyists who carefully nurtured the social aspects . . . of their projects.” *Id.*

such as connecting with former classmates or friends.⁷ However, recently some of the biggest social media platforms have become “home to a variety of subcultures and microgenres—including financial advice.”⁸

One way to track how individuals actually “use” certain social media platforms is by the number of times specific hashtags have been viewed or searched by users on the sites.⁹ For example, on TikTok, a social media app where users make and share short videos, “[h]ashtags play a [valuable] role” as they “actually exist as a real, functional organizing principle . . . for [tracking] discernible blobs of activity.”¹⁰ Although TikTok is known for having a particularly strong following within the population of young adults, one of the recently popular “blobs of activity” that has emerged on the platform is financial content,¹¹ specifically investment advice. This trend is evidenced, in part, by the fact that videos tagged with hashtags such as “#finance, #investing or #stocktok . . . have billions of views.”¹² It has also led to the emergence of a new term “Fintok” to describe “the corner of TikTok filled with stock tips and investment advice.”¹³

Young people learning how to manage their finances through social media may not inherently be an issue. However, recent events and discussion draw attention to the theory that the combination of social media and trading apps may “be doing more harm than good,” as many do not provide sufficient educational information for young users and may not be the most inclusive places.¹⁴ These potentially negative elements are

⁷ *Id.*

⁸ *The Influencer Boom*, AGENCY P'SHIP (Mar. 21, 2021), <https://theagencypartnership.com/influencers/> [<https://perma.cc/KKN2-VHQR>].

⁹ See John Herrman, *How TikTok Is Rewriting the World*, N.Y. TIMES (Mar. 10, 2019), <https://www.nytimes.com/2019/03/10/style/what-is-tik-tok.html>.

¹⁰ *Id.*

¹¹ Auxier & Anderson, *supra* note 3; Herrman, *supra* note 9; Sophie Kiderlin, *Social Media Has Hooked Young Investors on Finance, but a Growing Number Are Taking More and More Risks. 'Influencers' and Money Experts Say It's Time for Some Caution*, INSIDER (July 18, 2021, 8:00 AM), <https://markets.businessinsider.com/news/stocks/gen-z-investing-social-media-finance-fintok-millennial-investors-2021-7> [<https://perma.cc/NP32-WCTV>].

¹² At the time the cited Business Insider article was written, in July 2021, TikTok videos tagged with these hashtags had over 7.5 billion views. Kiderlin, *supra* note 11.

¹³ Emma Johnsen & Nathan Mattock, *TikTok Influencers Could Face \$100k Fines for Giving Advice*, MONEY MAG. (Aug. 4, 2021), <https://www.money.com.au/tiktok-finfluencers-financial-advice-asic> [<https://perma.cc/TRZ7-WLZ2>].

¹⁴ Sophie Kiderlin, *A 'Influencer' with Millions of Followers on Social Media Says Robinhood and Other Trading Apps Might Do More Harm than Good to Young Investors*, INSIDER (July 13, 2021, 3:48 AM), <https://markets.businessinsider.com/news/stocks/robinhood-retail-trading-tori-dunlap-young-investors-harmful-risk-2021-7> [<https://perma.cc/DK9M-Q8GF>].

further heightened by the lack of regulation over the general field of users who offer online financial advice to possibly thousands, if not millions, of investors and have come to be referred to as “finfluencers.”¹⁵ This group’s rising popularity is not surprising to those in the financial services industry, as one finance analyst describes the phenomenon: “[i]f you’re using social media, and you have a choice of sensible advice from a regulated firm, complete with reams of risk warnings that make everything sound terrifying, or simple 30-second tips from a finfluencer who makes it sound foolproof, the temptation is to opt for the latter.”¹⁶

With the growth of Fintok, the lack of oversight of finfluencers raises concerns such as the heightened likelihood of market volatility and exploitative practices, which have resulted in calls for regulation, both in the United States,¹⁷ and other countries.¹⁸ One of the countries at the forefront of addressing this issue is New Zealand, which recently put into action new financial advice laws that may serve as a starting point for other countries as they begin to resolve issues in their own governance regimes.¹⁹

This note argues that there is currently a regulatory gap in the United States regarding oversight of investment advice that is provided online by “finfluencers,” or those acting in a similar manner.²⁰ As such, the United States should implement a new financial advice regime specifically addressing this form

¹⁵ Corey I. Rogoff, *FINRA Lives Up To Its Name, Announces Regulatory Inquiries into SPACs*, NAT’L L. REV. (July 26, 2021) <https://www.natlawreview.com/article/finra-lives-to-its-name-announces-regulatory-inquiries-spacs> [<https://perma.cc/WM4Y-53PS>]; see also Kiderlin, *supra* note 14.

¹⁶ Shane Hickey, *As ‘Finfluencers’ Spread Through Social Media, Beware the Pitfalls*, GUARDIAN (Aug. 22, 2021, 4:00 PM), <https://www.theguardian.com/money/2021/aug/22/as-finfluencers-spread-through-social-media-beware-the-pitfalls> [<https://perma.cc/DC4F-4AZE>]; see *infra* Section II.B.1 (describing the requirements for regulation in the United States).

¹⁷ In July 2021, FINRA announced, during a SIFMA webcast, that it “is eyeing a sweep in the area of so-called finfluencers, online personalities who dole out financial advice.” Al Barbarino, *FINRA Sweeps to Target SPACs, Social Media Influencers*, LAW360 (July 22, 2021, 7:02 PM), <https://www.law360.com/articles/1405500>.

¹⁸ In April 2021, the Financial Conduct Authority, a financial regulatory body in the United Kingdom, set out a warning to social media sites regarding potential consequences for promoting risky investments to inexperienced customers. Hickey, *supra* note 16; *Rise of the Finfluencers*, BUS. TODAY INDIA, <https://www.businesstoday.in/interactive/immersive/rise-of-the-finfluencers/> (last visited Feb. 7, 2023) (describing the expanding universe of finfluencers in India and how the COVID-19 lockdown provided people with newfound time to consider their finances, many of whom turned to social media platforms for information).

¹⁹ Gabriel Olano, *FMA Lays Down Guidelines for ‘Finfluencers’*, INS. BUS. N.Z. (June 29, 2021), <https://www.insurancebusinessmag.com/nz/news/breaking-news/fma-lays-down-guidelines-for-finfluencers-259130.aspx> [<https://perma.cc/5YFP-5YPQ>].

²⁰ See *infra* Section II.B.

of investment advice²¹ as New Zealand has done.²² Doing so would provide clearer rules and requirements for finfluencers, those receiving their advice, and tangential actors involved in this continuously growing field. In addition to enacting a regulatory regime, the requirements should be simplified into a concise guide that is digestible by those directly affected, leading to less uncertainty and better adherence to rules. This would provide greater protection for those giving out the investment advice, the investors receiving the advice, and the financial market as a whole. Together these measures would likely lead to fewer instances of market volatility and would benefit the federal government and agencies overseeing the related industries in their efforts to protect all market participants.

Part I of this note provides background on the rising concerns with online financial advice around the world,²³ and identifies how the United States²⁴ and other countries, particularly New Zealand,²⁵ have addressed them. Part II gives an overview of United States' regulations currently in place that may be relevant to finfluencers.²⁶ Specifically, this Part looks at structural inadequacies in the current oversight provided by the United States Securities Exchange Commission (SEC),²⁷ noting the uncertainty surrounding how finfluencers fit practically into the regulatory framework.²⁸ This Part ends with an overview of how a different government agency, the United States Federal Trade Commission (FTC), has addressed the issue of social media influencer activities.²⁹ Lastly, Part III proposes a potential solution advising Congress and the SEC to follow New Zealand and the FTC's lead in addressing the rise of this group through a revised financial advice regime and simplified guidelines for parties involved.³⁰

I. MEME STOCK RALLY INVOKED SOME RESPONSE, BUT IS IT ENOUGH?

Social media, which originally had little connection to the world of finance, has come to be known as “the wild west of

²¹ See *infra* Part III.

²² See *infra* Section I.D.

²³ See *infra* Section I.B.

²⁴ See *infra* Section I.C.

²⁵ See *infra* Section I.D.

²⁶ See *infra* Part II.

²⁷ See *infra* Section II.A.

²⁸ See *infra* Section II.B.

²⁹ See *infra* Section II.C.

³⁰ See *infra* Part III.

financial information.”³¹ Several factors place the expanding group of social media figures who provide financial advice in a possibly dangerously influential position.³² Finfluencers are uniquely influential because they assume “the role of a trusted individual in the online community; they are trusted because they present themselves as authentic, approachable, and relatable individuals.”³³ This inherent aspect of trust combined with the general naivety and lack of financial knowledge possessed by many of the, primarily young, people using these platforms creates a potentially serious consumer protection issue.³⁴

With these issues becoming more salient over recent years, conduct regulators around the world, such as the Australian Securities and Investment Commission (ASIC), have expressed concerns regarding financial advice provided by unlicensed users online because of the absence of legal protections for consumers.³⁵ Regulators in the United Kingdom have similarly expressed concerns about social media sites following “the emergence of the new breed of mainly younger DIY investors that [regulators] believe[] are taking big financial risks.”³⁶ The increased prominence of this influencer group is, at least, somewhat related to the global COVID-19 pandemic.³⁷ Since the pandemic began, there has been a surge of complaints directed to ASIC relating to “unlicensed financial advice” targeted at unsophisticated investors on social media.³⁸ India has also seen “an explosion in the popularity of influencers” over the last few years.³⁹ One Indian influencer points to the pandemic as a catalyst for the surge in the industry, observing that “[t]he lockdown . . . gave people more time to look at their finances and financial planning in particular. Job losses and salary cuts were rampant and people started looking at other sources of income.”⁴⁰ These societal shifts brought many people to social media platforms for information and advice.⁴¹

³¹ Johnsen & Mattock, *supra* note 13.

³² See Catalina Goanta & Sofía Ranchordás, *The Regulation of Social Media Influencers: An Introduction*, 1–4, 11–12 (U. Groningen Fac. L. Rsch. Paper Series, No. 41/2019, 2019) (describing the imperative need to regulate social media influencers who have become inspirational figures for young audiences, many of whom provide advice on various fields without any type of professional training).

³³ *Id.* at 5 (citations omitted).

³⁴ Kiderlin, *supra* note 14.

³⁵ Johnsen & Mattock, *supra* note 13.

³⁶ Hickey, *supra* note 16.

³⁷ See Johnsen & Mattock, *supra* note 13; see also *Rise of the Finfluencers*, *supra* note 18.

³⁸ Johnsen & Mattock, *supra* note 13.

³⁹ *Rise of the Finfluencers*, *supra* note 18.

⁴⁰ *Id.*

⁴¹ *Id.*

A. *Cashing In on Online Advice*

While in recent years some people have turned to social media for advice on how to invest their money, others have found themselves on the opposite end—making money by providing online advice. On social media platforms, there are a multitude of ways that influencers can monetize their platforms.⁴² Affiliate marketing, a form of marketing where influencers display customized URLs and are compensated based on sales or clicks from the link, is a popular social media economic strategy.⁴³ Another standard way for influencers to receive monetary benefits is through deals where a “brand offers its goods or services for a post, a review, a mention and/or a story made by the influencer on their social media.”⁴⁴ Partnering with influencers, for companies in the finance industry, has been termed “a no-brainer,” as there is not a “faster and more direct access to” millennials and Gen-Z, especially during a period where retail investing is skyrocketing.⁴⁵

As a more straightforward method of compensation, some social media platforms, such as TikTok, Instagram, and YouTube, set up funds or programs where certain influencers can receive money directly from the site.⁴⁶ To participate in the Creator Fund on TikTok, users are required to be eighteen years or older, meet minimum thresholds of authentic followers and video views within a specific period, and follow TikTok’s Community Guidelines.⁴⁷ Satisfying these requirements does

⁴² See Goanta & Ranchordás, *supra* note 32, at 9.

⁴³ *Id.*

⁴⁴ *Id.* at 9–10.

⁴⁵ Misyrlena Egkolopoulou, *Wall Street Influencers Are Making \$500,000, Topping Even Bankers*, BLOOMBERG WEALTH (Sept. 17, 2021, 12:01 AM), <https://www.bloomberg.com/news/articles/2021-09-17/social-media-influencers-income-advertising-wall-street-products> [<https://perma.cc/4FL2-NLTK>].

⁴⁶ Amanda Perelli, *How Much Influencers Get Paid on Instagram, TikTok, and YouTube*, INSIDER (Apr. 22, 2022, 3:09 PM), <https://www.businessinsider.com/how-much-influencers-get-paid-on-instagram-tiktok-and-youtube-2021-7> [<https://perma.cc/M55G-CBCE>].

⁴⁷ To qualify, the users must also “be a legal resident of one of the 50 states, District of Columbia, or the territories and possessions, of the United States.” *Creator Fund*, TIKTOK, <https://www.tiktok.com/creators/creator-portal/en-us/getting-paid-to-create/creator-fund/> [<https://perma.cc/DRB5-2BSG>]. Authentic or real followers refer to followers who are “genuinely engaging with [an influencer’s] content,” as opposed to fake followers who “may have been set up by a business . . . that sells fake followers . . . [or are] social media bots that are computer programs automatically set up to like and comment posts.” These types of followers can be identified “by looking out for: extreme engagement rates (very high or very low), spam comments and an uneven number of follower to following ratio[.]” or through the “use of free tools to analyze influencer profiles and reveal the level of audience authenticity.” Caroline Bellanger, *How to Tell if an Influencer Has Fake Followers*, UPFLUENCE (Feb. 1, 2023), <https://www.upfluence.com/influencer-marketing/how-to-tell-if-an-influencer-has-fake-followers> [<https://perma.cc/BP54-A5HT>].

not mean users automatically start receiving payments for posts, but rather after they attain the thresholds they are provided the option to apply for the Creator Fund.⁴⁸

In addition, there are also opportunities for finfluencers to be compensated even more directly by those receiving the advice. This is particularly the case for TikTok finfluencers. It is not uncommon for users to plug Venmo handles or links in their bio on these sites in an effort to receive a form of virtual tips.⁴⁹ On TikTok and other popular platforms where users can participate in live streams, there are options to send the person hosting the stream “[g]ifts.”⁵⁰ This live gifting feature provides viewers an opportunity to show appreciation for creators.⁵¹ TikTok then takes the number and type of gifts into account when calculating the monetary reward given to the user who hosted the stream.⁵²

Beyond the increasingly popular platform of TikTok, users doling out investment related advice appear on other social media platforms, such as YouTube, Instagram, Twitter, and Reddit.⁵³ While many of these sites create space for dependable users who provide credible advice, necessary attention is being drawn to the “dangerous detritus’ of finfluencers” lacking experience or skill, who also participate in these practices.⁵⁴ This danger is twofold. Firstly, there are no requirements to become a finfluencer so anyone can be one.⁵⁵ Second, the general lack of regulation over the industry allows finfluencers to post anything on the topic without repercussions

⁴⁸ Perelli, *supra* note 46.

⁴⁹ See Terry Nguyen, *Virtual Tips Are Helping Content Creators Actually Make Money*, VOX (Feb. 26, 2021, 10:00 AM), <https://www.vox.com/the-goods/22301751/digital-tipping-creators-platforms> [<https://perma.cc/3J3T-CK45>].

⁵⁰ *LIVE Gifting*, TIKTOK, <https://www.tiktok.com/creators/creator-portal/en-us/getting-paid-to-create/live-gifting/> [<https://perma.cc/7G7D-FDV3>].

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Rise of the Finfluencers*, *supra* note 18 (describing YouTube as the preferred social media platform for finfluencers in India); Juliana Kaplan, *Forget ‘American Psycho’—Instagram ‘Finfluencers’ Will Fast-Track Your Knowledge of Wall Street. Here Are 7 of the Best to Follow Now*, INSIDER (Sept. 19, 2019, 11:25 AM), <https://www.businessinsider.com/move-over-american-psycho-finfluencers-are-inside-finance-look-2019-9> [<https://perma.cc/SE6W-94ZH>] (noting that Instagram finfluencers provide their followers insight into “Wall Street culture”); Angel Zhong, *Fintok and Finfluencers Are on the Rise: 3 Tips to Assess if Their Advice Has Value*, CONVERSATION (May 25, 2021, 2:13 AM), <https://theconversation.com/fintok-and-finfluencers-are-on-the-rise-3-tips-to-assess-if-their-advice-has-value-161406> [<https://perma.cc/2UMW-CXXG>].

⁵⁴ Hickey, *supra* note 16 (quoting Sarah Coles of Hargreaves Lansdown); Kiderlin, *supra* note 11 (“Not all financial social media content can however be labeled the same. With the same hashtags that promote questionable investment and financial advice, there are videos with sound advice explaining Roth IRAs, how to increase your credit score or the benefits of long-term investing.”); Zhong, *supra* note 53.

⁵⁵ See Hickey, *supra* note 16.

“because nobody is monitoring what they say.”⁵⁶ This allows influencers to build a following through sensational claims, as they have freedom to promise massive returns or promote unsound products.⁵⁷

B. *Growing Concerns Heightened by the Meme Stock Market Event*

The world of online financial advice received heightened media attention in early 2021 during a trading frenzy that is now known as the “Meme Stock Market Event.”⁵⁸ The term “meme stocks” refers to certain stocks that gained extraordinary popularity because of discussions on social media platforms.⁵⁹ During this frenzy, institutional investors were betting against meme stocks, assuming their prices would eventually fall, and retail investors were taking the opposite side by “purchasing the [same] stocks *en masse*.”⁶⁰ For example, the stock of a normally struggling video game retailer, GameStop Corporation (GME),⁶¹ surged in the initial couple weeks of 2021, during which “the gross market value of GME cleared in the stock market was 21,318% greater” than it had been less than twenty-five days prior.⁶² This specific surge stemmed, at least in part, from investment advice circulating on Reddit,⁶³ and resulted in

⁵⁶ *Id.*

⁵⁷ Zhong, *supra* note 53; see also Catalina Goanta, *The Rise and Fall of the Liver King—A Social Media Sensation Who Is Now Being Sued by His Followers for \$25 Million*, FORTUNE (Jan. 31, 2023, 1:17 PM), <https://fortune.com/2023/01/31/liver-king-youtube-sued-by-followers-regulating-influencers/> [<https://perma.cc/7C2F-P3KN>] (describing how a “social media personality” who gained millions of followers and profited from selling products related to his healthy, “ancestral living” lifestyle was sued by his followers after his monthly steroid use was leaked); Catherine Thorbecke, *GameStop Timeline: A Closer Look at the Saga that Upended Wall Street*, ABC NEWS (Feb. 13, 2021, 6:00 AM), <https://abcnews.go.com/Business/gamestop-timeline-closer-saga-upended-wall-street/story?id=75617315> [<https://perma.cc/Z5G4-GAYY>] (noting that during the meme stock trading frenzy in early 2021, which is discussed further in Section I.B, the main social media group that was encouraging risky trading increased by 5 million members in one week).

⁵⁸ MAJORITY STAFF OF H. COMM. ON FIN. SERVS., 117TH CONG., GAME STOPPED: HOW THE MEME STOCK MARKET EVENT EXPOSED TROUBLING BUSINESS PRACTICES, INADEQUATE RISK MANAGEMENT, AND THE NEED FOR LEGISLATIVE AND REGULATORY REFORM 3 (2022) [hereinafter GAMESTOPPED], https://democrats-financialservices.house.gov/uploadedfiles/6.22_hfsc_gs.report_hmsmeetbp.irm.nlrf.pdf [<https://perma.cc/2C8L-KY3L>].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ This abbreviation is GameStop Corporation’s stock ticker.

⁶² *Id.*; see also Stan Choe, *EXPLAINER: Why GameStop’s Stock Surge is Shaking Wall Street*, AP NEWS (Jan. 28, 2021), <https://apnews.com/article/gamestop-stock-surge-explained-fb377363d1b04809706619a6bcc9e549> [<https://perma.cc/VM33-UMRM>].

⁶³ Reddit is a social media platform that primarily consists of “group[s] of people meeting on the internet, sharing stuff, and talking to one another” within “more

extreme volatility across the broader market.⁶⁴ During this period of time, Reddit users, specifically members of the subreddit group known as WallStreetBets, banned together and “encourag[ed] each other to keep buying GameStop and push it ever higher, or ‘to the moon.’”⁶⁵

The online trading platform, Robinhood,⁶⁶ served “as the venue of choice for much of the stock-trading mania that boosted shares in companies like GameStop.”⁶⁷ Robinhood’s business model appeals to retail investors because it simplifies purchasing and selling stocks with “one-click trading, easy access to complex investment products”⁶⁸ and various “game-like features.”⁶⁹ This business model, which is “marked by commission-free trading supported by payment for order flow (PFOF)” incentivizes the broker platform to encourage high levels of trading because heightened trading activity increases PFOF rebates, resulting in Robinhood’s profit.⁷⁰ During the Meme Stock Market Event, Robinhood’s platform became overwhelmed by the order volume, resulting in technology outages and restrictions being placed on trading certain meme stocks.⁷¹ These effects, in turn, “limited market access for ordinary retail investors and undermined confidence in market integrity.”⁷²

Various legal ramifications followed this event, the majority of which were aimed at Robinhood. A congressional investigation revealed that “Robinhood exhibited troubling business practices, inadequate risk management, and a culture that prioritized growth over stability.”⁷³ Robinhood also incurred a \$70 million fine from the Financial Industry Regulatory

than a million communities [on the site] known as ‘subreddits,’ each of which covers a different topic.” Jake Widman, *What Is Reddit?*, DIGIT. TRENDS (July 5, 2021), <https://www.digitaltrends.com/web/what-is-reddit/> [<https://perma.cc/DZ43-93MP>].

⁶⁴ See Choe, *supra* note 62.

⁶⁵ *Id.*

⁶⁶ “Millions of young Americans have begun investing in recent years through Robinhood, which was founded in 2013 with a sales pitch of no trading fees or account minimums. The ease of trading has turned it into a cultural phenomenon and a Silicon Valley darling.” Nathaniel Popper, *Robinhood Has Lured Young Traders, Sometimes with Devastating Results*, N.Y. TIMES (Sept. 25, 2021), <https://www.nytimes.com/2020/07/08/technology/robinhood-risky-trading.html> [<https://perma.cc/7RPY-VA2W>].

⁶⁷ Michael J. de la Merced & Erin Griffith, *Robinhood Is Fined \$70 Million Over Misleading Customers and System Outages*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/06/30/technology/robinhood-fined-misleading-customers.html> [<https://perma.cc/Q4UV-P2GD>].

⁶⁸ GAME STOPPED, *supra* note 58, at 4.

⁶⁹ Popper, *supra* note 66.

⁷⁰ GAME STOPPED, *supra* note 58, at 4.

⁷¹ *Id.* at 3.

⁷² *Id.*

⁷³ *Id.* at 4.

Authority (FINRA), the largest fine ever given out, which was said to reflect the gravity of the violations.⁷⁴ Additionally, different lawsuits were filed on behalf of app users who experienced economic setbacks because of the trading restrictions implemented by Robinhood relating to meme stocks.⁷⁵

While Robinhood's leadership practices clearly violated federal securities regulations, what is less clear is whether certain Reddit users also violated any rules or regulations, and whether they are culpable.⁷⁶ Typically, market manipulation charges are brought against individuals or entities who artificially influence the supply or demand of a financial instrument, such as a security, and do so using some form of deception.⁷⁷ The strategy promoted by these online users, however, centered around rallying enough investors to purchase specific securities, in an effort to drive up the stock prices and force short sellers into purchasing at the increased "prices to close out [their] positions."⁷⁸ The Reddit investors' motivations were, at least in part, "about inflicting pain on short sellers, hedge funds and other big financial firms" rather than necessarily believing in GameStop's business.⁷⁹ Reddit investors were generally transparent about these objectives and, therefore, seemingly lacked the requisite deceptive conduct.⁸⁰

⁷⁴ de la Merced & Griffith, *supra* note 67; Emily Graffeo, *Robinhood Gets Slapped with FINRA's Largest-Ever Fine to Settle Allegations of Misleading Customers and Causing 'Significant Harm' to Millions*, MKTS. INSIDER (June 30, 2021, 12:26 PM), <https://markets.businessinsider.com/news/stocks/robinhood-finra-fine-millions-misleading-customers-trading-options-sec-ipo-2021-6> [<https://perma.cc/NLA4-XMVX>].

⁷⁵ Megan Leonhardt, *Robinhood Now Faces Roughly 50 Lawsuits After GameStop Trading Halt—Here's How Customers Might Actually Get Their Day in Court*, CNBC MAKE IT (Feb. 17, 2021, 12:17 PM), <https://www.cnbc.com/2021/02/17/robinhood-faces-lawsuits-after-gamestop-trading-halt.html> [<https://perma.cc/3EC6-5AH9>].

⁷⁶ Bruce Brumberg, *Reddit and GameStop Lessons: Former SEC Enforcement Chief Explains Stock Manipulation and How to Avoid Trouble*, FORBES (Feb. 4, 2021, 10:00 AM), <https://www.forbes.com/sites/brucebrumberg/2021/02/04/reddit-and-gamestop-lessons-former-sec-enforcement-chief-explains-stock-manipulation-and-how-to-avoid-trouble/?sh=7e198cd02859> [<https://perma.cc/LQK2-T7ZC>].

⁷⁷ *Id.*; *Market Manipulation*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/glossary/market-manipulation> [<https://perma.cc/H9VD-HWHQ>].

⁷⁸ Chris Webber, *GameStopped? Regulators React to the "Short Squeeze,"* NAT'L L. REV. (Feb. 26, 2021), <https://www.natlawreview.com/article/gamestopped-regulators-react-to-short-squeeze> [<https://perma.cc/26XA-W4JE>].

⁷⁹ *See* Choe, *supra* note 62.

⁸⁰ *See id.* In February 2021, there was one class action lawsuit in relation to this incident filed against one of the main Reddit users who encouraged investment. *See Iovin v. Gill*, No. 3:21-CV-10264 (D. Mass. 2021) (Westlaw, D. Mass. Case Law), *voluntarily dismissed* (Apr. 14, 2021). The lawsuit, brought by other Reddit users, argued that they suffered damages because of the market manipulation of GME stock that resulted from the defendants' conduct. Complaint at 19, *Iovin*, No. 3:21-CV-10264 (D. Mass. Feb.16, 2021). However, the case was subsequently closed in June 2021 after a request for voluntary dismissal by the plaintiffs. *See Iovin*, No. 3:21-CV-10264.

Although this incident primarily affected US-traded shares, it caught the attention of the global legal community and other financial regulators.⁸¹ Some noted that, while these particular shares were not within the scope of their country's regulations, other instruments have similarly been targeted with the same types of strategies, making it important for regulators, such as the United Kingdom's Financial Conduct Authority (FCA), to consider these issues and to expect copycat incidents related to UK and EU financial instruments.⁸² These strategies "pose novel challenges for . . . conduct regulator[s] tasked with ensuring the integrity of . . . financial markets, protecting consumers, and preventing financial crime."⁸³ Consequently, calls have been made in the United Kingdom for examining and potentially reforming market rules if the evaluation demonstrates that the present regime cannot properly respond.⁸⁴ This is a not-so-unlikely possibility, since, over the last few years, developments in technology have revolutionized "financial markets . . . creating a risk that market practice will outstrip the ability of existing rules to regulate it effectively."⁸⁵ Furthermore, these transformations have been "exacerbated by the advent of social media platforms and message boards" such as Reddit, where discussions can occur both anonymously and rapidly.⁸⁶

C. *The (Lack of) Regulatory Response in the United States*

Notably absent in the wake of the Meme Stock Market Event fallout was a strong response from US regulators, particularly the SEC, related to social media's role in causing this disarray.⁸⁷ As noted above, this event led to a congressional

⁸¹ See Webber, *supra* note 78.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Joanna Perkins, *Robinhood: Hero or Outlaw?*, 5 J. INT'L. BANKING & FIN. L. 319 (2021).

⁸⁶ *Id.*

⁸⁷ See Webber, *supra* note 78; Thornton McEnery, *Opinion: After 9 Months of Investigation into GameStop Stock Frenzy, the SEC Concludes that Things Got Crazy for a Second There*, MARKETWATCH (Oct. 18, 2021, 5:32 PM), <https://www.marketwatch.com/story/after-9-months-of-investigation-into-gamestop-stock-frenzy-the-sec-concludes-that-things-got-crazy-for-a-second-there-11634592761> [<https://perma.cc/6RLB-5JFS>] (discussing how, in a long-awaited report analyzing the Meme Stock Market Event, the SEC staff merely summarized the events and provided little concrete regulatory recommendations, thereby seemingly "pass[ing] on the opportunity that many were waiting for them to seize with both hands: addressing market issues that have given rise to a daily skirmish between individual investors and institutional Wall Street short-sellers"); STAFF OF U.S. SEC. & EXCH. COMM'N, STAFF REPORT ON EQUITY AND OPTIONS MARKET STRUCTURE CONDITIONS IN EARLY 2021, 43–44 (2021).

investigation, which resulted in the US House of Financial Services Committee (the Committee) publishing a cumulative report in June 2022.⁸⁸ This report was titled “GAME STOPPED: How the Meme Stock Market Event Exposed Troubling Business Practices, Inadequate Risk Management, and the Need for Legislative and Regulatory Reform.”⁸⁹ It provides detailed information about the Committee’s key findings and the need to modernize the country’s “retail market regulatory architecture.”⁹⁰ In the House Report, the Committee acknowledges the new reality where securities trading is increasingly affected by trends such as stocks gathering traction from social media discussions.⁹¹ It also notes the potential implications of these trends on the market, regulation, and infrastructure, and calls for the SEC and other regulators to make a greater effort to safeguard the market from similar occurrences.⁹²

The SEC, a federal government agency founded by Congress following the Great Crash of 1929 and the resulting Great Depression, “was designed to restore investor confidence in . . . capital markets by providing . . . clear rules of honest dealing.”⁹³ The SEC, which is empowered by the Securities Exchange Act of 1934, maintains expansive authority over the entire securities industry.⁹⁴ Underlying the securities regulatory architecture is the concept that “everyone should be treated fairly and have access to certain facts about investments and those who sell them.”⁹⁵ As stated in the SEC’s mission, it is committed to “protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation,”⁹⁶ which it achieves by overseeing various key participants within the securities industry, including investment advisors.⁹⁷ Part of this oversight involves enforcing punitive powers over entities and associated persons that are regulated by the SEC in relation to certain prohibited conduct.⁹⁸

⁸⁸ See *supra* Section I.B; GAME STOPPED, *supra* note 58.

⁸⁹ GAME STOPPED, *supra* note 58.

⁹⁰ *Id.* at 4–5, 8.

⁹¹ See *id.* at 3–4.

⁹² *Id.* at 8; see also Katanga Johnson & John McCrank, *Factbox: The SEC’s Response to the ‘Meme Stock’ Rally*, REUTERS (June 24, 2022, 2:55 PM), <https://www.reuters.com/markets/europe/secs-response-meme-stock-rally-2022-06-24/> [<https://perma.cc/ZT5V-BMGS>].

⁹³ JAMES D. COX & MELVIN ARON EISENBERG, *BUSINESS ORGANIZATIONS: CASES AND MATERIALS* 415 (12th ed. 2019).

⁹⁴ *Id.*

⁹⁵ *What We Do*, U.S. SEC. & EXCH. COMM’N (Nov. 22, 2021), <https://www.sec.gov/about/what-we-do> [<https://perma.cc/WD3X-73PQ>].

⁹⁶ *Id.*

⁹⁷ COX & EISENBERG, *supra* note 93, at 414–15.

⁹⁸ *Id.* at 415.

Prior to the House Report's call to action, the SEC acknowledged the resulting market volatility from the Meme Stock Market Event and "stat[ed] that it would 'work to protect investors, to maintain fair, orderly, and efficient markets' and . . . 'act to protect retail investors when the facts demonstrate abusive or manipulative trading activity.'"⁹⁹ While this was initially labeled as a somewhat understandable response to such a rapidly materializing issue, individuals in the legal community called on the SEC and other regulators to provide additional commentary as these events presented various regulatory pitfalls.¹⁰⁰ As alluded to in the 2022 House Report, the current regulatory regime has not adapted to new industry innovations and requires updating.¹⁰¹ Furthermore, some of the initial questions raised by this event, such as whether there was actually anything improper about the Reddit traders' conduct, have yet to be fully addressed.¹⁰²

Since this initial, arguably inadequate, response, the SEC has sought, through a request for public input, "information on so-called gamification and other digital engagement practices used by online brokerages and advisers to give advice and encourage people to trade."¹⁰³ As the SEC stated in one of its press releases, a primary purpose of this request is to "[f]acilitate an assessment by the Commission and its staff of existing regulations and consideration of whether regulatory action may be needed."¹⁰⁴ This initiative, which is typical for the SEC when attempting to gain a better understanding of modern issues affecting the industry, indicates that the SEC is considering revising its regulations in recognition of these emerging practices.¹⁰⁵ The request focuses specifically on how certain

⁹⁹ Webber, *supra* note 78 (emphasis omitted) (quoting Joint Statement, U.S. Sec. & Exch. Comm'n, Statement of Acting Chair Lee and Commissioners Pierce, Roisman, and Crenshaw Regarding Recent Market Volatility (Jan. 29, 2021), <https://www.sec.gov/news/public-statement/joint-statement-market-volatility-2021-01-29> [<https://perma.cc/VM5Y-8SNL>]); Choe, *supra* note 62.

¹⁰⁰ *Id.*

¹⁰¹ GAME STOPPED, *supra* note 58, at 8.

¹⁰² See Webber, *supra* note 78.

¹⁰³ Al Barbarino, *SEC Seeks Public Input on 'Gamification' of Online Trading*, LAW360 (Aug. 27, 2021, 4:39 PM), <https://www.law360.com/articles/1417037> [<https://perma.cc/AN3M-FWAA>].

¹⁰⁴ Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, 86 Fed. Reg. 49,067, 49,068 (Sept. 1, 2021).

¹⁰⁵ *Id.*; see also *How to Submit Comments*, U.S. SEC. & EXCH. COMM'N (last updated Sept. 1, 2022), <https://www.sec.gov/regulatory-actions/how-to-submit-comments> [<https://perma.cc/7Q34-KWYV>].

market participants use “digital engagement practices” (DEP) to reach retail investors.¹⁰⁶

A variety of DEPs exist, “which broadly include behavioral prompts, differential marketing, game-like features, and other design elements or features designed to engage retail investors.”¹⁰⁷ For example, this potential regulation would target retail-orientated broker platforms, such as Robinhood, and their method of encouraging more trading through “game-like features and celebratory animations.”¹⁰⁸ Targeting DEPs is undoubtedly an important step in addressing modern issues. However, by narrowing its scope of inquiry to investment advisers’ use of gamification tools in appealing to investor behavior, the SEC potentially misses an entire sector of influencers who do not necessarily rely on these strategies as they dole out their unregulated advice online.¹⁰⁹

FINRA addressed the presence of influencers on social media more precisely following the Meme Stock Market Event.¹¹⁰ In July 2021, FINRA announced that it planned to perform a “sweep[] to address the latest developments causing turbulence in financial markets, including . . . social media’s ‘influencers.’”¹¹¹ FINRA’s CEO and president, Robert Cook, acknowledged that the creative nature of the United States capital markets industry requires FINRA to regularly develop its oversight perspective regarding emerging businesses, technologies, and manners that investors are gaining entrance to capital markets.¹¹² However, FINRA focuses its regulation more specifically on governing registered brokers and broker-dealer firms.¹¹³ Therefore, the sweeps that FINRA is in the process of undertaking focus on the manner in which these firms manage the activities of paid social media influencers.¹¹⁴ FINRA’s review centers on firm practices associated with acquiring customers via social media sites, and how these firms

¹⁰⁶ Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, 86 Fed. Reg. at 49,068.

¹⁰⁷ *Id.*

¹⁰⁸ See GAME STOPPED, *supra* note 58, at 4 (quoting STAFF OF U.S. SEC. & EXCH. COMM’N, STAFF REPORT ON EQUITY AND OPTIONS MARKET STRUCTURE CONDITIONS IN EARLY 2021 44 (2021)).

¹⁰⁹ See FINRA Conducts Sweep of Social Media “Influencers,” QUEST CE (Sept. 20, 2021), <https://www.questce.com/finra-conducts-sweep-of-social-media-finfluences/> [<https://perma.cc/QUY7-AJK8>].

¹¹⁰ Barbarino, *supra* note 17.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *What We Do*, FIN. INDUS. REGUL. AUTH., www.finra.org/about/what-we-do [<https://perma.cc/5UHJ-68UK>].

¹¹⁴ Barbarino, *supra* note 17.

govern obligations in relation to information provided by customers.¹¹⁵ In other words, FINRA is looking at whether firms who hire social media influencers are “managing the process with the supervision and care that it needs in order to make sure that these new investors are not misled.”¹¹⁶ In its inquiry, FINRA is requesting that firms describe their search and contract practices, compensation methods, and compliance programs relating to influencers.¹¹⁷ While these sweeps may eventually lead to enforcement activity by the regulator, the main purpose, at this time, is educational.¹¹⁸

Both the SEC and FINRA’s actions thus far demonstrate their awareness of the rising issue of unregulated online financial advice. However, neither address completely and directly the concerns surrounding finfluencers’ free rein on social media, instead focusing on more specific subsets of this group, namely those that use targeted marketing tools or are engaged by firms.

D. *New Zealand Takes the Lead*

Amid mounting concerns across the globe, New Zealand implemented a new financial advice regime, which took effect in March 2021.¹¹⁹ The changes were meant to ensure the continued adequate regulation over financial markets and market participants.¹²⁰ Furthermore, they were designed to construct a regulated way for “financial advice to be provided online . . . [and] set industry-wide standards for conduct and competence.”¹²¹ As part of this updated regime, New Zealand passed the Financial Services Legislation Amendment Act (Amendment Act), which, among other things, repealed the

¹¹⁵ *Social Media Influencers, Customer Acquisition, and Related Information Protection*, FIN. INDUS. REGUL. AUTH. (Sept. 2021), <https://www.finra.org/rules-guidance/guidance/targeted-examination-letters/social-media-influencers-customer-acquisition-related-information-protection> [<https://perma.cc/A6Q5-7P9S>].

¹¹⁶ Al Barbarino, *FINRA Seeks to Demystify the Social Media Influencer*, LAW360 (Sept. 21, 2021, 6:27 PM), <https://www.law360.com/articles/1423548> [<https://perma.cc/JL3V-Y8FX>].

¹¹⁷ Holly Deaton, *Finra Exam Letters Target ‘Finfluencers’ Hired by Wealth Managers*, RIA INTEL (Oct. 6, 2021), <https://www.riaintel.com/article/b1twxzc5hjt038/finra-exam-letters-target-finfluencers-hired-by-wealth-managers> [<https://perma.cc/8Z99-YVFU>].

¹¹⁸ Barbarino, *supra* note 116.

¹¹⁹ Olano, *supra* note 19; *About the New Financial Advice Regime*, FIN. MKT. AUTH. (Mar. 15, 2021), <https://www.fma.govt.nz/compliance/role/fap-new-regime/about-the-changes/> [<https://perma.cc/C4A6-ANB9>].

¹²⁰ *See About the New Financial Advice Regime, supra* note 119.

¹²¹ *Id.*

Financial Advisers Act from 2008.¹²² The Amendment Act also amended the Financial Markets Conduct Act of 2013 (FMC Act), which sets forth the applicable duties for providers of financial advice.¹²³ Some of the major components within the new regime include a new code of conduct, new disclosure requirements, new registration requirements, and standard conditions.¹²⁴

The new Code of Professional Conduct (Code) for Financial Advice Services establishes clear statutory duties for anyone who does out “regulated financial advice to retail clients.”¹²⁵ The Code requires compliance with two subsets of duties: “standards of ethical behavior, conduct, and client care” and “standards of competence, knowledge, and skill.”¹²⁶ These requirements are further split into nine standards; each of which contains a commentary section included for the purpose of helping financial advisors comply with regulations.¹²⁷

In regard to the new disclosure requirements, individuals providing financial advice must disclose specified information, such as any conflicts of interest, including expected commissions or incentives, which could affect their advice.¹²⁸ This ensures those receiving the advice have the ability to make educated decisions.¹²⁹ Full disclosure, which includes information about licenses, applicable fees and commissions, dispute resolution arrangements, and different “conflicts of interest,” is not required up front because of its potential to initially overwhelm consumers.¹³⁰ However, disclosures related to the individuals providing the advice and their services are required, in varying degrees, when relevant at different points during the advice process.¹³¹ In response to the range of methods for how advice can be provided in today’s society, the form of disclosure is also flexible, a choice of verbal, written, or electronic disclosure is

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ NEW ZEALAND CODE COMM., CODE OF PROFESSIONAL CONDUCT FOR FINANCIAL ADVICE SERVICES (2019), <https://financialadvicecode.files.wordpress.com/2021/03/codeofprofessionalconduct-march2021.pdf> [<https://perma.cc/2NWV-STYF>].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Disclosure Requirements*, MINISTRY BUS., INNOVATION & EMP. (Aug. 28, 2021), <https://www.mbie.govt.nz/business-and-employment/business/financial-markets-regulation/regulation-of-financial-advice/regulations-to-support-the-financial-services-legislation-amendment-act/disclosure-requirements/>.

¹²⁹ *About the New Financial Advice Regime*, *supra* note 119.

¹³⁰ MINISTRY BUS., INNOVATION & EMP., SUMMARY OF DISCLOSURE REQUIREMENTS IN THE NEW FINANCIAL ADVICE REGIME 2 (2019), <https://www.mbie.govt.nz/dmsdocument/4762-summary-of-disclosure-requirements-new-financial-advice-regime>.

¹³¹ *Id.*

typically acceptable as long as it is provided in a “clear, concise, and effective” manner.¹³²

Under the updated registration requirements, and in an effort to enhance New Zealand’s positive business reputation and boost client confidence, only financial services providers that service New Zealand clients may register.¹³³ Lastly, as part of the new regime, anyone providing retail investment clients with regulated advice is required to hold, or act under, a provider license.¹³⁴ The licensing is split into two phases, transitional and full, each of which is subject to different standard conditions with which providers must comply.¹³⁵

In June 2021, to address concerns that social media influencers “may be straying into regulated financial advice,” the Financial Markets Authority (FMA), New Zealand’s governmental agency responsible for regulation of financial markets, released new guidelines for finfluencers.¹³⁶ The guide, titled “A guide to talking about money online,” emphasizes the potential for discussions relating to money and investing to cross the line into financial advice, which requires a FMA license.¹³⁷ In clarifying the scope of the new regulations, the FMA Chief Executive noted that typically “talk[ing] about general financial matters” on social media platforms is allowed, however, “when social media influencers . . . recommend[] particular products, such as specific funds, stocks or insurance, then it’s very likely they are giving regulated financial advice.”¹³⁸

Understanding the difficulties with determining whether or not someone is actually giving regulated advice, the FMA provides examples demonstrating how a discussion related to financial matters may cross this threshold and be considered regulated advice.¹³⁹ The guide emphasizes that sharing factual information about a financial product’s features is acceptable, but issues arise where finfluencers are recommending whether

¹³² *Id.*

¹³³ *About the New Financial Advice Regime*, *supra* note 119.

¹³⁴ *Who Needs a License?*, FIN. MKT. AUTH. (June 24, 2021), <https://www.fma.govt.nz/compliance/role/fap-new-regime/getting-prepared/> [<https://perma.cc/5DSY-BWEU>].

¹³⁵ *About the New Financial Advice Regime*, *supra* note 119.

¹³⁶ Media Release, Financial Markets Authority, FMA Releases Guide for ‘Finfluencers’ (June 28, 2021), <https://www.fma.govt.nz/news-and-resources/media-releases/fma-releases-guide-for-finfluencers/> [<https://perma.cc/S3QD-LW3W>]; *see A Guide to Talking About Money Online*, FIN. MKTS. AUTH. (June 28, 2021), <https://www.fma.govt.nz/library/articles/guide-to-talking-about-money-online/> [<https://perma.cc/LB9X-S4UQ>].

¹³⁷ *Id.*

¹³⁸ Olano, *supra* note 19.

¹³⁹ *A Guide to Talking About Money Online*, FIN. MKT. AUTH. (June 28, 2021), <https://www.fma.govt.nz/news-and-resources/reports-and-papers/guide-to-talking-about-money-online/> [<https://perma.cc/G4KV-5JQC>].

or not to partake in the product.¹⁴⁰ It lays out back-to-back scenarios indicating phrasing that would typically be alright to use online, followed by similar, but slightly different versions that would most likely breach the threshold.¹⁴¹ For example, according to the guide, saying that “[g]overnments are rolling out COVID-19 vaccines, so tourism companies and airlines could be good investments,” is alright.¹⁴² However, saying “[b]uy ABC campervan shares now, the tourism boom is about to start,” is potentially crossing over into regulated advice.¹⁴³

The guide further encourages finfluencers to stay in line with best practices on social media, including disclosing compensated and gifted posts as required by the Advertising Standards Authority code.¹⁴⁴ Additionally, while the guide is mainly intended to help finfluencers comply with regulations, it also provides advice and tips for consumers who encounter financial advice online to bring awareness to ways they can protect themselves against potentially risky advice.¹⁴⁵

II. US REGULATORY REGIME AND ITS PITFALLS

In the United States, the SEC is the primary regulator of the securities market, a role which includes “protecting investors, [and] maintaining fair, orderly, and efficient markets.”¹⁴⁶ In achieving its goal to protect investors, the SEC enforces disclosure and other requirements related to market participants, set forth in federal securities laws, so that investors can make informed decisions about their investments.¹⁴⁷ One of the primary market participant groups regulated under this category are investment advisers, a subset that finfluencers arguably fall within.

A. *Current SEC Framework Relevant to Finfluencers*

The Investment Advisers Act of 1940 (Advisers Act) is one of the fundamental laws enforced by the SEC.¹⁴⁸ It was intended

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Olano, *supra* note 19.

¹⁴⁵ Media Release, *supra* note 136; *see also* *A Guide for Talking About Money Online*, *supra* note 139.

¹⁴⁶ *What We Do*, *supra* note 95.

¹⁴⁷ *See id.*

¹⁴⁸ *See The Laws That Govern the Securities Industry*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry> [<https://perma.cc/6BA7-ZKGN>].

to help eliminate or expose abuses, such as advisers giving biased advice, which Congress views as a contributing factor to the 1929 market crash.¹⁴⁹ To prevent this type of extreme market volatility from recurring, Congress mandated a study looking into investment companies, investment counsel, and advisory services, executed by the SEC.¹⁵⁰ The resulting report, which examined investment adviser growth, “reflected the position that investment advisers could not properly perform their function unless all conflicts of interest between them and their clients were removed.”¹⁵¹ The report further pointed to a pervasive problem in the securities industry surrounding investment advisers where advisers’ prejudices, whether consciously or not, caused them to favor their own interests over those of clients.¹⁵² As a result of these findings, the Advisers Act was adopted, which “reflects congressional recognition of the delicate fiduciary nature of the advisory relationship . . . [and] desire to eliminate, or at least expose, all conflicts of interest that might cause advisers . . . to render advice that is not disinterested.”¹⁵³

The Advisers Act requires investment advisers, with specific exceptions, to register with the Commission and comply with applicable regulations focused on protecting investors.¹⁵⁴ Under Section 202(a)(11) of the Advisers Act, an “investment adviser” is defined as

any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.¹⁵⁵

A series of exceptions follow this definition, including: banks and bank holding companies; certain professionals who provide financial advice solely incidentally to practicing their profession; brokers or dealers whose financial advice is similarly incidental to their profession or uncompensated; publishers of bona fide, regularly circulated publications; anyone providing

¹⁴⁹ See DIV. INV. MGMT., U.S. SEC. & EXCH. COMM’N, REGULATION OF INVESTMENT ADVISERS BY THE U.S. SECURITIES AND EXCHANGE COMMISSION 1 (2013), https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf [<https://perma.cc/UR46-JQEW>].

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Laws and Rules*, U.S. SEC. & EXCH. COMM’N (May 13, 2020), <https://www.sec.gov/investment/laws-and-rules> [<https://perma.cc/4MX2-A44G>]; see also *The Laws That Govern the Securities Industry*, *supra* note 148.

¹⁵⁵ 15 U.S.C. § 80b-2(a)(11).

advice related solely to securities obligated by the United States; specific statistical rating agencies; family offices; and lastly, as a catch all, other persons outside the intent of the section as designated by the Commission.¹⁵⁶ Fitting into one of these exclusions means that person or firm does not fall within the scope of the provisions of the Advisers Act.¹⁵⁷

Additionally, under the framework, typically only investment advisers who manage at least \$100 million of assets or investment advisers to registered investment companies are required to register.¹⁵⁸ Other investment advisers, who do not meet the SEC asset requirement, considered small and midsize advisers, register with and are overseen by state regulators in the state where they maintain a principal place of business.¹⁵⁹ This allocation of regulatory responsibility stems from Section 203A of the Advisers Act, which has been interpreted, not as an exemption from having to register with the SEC, but rather a prohibition against registering.¹⁶⁰

However, the SEC rules and Section 203A carve out some exceptions to this general prohibition against registration.¹⁶¹ The “Internet adviser exemption,” which became effective through a rule amendment in 2003, allows certain advisers to register with the SEC if they use interactive websites to provide investment advice.¹⁶² The rule, 203A-2(e), defines “interactive website” as “a website in which computer software-based models or applications provide investment advice based on personal information each client submits through the website.”¹⁶³ This exemption stems from a recognition by Congress that some advisers should be federally regulated even if they do not qualify under the assets management requirements.¹⁶⁴

Another governing law of the securities industry that is likely relevant to the activities of influencers and known commonly as “the ‘anti-touting’ provision,” is Section 17(b) of the Securities Act of 1933 (Securities Act).¹⁶⁵ The Securities Act,

¹⁵⁶ 15 U.S.C. § 80b-2(a)(11)(A)–(H).

¹⁵⁷ DIV. INV. MGMT., U.S. SEC. & EXCH. COMM’N, *supra* note 149, at 4.

¹⁵⁸ *Laws and Rules*, *supra* note 154.

¹⁵⁹ *Id.*; see also 15 U.S.C. § 80b-3a(1).

¹⁶⁰ DIV. INV. MGMT., U.S. SEC. & EXCH. COMM’N, *supra* note 149, at 8.

¹⁶¹ *Id.* at 10.

¹⁶² Press Release, U.S. Sec. & Exch. Comm’n, Release No. IA-2091 (Jan. 20, 2003), <https://www.sec.gov/rules/final/ia-2091.htm> [<https://perma.cc/T3QY-U3TU>]; see also DIV. INV. MGMT., *supra* note 149, at 11.

¹⁶³ Exemption for Certain Investment Advisers Operating Through the Internet, 67 Fed. Reg. 77620, 77625 (Dec. 18, 2002) (codified at 17 C.F.R. § 275.203A-2I(2) (2022)).

¹⁶⁴ Press Release, *supra* note 162.

¹⁶⁵ S.E.C. v. Gagnon, No. 10-CV-11891, 2012 WL 994892, at *10 (E.D. Mich. 2012).

otherwise known as the “truth in securities’ law,” strives to provide investors with notable information relating to public securities being sold and prohibit fraudulent activities in the sale of such securities.¹⁶⁶ Section 17(b) of the Securities Act states:

It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.¹⁶⁷

Practically, this provision prohibits “publicizing securities in return for past or future undisclosed compensation from an issuer, underwriter, or dealer.”¹⁶⁸ In recent years, celebrities such as Floyd Mayweather, DJ Khaled, and Kim Kardashian have found themselves in trouble with the SEC in relation to this provision resulting from their posts on social media sites encouraging followers to invest in Initial Coin Offerings and cryptocurrencies.¹⁶⁹ A 2018 SEC investigation into Mayweather and Khaled resulted in settlement offers indicating that their actions, specifically their endorsements of bitcoin offerings on social media without disclosing that they were paid hundreds of thousands of dollars, violated Section 17(b).¹⁷⁰ In October 2022, the SEC fined Kim Kardashian under the same provision for promoting a cryptocurrency coin to her hundreds of millions of Instagram followers without disclosing she received financial compensation to do so.¹⁷¹

¹⁶⁶ *The Laws That Govern the Securities Industry*, *supra* note 148.

¹⁶⁷ 15 U.S.C. § 77q(b).

¹⁶⁸ *Gagnon*, 2012 WL 994892, at *10.

¹⁶⁹ Press Release, U.S. Sec. & Exch. Comm’n, Two Celebrities Charged With Unlawfully Touting Coin Offerings (Nov. 29, 2018), <https://www.sec.gov/news/press-release/2018-268> [<https://perma.cc/2EUA-VFR4>]; Q.ai, *Kim Kardashian Fined For Cryptocurrency Promotion, Here’s What It Means For Crypto*, FORBES (Oct. 3, 2022, 7:29 PM), <https://www.forbes.com/sites/qai/2022/10/03/kim-kardashian-fined-for-cryptocurrency-promotion-heres-what-it-means-for-crypto/?sh=7b8536623935> [<https://perma.cc/U4DY-2T25>].

¹⁷⁰ Press Release, *supra* note 169. In relation to this investigation, the SEC Enforcement Division Co-Director at the time, Steven Peikin, stated that

[i]nvestors should be skeptical of investment advice posted to social media platforms, and should not make decisions based on celebrity endorsements . . . Social media influencers are often paid promoters, not investment professionals, and the securities they’re touting, regardless of whether they are issued using traditional certificates or on the blockchain, could be frauds.

Id.

¹⁷¹ Q.ai, *supra* note 169.

B. Finfluencers Highlight Shortcomings in the SEC Framework

Although the SEC has oversight schemes to fulfill its duty to regulate investment advisers and ensure efficient running of the US securities market, placing “finfluencers” within this same regulatory structure is not straight forward.¹⁷² The increasing commonality of finfluencers draws attention to some of the gaps within the present regulatory framework and demonstrates a need for an adjustment in the current scheme, one that allows for a clearer federal oversight regime directed at this increasingly influential group.¹⁷³

1. Is a Finfluencer an “Investment Adviser” Under the Advisers Act?

The SEC does not directly address finfluencers giving heightened financial advice on social media platforms in any of their rules or regulations.¹⁷⁴ Examining how finfluencers could fall within the categorizations of the current securities regime reveals further conflict stemming from the Adviser Act’s definition of “investment adviser.” This definition, found in Section 202(a)(11) of the Advisers Act, defines an “investment adviser” under the SEC’s regulatory purview as

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.¹⁷⁵

All three elements: (1) receiving compensation, (2) being engaged in the business, and (3) providing advice about securities, must be met for a person to be considered an “investment adviser” under the regulation of the SEC.¹⁷⁶

¹⁷² See *supra* Section II.A.

¹⁷³ See *infra* Part III.

¹⁷⁴ See generally *Rules and Regulations for the Securities and Exchange Commission and Major Securities Laws*, U.S. SEC. & EXCH. COMM’N (last modified Mar 29, 2017), <https://www.sec.gov/about/laws/secrulesregs.htm> [<https://perma.cc/2CVF-E6DC>] (demonstrating that there are no references to finfluencers or social media in any of the SEC’s final rules or regulations); see also STAFF OF DIV. OF EXAMINATIONS, U.S. SEC. & EXCH. COMM’N, 2022 EXAMINATION PRIORITIES 16 (2022), <https://www.sec.gov/files/2022-exam-priorities.pdf> [<https://perma.cc/LQN5-JGKL>] (showing one mention of finfluencers in SEC’s report regarding their 2022 examination priorities, which indicates that the topic is on their radar but not yet addressed).

¹⁷⁵ 15 U.S.C. § 80b–2(a)(11).

¹⁷⁶ DIV. INV. MGMT., SEC. & EXCH. COMM’N, *supra* note 149, at 2.

The SEC has broadly construed the first element, regarding compensation, to generally be satisfied by “receipt of any economic benefit,” and stated that the recipient of the investment advice or someone else may provide the compensation.¹⁷⁷ As previously noted, there are various mechanisms that influencers can utilize to receive economic benefits from their online posts.¹⁷⁸ The SEC has indicated that the compensation satisfying this element could take a variety of shapes, including “an advisory fee, some other fee relating to the total services rendered, a commission, or some combination.”¹⁷⁹ Regardless of the exact method, it seems most likely that influencers are bound under this element given the breadth and generality of the construction.

The second element of the investment adviser definition requires that a person “is engaged in the business of” providing this type of advice.¹⁸⁰ This business, however, does not need to be that individual’s primary form of income.¹⁸¹ There are three main factors that the SEC staff considers when evaluating if someone is engaged for this purpose: (1) “whether the person holds himself out as an investment adviser,” (2) “whether the person receives compensation that represents a clearly definable charge for providing investment advice,” and (3) “the frequency and specificity of the investment advice provided.”¹⁸² Unless the advice is only furnished on a one-off or rare occasion, when a person provides advice about particular securities, this element will be met.¹⁸³ These factors would likely be applied on a case by case basis, but given that the advice does not need to be the individual’s primary activity or business enterprise, it seems this element also leans in favor of satisfaction by potentially a large number of influencers.

The final portion of the definition states that an adviser must advise others about securities.¹⁸⁴ The primary inquiry here is whether the advice is actually about securities.¹⁸⁵ According to the SEC, “[a] person clearly meets the third element of the

¹⁷⁷ *Id.*

¹⁷⁸ *See supra* Section I.A.

¹⁷⁹ DIV. INV. MGMT., U.S. SEC. & EXCH. COMM’N, *supra* note 149, at 2.

¹⁸⁰ *Id.*

¹⁸¹ *See id.*

¹⁸² *Id.* (numbering added).

¹⁸³ For example, “an employer providing advice to an employee in connection with an employer-sponsored benefit program” would not be considered by the SEC staff as satisfying this element. *Id.* at 2 n.6. Applying this concept to the realm of influencers it seems that, similarly, the SEC staff would not view a user’s onetime social media post discussing the benefits of a certain type of 401(k) to implicate this element.

¹⁸⁴ *See id.* at 3.

¹⁸⁵ *Id.*

statutory test if he provides advice to others about specific securities, such as stocks, bonds, mutual funds, limited partnerships, and commodity pools.¹⁸⁶ On the flip side, the SEC staff would not consider investment advice “about real estate, coins, precious metals, or commodities” to satisfy this element. The inquiry becomes less straightforward when the advice is either less specific or indirectly related to securities.¹⁸⁷ While there is overall less clarity with such advice, the SEC has provided some direction indicating that the following are considered advice about securities:

- (i) advice about market trends . . .
- (ii) advice about the selection and retention of other advisers . . .
- (iii) advice about the advantages of investing in securities versus other types of investments . . .
- (iv) providing a selective list of securities . . . even if no advice is provided as to any one security . . .
- (v) asset allocation advice.¹⁸⁸

Again, based on the SEC’s seemingly broad construction of what constitutes “advising others about securities,” influencers would likely satisfy this element as much of the financial advice seen on social media platforms falls within these categories.¹⁸⁹

As demonstrated by the SEC guidance on these three elements of the definition, there is a strong argument that influencers satisfy the requirements and therefore fall within the statutory definition of an investment adviser and the SEC’s regulatory authority.

2. Other Aspects of the Advisers Act Framework

Assuming influencers fit into the category of investment adviser, further problems arise when looking to the next portion of the framework, the assets managed requirement. As previously noted, to register with the SEC—granted, a few exceptions apply—an investment adviser must manage at least \$100 million in assets, otherwise they are subject, instead, to

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (capitalization omitted); Egkolfopoulou, *supra* note 45 (capitalization omitted) (discussing how “[c]reators from a variety of ages, backgrounds, and ethnicities offer advice about how to open a Roth IRA, how to invest in real estate, how trading options makes more sense if you compare it to buying makeup, or how to use astrology to predict the price of Bitcoin”).

state regulatory bodies.¹⁹⁰ Two main issues present themselves at this stage.

First, it is unclear how to determine exactly how many assets a social media influencer who is posting on their platform is actually managing. This framework does not lend itself well to social media sites where individuals are often posting without awareness of exactly who is on the receiving end of their financial advice. The finfluencer is likely to be even less aware, or able to track, how much social media users are investing of their own funds based on the advice provided.

Second, even if it is possible to determine the approximate amount of assets a given finfluencer is managing through their posts, if the amount falls below the \$100 million threshold, then the person would still be outside SEC's authority and required to register with a state regulator.¹⁹¹ The fact that registration requirements differ state by state does not fit well with the ubiquitous presence of social media and its ability to blur state boundaries.¹⁹² This framework would therefore pose its own hardships relating to a lack of uniformity among states, as to if and how this group would be regulated.

The Internet adviser exemption, which allows registration with the SEC if the advice is provided through an interactive website regardless of the assets-managed requirement, likely does not apply to finfluencers due to the statutory definition of "interactive website."¹⁹³ The process of formulating and conferring investment advice based on client information supplied from the website, does not necessarily align with the way finfluencers provide advice.¹⁹⁴ Finfluencers more likely dole out generalized advice to larger groups through their posts, rather than use personal information provided by different viewers.¹⁹⁵ Furthermore, this amendment was executed in 2003, before finfluencers, in their modern sense, were around

¹⁹⁰ See *supra* Section II.A.

¹⁹¹ See *supra* Section II.A.

¹⁹² See *Should You Register Your New RIA Firm with the State or SEC?*, RIA IN A BOX (Feb. 25, 2021, 2:46 PM), <https://www.riainabox.com/blog/should-you-register-your-new-ria-firm-with-the-state-or-the-sec> [<https://perma.cc/X85X-5FAZ>].

¹⁹³ See *supra* Section II.A.

¹⁹⁴ See *supra* Section II.A. This does not mean that there may not be instances, such as through direct messaging or commenting on posts, where this type of interaction involving a finfluencer giving advice based on specific client information occurs. However, as one of the exceptions, which allows but does not require registration, finfluencers who may qualify under it likely would not, and many probably do not even know it exists.

¹⁹⁵ See also Egkolfopoulou, *supra* note 45 (discussing one finfluencer who posts general "videos describing how to retire a millionaire").

and held a large presence online.¹⁹⁶ Therefore, the exception was not intended to encompass this now much larger and more powerful group, and the unique avenues through which they approach social media and advising.

Similarly, the anti-touting provision of the Securities Act, was not set forth to deal with the issue of influencers, and therefore is not phrased to encompass groups of social media personnel who may not necessarily be receiving compensation from “an issuer, underwriter, or dealer.”¹⁹⁷ Instead, influencers are likely providing advice with the hopes that their encouragement of others to invest in certain stocks or markets will indirectly benefit their investments or help them grow a larger platform online—areas not covered by this provision.

C. *FTC Releases Guide for Social Media Influencers*

The FTC, a federal government agency with the dual mission of promoting competition and protecting consumers,¹⁹⁸ was created when the Federal Trade Commission Act (FTC Act) was signed into law in 1914.¹⁹⁹ The FTC satisfies its two-part mission “by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.”²⁰⁰ In an effort to assist the public in conforming with the FTC Act, the FTC publishes “guides” or simplified interpretations of various laws enforced by the FTC.²⁰¹

In 2019, with increased concerns that disclosure failures on social media were becoming a pervasive issue, the FTC released a new guide, specifically for social media influencers, summarizing its current guidance in this area.²⁰² The guide,

¹⁹⁶ See *supra* Section II.A.

¹⁹⁷ *S.E.C. v. Gagnon*, No. 10-CV-11891, 2012 WL 994892, at *10 (E.D. Mich. 2012); see *supra* Section II.A.

¹⁹⁸ *Mission*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/mission> [<https://perma.cc/U7S4-QCQ9>].

¹⁹⁹ *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/9XGD-YZ2V>].

²⁰⁰ *Federal Trade Commission (FTC)*, USASPENDING.GOV, <https://www.usaspending.gov/agency/federal-trade-commission?fy=2023> (last visited Mar. 18, 2023).

²⁰¹ See *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 87 Fed. Reg. 44288, 44289 (proposed July 26, 2022) (to be codified at 16 C.F.R. pt. 255); see also Matthew D. Stein & Kasey Boucher, *Attention Brands and Social Media Influencers! Recent FTC Guidance for Avoiding FTC Act Liability*, NAT’L L. REV. (Dec. 20, 2019), <https://www.natlawreview.com/article/attention-brands-and-social-media-influencers-recent-ftc-guidance-avoiding-ftc-act> [<https://perma.cc/63RP-Q7RM>].

²⁰² *FTC Releases Advertising Disclosures Guidance for Online Influencers*, FED. TRADE COMM’N (Nov. 5, 2019), <https://www.ftc.gov/news-events/press->

titled “Disclosures 101 for Social Media Influencers,” puts forth a simplified roadmap for how influencers can adhere to relevant disclosure requirements.²⁰³ It “lays out the agency’s rules” detailing when and in what manner influencers need to disclose their sponsorships to followers.²⁰⁴ Furthermore, it underscores that it is the influencer’s responsibility to provide disclosures about their endorsements, and outlines how an influencer’s brand relationships could require disclosures.²⁰⁵

The guide’s “plain, easy-to-read language” used to describe the regulatory requirements creates an accessible tool for influencers who may not otherwise understand the legal implications of their posts.²⁰⁶ The guide, which is only a few pages in length, provides digestible insight regarding the proper timeline and procedures for disclosing relevant brand endorsements so as to comply with the applicable regulations.²⁰⁷ Furthermore, it contains FTC staff tips about important information such as what may trigger a disclosure, and provides examples of how effective disclosures compare to ineffective ones.²⁰⁸

The publication of specialized guides, providing plain language direction for legal compliance, such as the United States FTC’s “Disclosures 101 for Social Media Influencers” and the New Zealand FMA’s “A guide to talking about money online” demonstrate these agencies’ commitment to adapting to advancements in society and educating this expanding cohort of social media influencers in an effective manner.²⁰⁹

III. FILLING IN THE GAP: A TAILORED REGULATORY APPROACH

Finfluencers are not what most people picture as a typical “investment adviser.” They also differ from the majority

releases/2019/11/ftc-releases-advertising-disclosures-guidance-online-influencers [https://perma.cc/3SB7-N3B4].

²⁰³ See generally *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM’N (Nov. 2019), <https://www.ftc.gov/tips-advice/business-center/guidance/disclosures-101-social-media-influencers> [https://perma.cc/UL9Z-67HY] (walking through specific steps for how and when to disclose endorsements in their social media posts).

²⁰⁴ *FTC Releases Advertising Disclosures Guidance for Online Influencers*, *supra* note 202; see also *Disclosures 101 for Social Media Influencers*, *supra* note 203.

²⁰⁵ *FTC Releases Advertising Disclosures Guidance for Online Influencers*, *supra* note 202.

²⁰⁶ Stein & Boucher, *supra* note 201.

²⁰⁷ *Disclosures 101 for Social Media Influencers*, *supra* note 203.

²⁰⁸ *FTC Releases Advertising Disclosures Guidance for Online Influencers*, *supra* note 202.

²⁰⁹ See *Disclosures 101 for Social Media Influencers*, *supra* note 203; *A Guide to Talking About Money Online*, *supra* note 139.

of entities that regulatory agencies like the SEC oversee.²¹⁰ However, as evidenced by recent market volatility and ongoing discussions by financial regulators, there is a growing amount of investment advice being provided on social media platforms, which may fall within what is considered standardly regulated advice.²¹¹ While other countries have begun to acknowledge and take steps to address this new breed of adviser, there is a lack of adequate regulation over this group within the United States.²¹² To address this timely issue, the United States should implement a revised financial advice regime that addresses the influx of advice being given out on social media platforms. Furthermore, the SEC should create simplified guidance for compliance, as other countries and regulatory agencies have done, aimed at the groups directly affected by such regulatory schemes, such as the influencers and online consumers.

A. *Taking a Page Out of New Zealand's Book*

The United States should follow New Zealand's lead and amend the current financial regulation regime to address, from a federal level, the growing amount of advice circulating on social media platforms. One of the primary factors that federal agencies consider when determining the need to promulgate new rules is the emergence of new technologies.²¹³ It is the SEC's responsibility, under its grant of rule-making authority, "to adapt securities law to the expanding securities markets and remain responsive to changing technologies."²¹⁴ The current securities laws, enacted before social media's societal takeover, leave investors unprotected against this currently unregulated territory.

In part, an updated regime should require individuals giving out certain financial advice on these sites to follow certain guidelines. For example, they should be required to comply with a Code of Conduct, obtain a license, or register directly with the SEC. Requiring adherence to a Code of Conduct, as New Zealand

²¹⁰ See, e.g., *About the SEC*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/strategic-plan/about> [<https://perma.cc/WMM7-8ZCE>] (describing the types of entities the SEC oversees in addition to investment advisers, which includes mutual funds, broker-dealers, transfer agents, national exchanges, and clearing agencies).

²¹¹ See *supra* Part II.

²¹² See *supra* Sections I.C–D.

²¹³ OFF. OF FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/5QRB-GBQ7>].

²¹⁴ John H. Matheson, *Securities and Exchange Commission*, FIRST AMEND. ENCYC. (2009), <https://www.mtsu.edu/first-amendment/article/819/securities-and-exchange-commission> [<https://perma.cc/6375-3HLY>].

has done,²¹⁵ that promotes integrity and disclosure of any conflicts an adviser has relating to their advice, would provide consumers with necessary information to make an informed decision about their investments. The SEC has already interpreted the Advisers Act to include a fiduciary duty for investment advisers, which applies not only to SEC and state-registered investment advisers but also other exempt advisers and those prohibited from registering under the Advisers Act.²¹⁶ This duty encompasses both a duty of care and duty of loyalty, the combination of which requires that the investment adviser always act in their client's best interest.²¹⁷ Therefore, if it is determined that finfluencers fall within the definition of an investment adviser, regardless of how many assets they manage or if they are otherwise exempted or prohibited from registering, then they must adhere to this duty which could provide the foundation for the Code. Their required disclosure should also go beyond the anti-touting provision, which is focused on the exchange of consideration from specific groups, and instead contemplate the way finfluencers often receive compensation for their posts.²¹⁸

B. Tailoring the Oversight to Social Media

When determining if advice is considered “regulated financial advice” the proper analysis should be tailored to how social media and other related online platforms operate. Given the way online platforms are structured,²¹⁹ it would be hard to determine a finfluencer's “assets managed” as a measurement. Instead, the inquiry should look to elements such as a user's number of followers or how many members are subscribed to a particular subgroup on a platform. If a finfluencer regularly gives out investment advice to over a certain amount of followers or members, it may make sense to have direct registration with the SEC as an investment adviser, a category some already potentially qualify under,²²⁰ or create a separate licensing feature under which individuals can register.

Part of the difficulty with attempting to regulate advice provided on social media sites, however, is that users, because of

²¹⁵ See *supra* Section I.D.

²¹⁶ Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248, 84 Fed. Reg. 33669, 33678 n.75 (July 12, 2019) (to be codified at 17 C.F.R. § 276).

²¹⁷ *Id.* at 33671.

²¹⁸ See *supra* Section II.A.

²¹⁹ See *supra* Section II.B.

²²⁰ See *supra* Section II.B.1.

different platforms' algorithms, do not necessarily need a significant following for their posts to gain a large amount of traction or reach an extended number of people. Therefore, SEC registration may not be necessary or practical for those users that provide one-off advice or post to a smaller number of followers but nonetheless sometimes reach a wider audience. To account for these views, methods besides registration could be utilized to support consumer protection goals, which may be better tailored to the ubiquity of the internet. For example, social media platforms could be encouraged or required to add warnings or notices at the bottom of posts containing financial advice, regardless of the poster's number of followers, as is done for potential misinformation about COVID-19.²²¹ These warnings could merely state a phrase or sentence such as "Learn more about investing your money safely," and then link to a webpage on the topic where users could find more information.

In early 2021, the SEC Office of Investor Education and Advocacy released an investor alert, warning investors about the risks of basing investments on social media "hot stock[s]" and providing tips for less risky long-term investments.²²² While this information is available on the SEC's website, it is unclear whether many of those participating in these social media investing trends are aware of the information or similar advisory pages from official sources. One way to ensure a more direct path to the target audience would be by having this type of webpage linked directly, such as through warning bubbles, on the platforms these users frequent.

C. *Enforcing the Regime Within First Amendment Bounds*

In terms of enforcing breaches, which could occur in situations where a finfluencer does not disclose required information or obtain a necessary license, a range of actions

²²¹ During the COVID-19 pandemic, the World Health Organization joined forces with social media platforms to prevent the spread of misinformation by providing consumers with links and warnings with additional information on suspect posts. For example, on Twitter, there may be warnings under certain posts that have misleading or fake COVID-19 information, which are identified by "a big blue exclamation mark with a message from Twitter: 'Get the facts about COVID-19' . . . [which then] links to a story debunking the claim." Malaka Gharib, *WHO Is Fighting False COVID Info on Social Media. How's That Going?*, NPR (Feb. 9, 2021, 11:26 AM), <https://www.npr.org/sections/goatsandsoda/2021/02/09/963973675/who-is-fighting-false-covid-info-on-social-media-hows-that-going> [<https://perma.cc/F3FJ-LVGK>].

²²² *Thinking About Investing in the Latest Hot Stock?*, U.S. SEC. & EXCH. COMM'N (Jan. 30, 2021), <https://www.sec.gov/oiea/investor-alerts-and-bulletins/risks-short-term-trading-based-social-media-investor-alert> [<https://perma.cc/3TFD-H538>] (capitalization omitted).

could be undertaken based on the degree of resulting harm. As a comparison, New Zealand's enforcement activity does not solely result in civil or criminal charges, but also entails revocation of licenses, issuing formal warnings, providing directions, or preventing the promotion of financial services.²²³ Similarly, the United States should consider a collection of potential enforcement actions, and tailor them to the severity of a breach, which could include court actions, monetary fines, or temporary or permanent injunctions from posting on specific social media sites.

When using another country's regime as a guide for regulatory updates in the United States, it is also important to consider how the proposed changes interact with freedom of speech rights under the First Amendment. The government generally cannot censor speech, unless certain exceptions apply such as if the speech "is intended, and likely to produce, 'imminent lawless action.'"²²⁴ One possible route to deal with the tension between regulating advice doled out on social media and First Amendment protections is aligning the interests of the media platforms with the goals of the agencies in overseeing this expanding world of unregulated financial advice.

One way to do this is by addressing the underlying reasons for the misalignment between the interests of social media platforms and regulatory agencies. This tension, in part, stems from the layers of safeguards provided to social media sites. Unlike governmental actors, social media sites are considered private companies, outside the scope of the First Amendment, and therefore can use their discretion to censor what users post on their webpages.²²⁵ On top of escaping First Amendment accountability, Section 230 of the Communications Decency Act provides "online intermediaries that host or republish speech," such as social media sites, with additional protection "against a range of laws that might otherwise be used to hold them legally

²²³ The FMA has acknowledged the need to prioritize when it comes to enforcement, focusing on breaches that are "justified in the public interest" or not merely "one-off, isolated, or minor events." *Enforcement Policy*, FIN. MKT. AUTH. (last updated Aug. 31, 2022), <https://www.fma.govt.nz/about-us/regulatory-approach/enforcement/enforcement-policy/> [<https://perma.cc/YE8W-95LF>]; FIN. MKT. AUTH., REGULATORY RESPONSE GUIDELINES 8 (2016), <https://www.fma.govt.nz/assets/Policies/160824-Regulatory-response-guidelines-policy.pdf> [<https://perma.cc/UAF7-7U7T>].

²²⁴ *Freedom of Expression*, ACLU, <https://www.aclu.org/other/freedom-expression> [<https://perma.cc/62DS-M5S4>] (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

²²⁵ Lata Nott & Brian Peters, *Free Expression on Social Media*, FREEDOM F. INST., <https://www.freedomforum.org/free-speech-on-social-media/> [<https://perma.cc/37QV-MJ3J>].

responsible for what others say and do” on their platforms.²²⁶ While this additional shield “from content-related suits” may allow free speech to flourish online, it simultaneously disincentivizes social media companies from moderating the majority of content posted on their sites.²²⁷ Both Democrats and Republicans agree, although for varying reasons, with calls to reform the scope of Section 230.²²⁸ Even “one of the biggest benefactors of the law’s sweeping protections, Facebook founder and CEO Mark Zuckerberg believes the government should regulate internet companies” to some degree.²²⁹ Narrowing Section 230, so that social media sites are not entirely safeguarded from liability when it comes to the financial advice being provided on their sites is one way to encourage cooperation and implement this proposed financial advice regime.

In addition to implementing new rules or regulations, the SEC should clarify where finfluencers fall within its regulatory structure—the current structure raises more questions than answers over finfluencers’ regulatory status.²³⁰ This should occur regardless of whether or not a new financial advice regime is promulgated, as there needs to be some form of guidance regarding how finfluencers fit into the framework to protect both those receiving and those providing the advice online. The guidance should mirror the FMA and FTC’s efforts in these areas, both of which have provided concise and accessible tips for compliance.²³¹ The SEC should similarly create simplified guidelines for finfluencers that outline how their advice may stray into the field of regulated financial advice, and for consumers that indicate ways they can determine whether they should follow advice from certain online influencers. Links to these guidelines should be placed in warning bubbles that social media sites are encouraged to attach to posts containing investment advice.

²²⁶ Section 230, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/HQ8J-UQGN>]; see 47 U.S.C. § 230.

²²⁷ Tessa R. Patterson, Comment, *Private Solutions to a Public Problem: Next Steps for Section 230*, 54 ARIZ. STATE L. J. 305, 310 (2022); Section 230, *supra* note 226.

²²⁸ Patterson, *supra* note 227, at 311 (noting that Republicans are concerned with how political, primarily conservative, speech is moderated by social media platforms whereas Democrats are focused on how social media is used to disseminate disinformation).

²²⁹ *Id.* at 314 (footnote omitted).

²³⁰ See *supra* Section II.B.

²³¹ See *supra* Section I.D; Section II.C.

CONCLUSION

Increasingly, social media users are relying on platforms and content creators for more than simply connecting with friends or family.²³² This increased dependency, specifically as related to financial investment advice, points to the pressing need to examine related regulatory regimes.²³³ Recent market volatility, resulting from insufficient regulation of financial advice on social media, emphasizes the need to implement responsive regulation.²³⁴

An inspection of the United States's framework reveals gaps in the oversight of finfluencers, and raises a multitude of questions as to how to place this subset of investment advisers into a regulatory scheme that allows for efficient and socially beneficial supervision.²³⁵ While certain SEC regulations and reports appear to touch on the issue, social media's burgeoning role in financial advising creates a need for more pointed regulation that considers the complexities arising from the uncharted territory of giving and receiving financial advice on social media.²³⁶

These gaps should be minimized by requiring finfluencers to comply with certain consumer protection rules, such as a Code of Conduct, licensing, or registration requirements, which should be tailored to how social media platforms operate.²³⁷ Additionally, the SEC should work with social media platforms to include warnings on posts discussing investment advice. Links to official, simplified guidance on the topic may be an efficient way for regulators to more directly reach their target audiences.²³⁸

If the SEC decides to amend or promulgate rules aimed at addressing these gaps, under its standard rulemaking process, the public will be notified about any proposals and be provided an opportunity to respond with comments, which are then considered in determining the Commission's next steps.²³⁹ Since the world of finfluencers, and social media generally, is an emerging and constantly changing area, there is not presently a

²³² See *supra* Introduction.

²³³ *Id.*

²³⁴ See *supra* Introduction; Part I.

²³⁵ See *supra* Section II.B.

²³⁶ See *supra* Section II.A; Part III.

²³⁷ See *supra* Part III.

²³⁸ *Id.*

²³⁹ *Rulemaking, How It Works*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/glossary/rulemaking-how-it-works> [<https://perma.cc/8T85-FT34>].

large body of research on this topic. Therefore, questions remain as to how these suggestions would be implemented by governmental agencies, received by consumers, and avoid preclusion by host website's heightened First Amendment protections. Specifically, there may be differing opinions over whether expanding regulation is necessary to protect the public interest or an unnecessary act of governmental overreach. Regardless of public consensus on the extent of regulation, it remains imperative that this new wave of investment advice is acknowledged and addressed in a timely manner. Otherwise, regulators are effectively authorizing social media to be the wild west of online investment advice.

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