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### The Corporate Forum

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# RESPONSE

## THE CORPORATE FORUM<sup>†</sup>

SERGIO ALBERTO GRAMITTO RICCI\* & CHRISTINA M. SAUTER\*\*

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<sup>†</sup> An invited response to Jill E. Fisch, *GameStop and the Resurgence of the Retail Investor*, 102 B.U. L. REV. 1799 (2022).

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## INTRODUCTION

In *GameStop and the Resurgence of the Retail Investor*, Jill E. Fisch masterfully weighs the advantages and risks associated with the rise of retail investors.<sup>1</sup> After a detailed analysis, Fisch welcomes the resurgence of retail investors as a new reality that should be embraced by society, corporations, the market, and regulators.<sup>2</sup> Despite saluting the resurgence of retail investors as good news, Fisch also cautions about risks associated with the growth of retail investors.<sup>3</sup> In our response, we focus on one of the risks associated with the growth of retail investing that Fisch surveys: uncontrolled information sourcing.<sup>4</sup> Drawing on our work on retail investors, we revisit an instrument dear to the Securities and Exchange Commission (“SEC”), whose potential has not yet been unleashed: the *corporate forum*.

In 2008, the SEC adopted regulations that encouraged the use of shareholder e-forums.<sup>5</sup> More specifically, the SEC adopted Rule 14a-17 providing that registrants, shareholders, and third parties acting on behalf of registrants or shareholders who create, operate, or maintain a forum will not incur federal securities liability for statements made or information provided by other parties in the forum.<sup>6</sup> The SEC also added a section to Rule 14a-2 exempting solicitations made in a shareholder e-forum from the proxy solicitation rules if certain conditions are satisfied.<sup>7</sup> In adopting these rules, the SEC purposely provided for flexibility in creating and maintaining forums “to facilitate experimentation, innovation, and greater use of the Internet to further shareholder communications.”<sup>8</sup> As we envision corporate forums, they could make retail investing better informed and more engaging. Hosted on the websites of listed corporations, corporate forums could improve the information flow

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<sup>1</sup> See generally Jill E. Fisch, *GameStop and the Resurgence of the Retail Investor*, 102 B.U. L. REV. 1799 (2022).

<sup>2</sup> *Id.* at 1831-51.

<sup>3</sup> *Id.* at 1851-60.

<sup>4</sup> See *id.* at 1851-54 (detailing issues raised by investors sourcing information via social media).

<sup>5</sup> 17 C.F.R. § 240.14a-17 (2008). In *I Forum degli Azionisti*, Matteo Gargantini surveys other jurisdictions that have adopted provisions to regulate corporate forums. For example, he highlights that Germany has adopted specific regulation on corporate forums in the *Aktionärsforumsverordnung*. Matteo Gargantini, *I Forum degli Azionisti*, in PRINCIPIO CAPITALISTICO: *QUO VADIS?* 357-59 (Federico Briolini ed., 2016). Gargantini also points out that Spain’s *Ley de Sociedades de Capital* provides that “issuers establish on their websites a forum accessible to shareholders and their associations in order to facilitate the interaction across investors before a shareholders meeting” (translation of the authors). *Id.* at 360.

<sup>6</sup> 17 C.F.R. § 240.14a-17(b). Registrants, shareholders, or third parties operating a forum on behalf of either registrants or shareholders remain liable for statements they make or information they provide in a forum. *Id.*

<sup>7</sup> 17 C.F.R. § 240.14a-2(b)(6); see also Electronic Shareholder Forums, 73 Fed. Reg. 4450, 4453 (Feb. 25, 2008) (codified at 17 C.F.R. § 240.14a-17).

<sup>8</sup> Electronic Shareholder Forums, 73 Fed. Reg. at 4451.

among and between shareholders and corporations as well as enhance the year-round engagement of retail investors.

Despite the SEC's encouragement and the flexibility corporations had in creating and running forums, corporations were not quick to create forums and the concept failed to gain significant traction.<sup>9</sup> It appears that, in general, corporate management was not eager to interact with smaller investors, finding it only necessary to speak with larger shareholders, and, similarly, smaller investors deserted the forums which were created.<sup>10</sup> Moreover, it seems that uncertainty still surrounds how forums should be run, questions regarding potential securities liability still remain to be answered, and concerns that forums may evolve into chat rooms for shareholders and be ignored by corporate leadership still loom.<sup>11</sup> The SEC may have been ahead of its time in encouraging forums for shareholder engagement.

We believe, however, that with the reemergence of retail investors along with their inclinations to gather online and desire to interact with corporate management, that the time is now ripe to revive the forum concept.<sup>12</sup> Our

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<sup>9</sup> Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 846 (observing that corporations do not appear to have used forums); Blake Smith, *Proxy Access and the Internet Age: Using Electronic Shareholder Forums to Improve Corporate Governance*, 2008 COLUM. BUS. L. REV. 1111, 1139 (discussing lack of "template" for forums). According to a Broadridge survey, shortly after the regulations went into effect in 2008, only 4% of forty-two public companies said they were planning on creating a forum or "seriously considering" one. Karey Wutkowski, *Companies Shrug Off Shareholder E-Forum Idea*, REUTERS (May 16, 2008, 8:59 AM), <https://www.reuters.com/article/us-column-lifting/companies-shrug-off-shareholder-e-forum-idea-idUSN1655068620080516>.

<sup>10</sup> See Wutkowski, *supra* note 9. In 2008, the parent company of U-Haul International created a forum that had little shareholder participation—less than one hundred posts and "few direct questions for management." *Id.* It should be noted that institutional investors typically interact among themselves using other methodologies than the forum. See Gargantini, *supra* note 5, at 369.

<sup>11</sup> See Smith, *supra* note 9, at 1139 (arguing flexibility in creating forums should be considered benefit); Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1305 (2009) (stating effectiveness of forums could be diminished if forums became chat rooms, as some commentators feared); Janet Dignan, *On the Way to the Investor Forum*, IR MAG. (July 30, 2013), <https://www.irmagazine.com/technology-social-media/way-investor-forum> [<https://perma.cc/Q2ZV-SPJS>] (explaining that among reasons corporate leadership were not adopting forums was "worry about breaching regulations, especially the risk of selective disclosure, and generally fear it's all a bit like a Yahoo! investor chatroom").

<sup>12</sup> See Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51, 52, 65, 72 (2021) [hereinafter Gramitto Ricci & Sautter, *Corporate Governance Gaming*] (discussing how new generations of retail investors gather online); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Wireless Investors Movement*, UNIV. CHI. BUS. L. REV. BLOG (Jan. 28, 2022), <https://businesslawreview.uchicago.edu/2022/01/28/the-wireless-investors-movement%EF%BF%BC/> [<https://perma.cc/9KNX-6LK5>] (detailing how Millennials and GenZ'ers gather and form community bonds online).

proposal takes Fisch's concerns seriously and suggests a path forward to ameliorate issues related to retail investing. It needs to be understood as an initiative that supplements more general efforts to make retail investors better equipped to navigate financial markets, such as increasing citizens' investing education across the board.<sup>13</sup>

Given the short nature of this Response, we limit our scope to a succinct discussion of the main mechanics of the corporate forum, of the benefits the corporate forum could provide, and of the feasibility hurdles that might undermine the success of corporate forums. We leave the analysis of policy questions such as those on the mandatory or private-ordering nature of the corporate forum as well as a thorough and complete analysis of the securities regulations implications to later investigation. However, we feel compelled to point out that those are fundamental questions, whose answer might determine the diffusion of corporate forums.

#### I. ONLINE INFORMATION SOURCING AND ENGAGEMENT ISSUES

As Fisch points out, the reemergence of retail investors is linked to the rise of commission-free, mobile-first trading apps, like Robinhood.<sup>14</sup> She notes that traditionally younger and more diverse investors have not participated in the capital markets due, in part, to their inability to relate to brokers and financial advisors who have served as gatekeepers.<sup>15</sup> Commission-free trading apps have removed this barrier, making it easier for younger retail investors to purchase shares—including fractional shares—directly via their phones, where younger generations are most comfortable.<sup>16</sup> Relatedly, as Fisch explains, and as we also have examined in prior work, younger retail investors rely heavily on social

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<sup>13</sup> We have proposed mandatory investing education—which includes coverage of financial markets and corporate governance—at least at the high school level. *See generally* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Educated Retail Investor: A Response to "Regulating Democratized Investing,"* 83 OHIO ST. L.J. ONLINE (forthcoming 2022) [hereinafter Gramitto Ricci & Sautter, *The Educated Retail Investor*], [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4189670](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4189670) [https://perma.cc/649Z-CGFW].

<sup>14</sup> Fisch, *supra* note 1, at 1810-11; *see also* Gramitto Ricci & Sautter, *Corporate Governance Gaming, supra* note 12, at 73-75 (discussing how mobile-first trading apps and online communication facilitated growth of retail investing).

<sup>15</sup> Fisch, *supra* note 1, at 1833; *see also generally* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Harnessing the Collective Power of Retail Investors*, in A RESEARCH AGENDA FOR CORPORATE LAW (Christopher M. Bruner & Marc Moore eds., forthcoming 2023) [hereinafter Gramitto Ricci & Sautter, *Harnessing the Collective Power*], [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4147388](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4147388) [https://perma.cc/77M3-4F5M] (discussing how mobile-first investing apps have been playing a role in increasing diversity of share owners).

<sup>16</sup> *See* Fisch, *supra* note 1, at 1834; *see also* Gramitto Ricci & Sautter, *Corporate Governance Gaming, supra* note 12, at 53, 71 (describing how commission-free trading apps made trading more accessible).

media and online venues to source information.<sup>17</sup> In a set of contributions on retail investors we use the term “wireless investors” to refer to investors who typically invest using mobile-first investing apps and are inclined to use apps, social media, and technology to discuss their investing efforts and to gather information.<sup>18</sup> A large number of wireless investors belong to the Millennial and GenZ generations.<sup>19</sup>

Wireless investors have led the charge that has been determining the growth of retail investing. Young generations of investors rely on social media and then friends, family, podcasts, and traditional investing sites to source investing information.<sup>20</sup> The reliance on sources other than unwieldy mandated disclosure is explainable with Millennials and GenZ’ers’ preference for processed information, readily available for consumption.<sup>21</sup> As Fisch cautions, however, the reliance on online sourced information is accompanied by the potential for misinformation.<sup>22</sup> In addition, even before these new generations of retail

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<sup>17</sup> Fisch, *supra* note 1, at 1851-54; *see also* Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 12, at 75-76; Gramitto Ricci & Sautter, *Harnessing the Collective Power*, *supra* note 15 (manuscript at 3). *See generally* Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Wireless Investors* (Sept. 6, 2022) (unpublished manuscript) (on file with author).

<sup>18</sup> Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 12, at 51, 53 (introducing terms “wireless generations” and “wireless investors”).

<sup>19</sup> Gramitto Ricci & Sautter, *Harnessing the Collective Power*, *supra* note 15 (manuscript at 2-3) (discussing how mobile-first apps have facilitated investing for new generations of investors, in particular Millennials and GenZ’ers).

<sup>20</sup> Jack Caporal, *Gen Z and Millennial Investors: Ranking the Most Used, Trusted Investing Tools*, MOTLEY FOOL (Aug. 3, 2021, 2:59 PM), <https://www.fool.com/research/gen-z-millennial-investors-tools/> [https://perma.cc/N4XB-P5Y4]. A 2021 survey of Millennial and GenZ investors revealed that 77% of those investors relied most heavily on social media, including Instagram, Facebook, Reddit, TikTok, Twitter, and YouTube, for investing information in the preceding thirty days. *Id.* Other sources, including friends, family, podcasts, and traditional investing sites, were a close second to social media, with 74% of Millennials and GenZ’ers indicating they relied on these other sources. *Id.* Of other sources, traditional investing websites were the most popular with Millennials while friends and family were more popular with GenZ’ers. *Id.*

<sup>21</sup> *An Interview with Joseph Caruso*, OPTIMIZER MAGAZINE 2022 SUPPLEMENT: DEALING WITH DISRUPTION 11 (Feb. 2022) (re-thinking communication strategies to appeal to younger generations of investors). To communicate effectively with younger generations of investors, proxy solicitor Alliance Advisors recommends that:

Companies need to engage with more graphic images both in print and in digital formats and fewer words if possible. Gen-Z, Millennials and Xers . . . have less time or willingness to read a proxy statement. Cut to the chase in your messaging, tell them what you need them to do and why in ten seconds or less.

*Id.*

<sup>22</sup> Fisch, *supra* note 1, at 1852-53; *see also* Gramitto Ricci & Sautter, *The Educated Retail Investor*, *supra* note 13 (manuscript at 5).

investors recently emerged, studies had found that retail investors were not reading the extensive disclosure of companies in which they invested.<sup>23</sup>

Moreover, canonical sources of information such as mandatory disclosure could prove hard to navigate and comprehend for the average citizen with small investments. The lingo is not accessible to everyone. The rules of the corporate governance game require specific knowledge. Not only is “[i]nvestor financial literacy . . . an ongoing challenge,” as Fisch points out, but corporate governance literacy is also a problem.<sup>24</sup> Furthermore, the *infrastructure* of shareholders meetings is not conducive to the involvement of retail investors in the life of a corporation. As a result, retail investors often miss out on a key aspect of investing: corporate governance.<sup>25</sup>

Against this backdrop, the corporate forum could enhance the flow of information among shareholders and between a corporation and its shareholders.<sup>26</sup> It could also facilitate retail investors’ engagement by fostering a form of shareholder involvement that continues during the year rather than being limited to shareholders meetings.<sup>27</sup> Moreover, the corporate forum could be a venue to provide shareholders with just-in-time investing education—an

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<sup>23</sup> Tim Loughran & Bill McDonald, *The Use of EDGAR Filings by Investors*, 18 J. BEHAV. FIN. 231, 232 (2017) (studying EDGAR downloads between 2003 and 2012 and finding that, on average, investors only downloaded annual reports 28.4 times on day of filing and next day); see also Jill E. Fisch, *Standing Voting Instructions: Empowering the Excluded Retail Investor*, 102 MINN. L. REV. 11, 50 (2017) (explaining that investors likely do not read federally mandated disclosure); Troy Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 431-32 (2003) (“Realistically, few people expect the ‘average’ individual investor to focus in any detail on the information that companies disclose.”); Kobi Kastiel & Yaron Nili, *In Search of the “Absent” Shareholders: A New Solution to Retail Investors’ Apathy*, 41 DEL. J. CORP. L. 55, 69 (2016) (discussing increase in length of disclosure). Another potential issue is that if investors do want to access disclosure by using the Electronic Data Gathering, Analysis, and Retrieval system, also known as EDGAR, it requires some knowledge regarding how to navigate the database. This includes a basic understanding of what information is contained in each SEC filing to find the relevant filing.

<sup>24</sup> Fisch, *supra* note 1, at 1858.

<sup>25</sup> In *The Educated Retail Investor: A Response to “Regulating Democratized Investing,”* we emphasize the corporate governance dimension of investing and recommend that investing education covers the corporate governance aspects of investing. Gramitto Ricci & Sautter, *The Educated Retail Investor*, *supra* note 13 (manuscript at 10-12).

<sup>26</sup> See Electronic Shareholder Forums, 73 Fed. Reg. 4450, 4459 (Feb. 25, 2008) (codified at 17 C.F.R. § 240.14a-17).

<sup>27</sup> To be clear, corporations may keep the forum open year-round for posting, or they may open it for certain set periods at salient moments of the year.

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educational model Fisch advocates for in *GameStop and the Resurgence of the Retail Investor*.<sup>28</sup>

The corporate forum would provide a centralized venue for all shareholders to discuss issues that are most important to them.<sup>29</sup> We conceive the corporate forum as an opportunity for investors to check information and seek clarification rather than a burden on corporations to rectify misinformation generated or spread by third parties. The success of the corporate forum as an instrument to make investors better informed ultimately depends on some of its features. If investors find it user-friendly and—to some extent—engaging, it is more likely that they will use it and read it.

## II. A THUMBNAIL SKETCH OF THE CORPORATE FORUM

### A. *The General Framework*

Although this article focuses on a broad overview of the proposed corporate forum, the architecture of the forum matters. Without some parameters to make the forum appealing for both shareholders and corporations, the forum is an empty concept that will fail to accomplish the tandem goals of information sourcing and engaging retail investors.<sup>30</sup> Accordingly, setting forth suggested parameters is essential for ensuring the forum is a beneficial tool for both corporations and their retail investors.

The corporate forum would be hosted on listed corporations' websites. Although the corporate forum could be run by a corporation's Investor Relations ("IR") team, the shell to host the corporate forum could be provided by third parties such as Say Technologies, a company that provides platforms that allow

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<sup>28</sup> Fisch, *supra* note 1, at 1859 (describing just-in-time education and explaining its effectiveness in financial education). In the context of financial education, just-in-time training "aims to provide financial education at its moment of maximal relevance and usefulness — when the financial decision itself arises, and the education can be immediately applied." Michael Kitces, *Financial Literacy Effectiveness & Providing Just-In-Time Training By Financial Advisors*, KITCES.COM (Sept. 21, 2016, 7:01 AM), <https://www.kitces.com/blog/financial-literacy-program-effectiveness-just-in-time-training-by-financial-advisors/> [<https://perma.cc/57VT-EWHN>].

<sup>29</sup> The corporate forum is not meant to serve only wireless investors, whose investing endeavors happen primarily online, but all current and future investors. An online forum could be easily viewed by virtually everyone although only verified shareholders should have the ability to post. The internet is already the venue where substantial corporate communication takes place.

<sup>30</sup> In a 2014 speech, former SEC Commissioner Luis Aguilar called for an investigation into why more corporations had not created forums and for the SEC to consider whether amendments to the rules were necessary. Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, *Looking at Corporate Governance from the Investor's Perspective* (Apr. 21, 2014), <https://www.sec.gov/news/speech/2014-spch042114laa.html> [<https://perma.cc/RX54-XRBD>].



investors to interact with the companies in which they invest.<sup>31</sup> The forum could be a discussion board similar to a Reddit subreddit incorporating attributes of the Say Technologies Q&A platform.<sup>32</sup> Only current shareholders would be allowed to post questions and comments on the corporate forum, but shareholders' questions and potential related answers would be visible to anyone who visits the corporation's website.<sup>33</sup> The forum could have a search bar which can be used to search for terms mentioned in forum posts. This would help to ensure the ability to use the forum for information gathering. A possible way to determine the popularity of statements made is to incorporate an upvoting feature like that used in Say Q&A and on Reddit. To further appeal to shareholders and also be useful to management, posts could reflect the number of shares represented by the poster, the total number of up and down votes a post receives, as well as the number of shares represented by upvotes and downvotes. Furthermore, like Say Q&A, the forum could be searchable by the most popular posts represented by votes and also by shares associated with these votes.<sup>34</sup> In addition, like Reddit, the forum could be sorted via new posts, via most popular

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<sup>31</sup> Through the Say Technologies platform, companies can invite shareholders to submit questions for their annual meetings, earning calls, and other events via Say Q&A. *Join the Conversation With the Companies You Invest In*, SAY, <https://www.saytechnologies.com/investor> [<https://perma.cc/V4MF-MSPV>] (last visited Oct. 25, 2022). Shareholders can upvote the questions they would like the company to address, and executives respond to a selection of the top questions during the event. *Id.* Say also offers a polling service which allows shareholders to provide direct feedback to companies by participating in company-created polls. *Id.*

<sup>32</sup> See *Stocks—Investing and Trading For All*, *r/stocks*, REDDIT, <https://www.reddit.com/r/stocks/> (last visited Oct. 25, 2022); SAY, <https://app.saytechnologies.com/> [<https://perma.cc/PP38-M3X4>] (last visited Oct. 25, 2022).

<sup>33</sup> Shareholder posts should be governed by certain minimum usage rules and abide by guidelines meant to promote the engagement of a diverse community while still fostering robust and critical conversations. Guidelines can be modeled after those found on popular social media sites like Instagram and Twitter. See, e.g., *The Twitter Rules*, TWITTER: HELP CTR., <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/LFE6-VZTQ>] (last visited Oct. 25, 2022); *Community Guidelines*, INSTAGRAM: HELP CTR., [https://help.instagram.com/477434105621119/?helpref=uf\\_share](https://help.instagram.com/477434105621119/?helpref=uf_share) [<https://perma.cc/69UM-AGLA>] (last visited Oct. 25, 2022). For example, although Instagram's Community Guidelines allow "stronger conversation" around individuals who have a "large public audience" or are in the news, the Guidelines prohibit "attack[ing] anyone based on their race, ethnicity, national origin, sex, gender, gender identity, sexual orientation, religious affiliation, disabilities, or diseases." *Id.* If a Q&A option is made available, corporations could refrain from answering based on corporate policies.

<sup>34</sup> Votes consist of preferences expressed by individual users.

(based on votes) posts during certain periods, and via posts that are rising in popularity (or “trending” posts).<sup>35</sup>

To be eligible to post on the forum, shareholders would need to verify their share ownership. To verify shares, the forum could link to investors’ brokerage accounts using an application programming interface, such as Plaid.<sup>36</sup> Using such an interface allows companies to easily verify shareholder status without having to set a record date each time companies would like to engage with shareholders via the forum. Verification via an interface like Plaid is particularly useful for corporations to identify, to some extent, who their retail investors are, although investors’ contact information would remain confidential.<sup>37</sup> The verification process would help assuage another concern which is that individuals who post in the forum are who they claim to be.<sup>38</sup> In adopting Rule 14a-17, the SEC explicitly did not take a stance on whether posters could operate anonymously and, instead, left it to those running the forum to decide.<sup>39</sup> We believe that, unlike with some online venues like Reddit, pseudonyms should not be allowed and, instead, at least the entire first name and the last name initial should be used as is the case with the Say Technologies platform.

B. *When the Corporate Forum Opens*

Issuers could keep the corporate forum open year-round or open it at some salient points of the year. As the SEC suggests, running the corporate forum would make issuers bear an additional cost.<sup>40</sup> The cost of running the forum would depend also on the features of the forum, which can make it more or less

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<sup>35</sup> Reddit currently allows posts to appear via top voted posts based on Today, This Week, This Month, This Year, and All Time.

<sup>36</sup> See Efi Pylarinou, *Tech Empowering Digital Shareholder Communities*, MEDIUM (Apr. 16, 2021), <https://efipm.medium.com/tech-empowering-digital-shareholder-communities-4fd2483b9c6a> [<https://perma.cc/R632-L6FK>] (stating that Say Technologies uses Plaid to verify share ownership).

<sup>37</sup> See Gramitto Ricci & Sautter, *Harnessing the Collective Power*, *supra* note 15 (manuscript at 7-8) (detailing difficulty corporations encounter in identifying and communicating with retail investors); Electronic Shareholder Forums, 73 Fed. Reg. 4450, 4451 (Feb. 25, 2008) (codified at 17 C.F.R. § 240.14a-17) (noting that forums could be structured to preserve privacy without “disclosing [a] participant’s name, address, or other identifying information”).

<sup>38</sup> As the SEC pointed out in its release, some individuals would likely need to reveal their identities, even in a forum that is anonymous, if the failure to identify oneself would lead to a material omission. See Electronic Shareholder Forums 73 Fed. Reg. at 4452 n.24. Furthermore, experts have recommended that companies that create forums and allow their employees who are also shareholders to participate in the forms “should adopt policies that set out the scope of their participation in such forums.” Keir Gumbs & Brandon Gay, *The Future of Electronic Shareholder Forums*, 18 CORP. GOVERNANCE ADVISOR 11, 13 (Jan./Feb. 2010).

<sup>39</sup> See Electronic Shareholder Forums, 73 Fed. Reg. at 4450-59.

<sup>40</sup> See *id.* at 4455-56 (discussing potential costs of forum).

costly.<sup>41</sup> The costs associated with running a forum could determine whether corporations keep the forum open year-round or only in certain periods.

Companies that do not keep the forum open year-round might make the forum active in relation to shareholders meetings as well as on a quarterly basis to accompany earnings calls. More specifically with respect to shareholders meetings, the forum can open at two key points in time. First, the corporate forum could open before the record date. The purpose of opening at this time would be to allow shareholders to ask questions and obtain information allowing them to determine whether they would like to increase their shareholdings before the record date.

Relatedly, a 2021 study by Scott Hirst and Adriana Robertson found that in 88% of shareholder votes, shareholders were not aware of what would be on the meeting agenda prior to the record date.<sup>42</sup> In fact, one of the goals of the corporate forum would be for shareholders to become more informed about the matters that are planned to be discussed at the upcoming shareholders meeting, before the record date.<sup>43</sup> In addition, the forum could open at a set time after the record date and receipt of the proxy materials but prior to the shareholders meeting. The purpose of opening the forum at this point would be to facilitate information gathering before voting and to incentivize proxy voting.<sup>44</sup>

As a shareholders meeting approaches, both those running the forum and those posting in the forum must be cognizant of not breaching proxy solicitation regulations. As previously mentioned, the SEC amended Rule 14a-2(b) to provide that communications made by individuals not directly or indirectly seeking a proxy more than sixty days prior to the date announced for a shareholders meeting (or if the announced date is less than sixty days away, two days after the announcement) are exempted from proxy rules if certain conditions are satisfied.<sup>45</sup> In settling on sixty days, the SEC balanced the information gathering function of a forum against proxy solicitation concerns.

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<sup>41</sup> See *id.* (listing attributes of forums which may affect costs).

<sup>42</sup> Scott Hirst & Adriana Z. Robertson, *Hidden Agendas in Shareholder Voting*, 39 *YALE J. ON REG.* 1161, 1163 (2022). For retail investors, this is particularly significant if they hold shares in a margin account as the terms and conditions of retail brokerages allow the brokerage to lend shares in margin accounts. *Id.* at 1177-78. If brokerages have lent shares in margin accounts prior to the record date, the vote is held by the borrower of the shares not by the retail investor. See Gramitto Ricci & Sautter, *Corporate Governance Gaming*, *supra* note 12, at 82-83 (explaining that shares that have been loaned must be recalled prior to record date for true owner of shares to have right to vote shares).

<sup>43</sup> However, it is important to highlight that certain communications about agenda items could amount to a proxy solicitation. We discuss issues regarding communications on corporate forums and proxy solicitation regulation in this Section of the Article (Section II.B) and in Part III.

<sup>44</sup> See Gargantini, *supra* note 5, at 371-72 (arguing that interaction among investors on forum could lead more shareholders to vote).

<sup>45</sup> 17 C.F.R. § 240.14a-2(b)(6) (2008); see also Gumbs & Gay, *supra* note 38, at 12-13 (providing examples of indirectly seeking a shareholder's vote).

Importantly, in striking the balance, the SEC determined that the sixty-day cut-off period prior to a meeting still allowed shareholders enough time to “consider the information disclosed to them about a planned shareholder meeting.”<sup>46</sup> However, both corporations and shareholders must tread carefully in the forum as it relates to items on the agenda for shareholders meetings, as the SEC has broadly defined what it means to directly or indirectly seek a proxy. For example, if corporate representatives post a discussion relating to items on the agenda, there is a potential this could be interpreted as seeking a proxy.<sup>47</sup>

C. *Posting on the Corporate Forum and Receiving Responses*

When responding to shareholder questions and otherwise communicating on the forum, management should strive to explain concepts in easy-to-understand terms. Along those lines, the forum should have an easily accessible section containing a glossary of terms to ensure that the topics discussed are comprehensible to individuals not versed in financial or corporate lingo.<sup>48</sup> The corporate forum could also provide easily accessible just-in-time investing education materials.<sup>49</sup> Similarly, a Frequently Asked Questions section to which management can refer would be beneficial in reducing redundant questions and providing information that investors might find useful.

Management should not be confined to solely written posts. For example, given wireless investors’ affinity for social media like TikTok and “bite-sized” presentations of information, short video clips of members of the management team responding to questions or otherwise presenting information could reach a broad audience.<sup>50</sup> No matter if management utilizes a video format or written

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<sup>46</sup> See Electronic Shareholder Forums, 73 Fed. Reg. at 4454.

<sup>47</sup> See Gumbs & Gay, *supra* note 38, at 12-13.

<sup>48</sup> John and Lewis Gilbert, brothers who focused on shareholder rights during the 20th century, published a multiple-chapter, several-hundred-page Annual Report each year summarizing the over 200 annual meetings they or their representatives attended that year. Of particular note, their Annual Report commenced “with a five-page glossary of words and terms most likely to stump the financial novice.” Irving Kahn, *The Gilbert Brothers—Gadflies or Eagles?*, 27 FIN. ANALYSTS J. 89, 89-90 (May-June 1971).

<sup>49</sup> On the importance of just-in-time educational materials, see Fisch, *supra* note 1, at 1859. See also Gramitto Ricci & Sautter, *The Educated Retail Investor*, *supra* note 13 (manuscript at 10-12) (arguing that just-in-time investing education could supplement scholastic investing education curricula).

<sup>50</sup> See Amy Ouellette, *What Gen Z Really Wants From the Workplace*, EBN (July 20, 2022, 9:00 AM), <https://www.benefitnews.com/advisers/opinion/the-employee-benefits-gen-z-wants-and-expects> [<https://perma.cc/VWC9-52SB>] (indicating that GenZ’ers favor bite-sized information).

format, their communication would be most effective if management keeps the audience in mind.<sup>51</sup>

In monitoring shareholder conversations, corporate leaders should keep in mind that sometimes the vocal or “popular” individuals are the ones who may be least informed.<sup>52</sup> Moreover, views expressed on the forum may not necessarily reflect the average shareholder in the corporation.<sup>53</sup> Admittedly, this is not a perfect solution as misinformation tends to spread quickly, sometimes more quickly than accurate information regarding the same matter.<sup>54</sup> However, if inaccurate information is raised in shareholder conversations on the forum, management will have an opportunity to correct such misinformation.<sup>55</sup> In fact, “to quickly dispel any misleading information” is one of the benefits to which the SEC pointed in adopting Rule 14a-17.<sup>56</sup>

### III. HOW THE CORPORATE FORUM ENHANCES INFORMATION GATHERING AND ENGAGEMENT ACROSS INVESTORS

The forum would provide a centralized venue, on the company’s website, where the company would be able to monitor shareholder sentiment and, depending on how the forum is run, rectify misinformation and disinformation. Shareholders would be able to check information by asking questions in the

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<sup>51</sup> Regarding writing his annual letter to Berkshire Hathaway shareholders, Warren Buffett says:

I write it for people like my sisters . . . They’re smart, they read a lot, they have a lot invested in the company. They don’t know all the financial jargon, but they don’t want to be treated like five year olds. I try to let them know on paper what I’d tell them about the business if we sat down for the afternoon.

Jason Zweig, *It’s Time for Investors to Re-Learn the Lost Art of Reading*, WALL ST. J. (Apr. 1, 2016, 1:04 PM), <https://www.wsj.com/articles/BL-MBB-48047> (internal quotations omitted).

<sup>52</sup> Gargantini cautions that the discussion in a forum could sometimes be steered by users who would not lead the discussion toward what is best for investors collectively considered. Gargantini, *supra* note 5, at 369. On the ability of some individuals to influence the decisions of other individuals, see CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 85 (2006).

<sup>53</sup> See Akshaya Kamalnath, *Social Movements, Diversity, and Corporate Short-Termism*, 23 GEO. J. GENDER & L. 449, 472 (2022) (explaining that “social media trends do not always accurately reflect society’s preferences”).

<sup>54</sup> See Chris Meserole, *How Misinformation Spreads on Social Media—And What to Do About It*, BROOKINGS (May 9, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/05/09/how-misinformation-spreads-on-social-media-and-what-to-do-about-it/> [<https://perma.cc/6AT5-66LF>].

<sup>55</sup> This is not to say that a corporation has a duty to correct information appearing in shareholder comments. For a further discussion of potential securities issues, see *infra* Part III.

<sup>56</sup> See Electronic Shareholder Forums, 73 Fed. Reg. 4450, 4455-56 (Feb. 25, 2008) (codified at 17 C.F.R. § 240.14a-17) (describing benefits of shareholder forums).

forum and accessing the materials that the company might make available on the forum such as FAQs or clarificatory videos. As such, the forum could aid in mitigating the spread of misinformation. Moreover, concise information provided directly from the company could help reduce herding by enhancing an individual's ability to carry out one's own analysis of information. As Fisch points out, trading platforms like Robinhood maintain lists of popular stocks which can lead to potential herding of the stock of companies included on the lists.<sup>57</sup> To further counteract herding, trading platforms could also provide links directly to companies' forums to encourage further analysis of information. To be clear, we do not envision a company's participation in the forum as a way to provide new information but, instead, as a way to help break down a corporation's SEC disclosure into a format that is accessible to the average retail investor.<sup>58</sup>

The corporate forum facilitates interaction among shareholders and allows retail investors to bring their voice to the ears of a company. In addition, the forum can be a way for shareholders to test the soundness and popularity of their proposals and for corporations to learn of and voluntarily adopt proposals that are popular among shareholders.<sup>59</sup> Establishing a canonic venue for investors' interaction could be key in an era characterized by an investor base that is "increasingly engaging with the companies in which they invest."<sup>60</sup>

Relatedly, the corporate forum could be a cost-effective way for management to monitor what is important to shareholders, in turn, enhancing the company's ability to build trust.<sup>61</sup> Establishing, maintaining, and furthering trust not just with shareholders but with other stakeholders is essential to the success of companies.<sup>62</sup> As former SEC Commissioner Aguilar stated, "trust is fundamental to both trade and investment. When there is a lack of trust, both

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<sup>57</sup> Fisch, *supra* note 1, at 1811.

<sup>58</sup> As we discuss in Part IV *infra*, if management were to disclose nonpublic information either intentionally or unintentionally, the corporation would likely need to file such information with the SEC in accordance with Regulation FD. *See* 17 C.F.R. § 243 (2021).

<sup>59</sup> *See* Electronic Shareholder Forums, 73 Fed. Reg. at 4455-56 (describing benefits of shareholder forums).

<sup>60</sup> Fisch, *supra* note 1, at 1852.

<sup>61</sup> *See* DELOITTE, THE CHEMISTRY OF TRUST—PART 3: DECONSTRUCTING TRUST 6, <https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/deloitte-analytics/ca-analytics-chemistry-of-trust-deconstructing-trust-pov-en-part-3-aoda.pdf> [<https://perma.cc/D7HJ-36BS>] ("Managing trust means senior business leaders know what factors matter to each stakeholder group, have a means to measure them, and make informed, data-driven decisions to strengthen trust.").

<sup>62</sup> *See* DELOITTE, THE CHEMISTRY OF TRUST—PART 1: THE FUTURE OF TRUST 3, <https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/deloitte-analytics/ca-chemistry-of-trust-pov-aoda-en.pdf> [<https://perma.cc/R558-XLGE>] (summarizing results of study of companies worth at least \$10 billion that experienced trust-related scandals and finding they lost 20-56% of their market cap following those scandals).

Wall Street and Main Street suffer.”<sup>63</sup> Relevantly, the forum could help to remedy the issue of executives not interacting with retail investors.<sup>64</sup> While “big institutional investors [have] access to top executives all year long,” generally the only opportunity for retail investors to have a some access to the same executives is during the annual meeting, which is not conducive to the type of access institutional investors enjoy.<sup>65</sup>

Fisch explains that investor relations experts are advising companies to develop strategies to nurture their relationships with retail investors.<sup>66</sup> Availability, access, and interactions would help to enhance trust between shareholders and the company, with positive ramifications on multiple dimensions of the corporation. For example, investors could be more inclined to invest longer-term. In addition, the forum would provide companies with an opportunity to showcase how their operations are consistent with stated values and provide leadership with the ability to facilitate authentic connections with investors. The corporate forum could aid corporations in building a better reputation in society based on transparency. Moreover, the forum would be a means for corporations to have a—mediated—voice in the social media narrative, because corporations could provide their input in information circles that bridge what is said on the forum with the information that circulates on social media. As Fisch points out, recently some companies have increased their focus on retail investors and have used social media to forge bonds with their retail investors.<sup>67</sup>

With respect to consumer-facing corporations, the corporate forum could assist in making consumers closer to the corporation. As the forum is utilized and comes to be relied upon by shareholders, it will help attract not just more retail investors, but for those companies who are consumer-facing, it can help build the consumer relationship. There is somewhat of a symbiotic, circular relationship between consumers and retail shareholders. Consumers are more likely to invest in companies whose products they use while shareholders are more likely to consume the products of companies in which they have invested.<sup>68</sup>

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<sup>63</sup> Aguilar, *supra* note 30.

<sup>64</sup> See Fairfax, *supra* note 11, at 1301 (stating that forums can result in a “genuine dialogue between corporations and their shareholders”).

<sup>65</sup> See Jessica DiNapoli & Ross Kerber, *U.S. Activists Complain That Virtual Shareholder Meetings Let Companies Silence Them*, REUTERS (Aug. 18, 2020, 7:24 AM), <https://www.reuters.com/article/us-health-coronavirus-shareholdermeeting/u-s-activists-complain-that-virtual-shareholder-meetings-let-companies-silence-them-idUSKCN25E1FD>.

<sup>66</sup> Fisch, *supra* note 1, at 1842.

<sup>67</sup> *Id.*

<sup>68</sup> See Matti Keloharju, Samuli Knüpfer & Juhani Linnainmaa, *Do Investors Buy What They Know? Product Market Choices and Investment Decisions*, 25 REV. FIN. STUD. 2921, 2937 (2012) (“[I]ndividuals are more likely to invest in companies they frequent as customers.”); Paolina C. Medina, Vrinda Mittal & Michaela Pagel, *The Effect of Stock Ownership on Individual Spending and Loyalty* 5 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28479, 2021),

In addition, by speaking with retail shareholders, the company will be able to, in a sense, “crowdsource” ideas to enhance or expand products and services.

#### IV. FEASIBILITY HURDLES

Issuers can design their corporate forum in different ways. They can simply host a forum to facilitate the interaction among investors, which we can dub an *investors-only forum*. They can host a forum only for investors, with the addition of informational materials such as videos and short clarificatory explanations, like some forms of information nuggets, which we can dub a *multi-media investors forum*. They can mediate the discussion among investors—a *mediated forum*. They can actively take part in the conversation, posting responses and comments, which we can refer to as an *interactive forum*. A forum could also combine features together, so an issuer can run a *multi-media interactive forum*, on which the issuer provides informational materials and participates in the conversation threads. The degree of involvement of the issuer in the forum determines the hurdles that the implementation of a forum on an issuer’s website raises, both from a practical perspective and from a liability perspective.

From a practical point of view, as mentioned already, the costs and resources associated with running a forum depend on the role an issuer wants to play in the forum. An investors-only forum requires much fewer resources and organizational efforts than a multi-media forum, although the forum would lack engagement between shareholders and corporate leaders. If the corporation actively participates in the forum, the corporation should determine, for example, who has the authority to post on the forum on behalf of the company.<sup>69</sup> An interactive role could come with enhanced risks of liability, too.

Possibly the most important hurdle is the degree of uncertainty that surrounds the securities law implications of the forum. The securities law implications depend on how the forum is run and the implications affect both issuers and users of the forum. For example, although Rule 14a-2(b)(6) provides a safe harbor for communications more than sixty days before the date of a shareholders meeting, users could unwittingly violate proxy solicitation regulations, especially as the date of a shareholders meeting approaches.<sup>70</sup> In its adopting release, the SEC suggested a period for the sixty days leading to the

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[https://www.nber.org/system/files/working\\_papers/w28479/w28479.pdf](https://www.nber.org/system/files/working_papers/w28479/w28479.pdf)

[<https://perma.cc/C88Y-XBCY>] (finding that stockholders are more likely to increase their consumption of the products of the company in which they invested). In fact, stock ownership may also result in these individuals shopping “less from the competition . . . or pay[ing] a higher price.” *Id.*

<sup>69</sup> See Gumbs & Gay, *supra* note 38, at 13 (recommending that companies adopt policies setting forth authority for who may post on behalf of company and also “adopt a protocol for company personnel to participate” in corporate forum).

<sup>70</sup> See Electronic Shareholder Forums, 73 Fed. Reg. 4450, 4453 (Feb. 25, 2008) (codified at 17 C.F.R. § 240.14a-17).



shareholders meeting during which the forum would not operate or be seen.<sup>71</sup> While this approach protects users from accidental violations of proxy solicitation regulations, it also partly defeats the purpose of enhancing the communication across shareholders and improving the information gathering. In fact, as discussed previously, enhancing communication across shareholders and improving information gathering would be particularly relevant before the record date, so investors can decide to buy or sell, and during the proxy season, so investors can decide what to do with the votes that shares carry. Rule 14a-2(b)(6) may not provide users with protection that is fully compatible with the very goals of corporate forums. But shortening the sixty-day period or eliminating it would come with potential risks of abuse of the forum to dodge proxy solicitation regulations. So, the tradeoffs that Rule 14a-2(b)(6) or potential amendments to Rule 14a-2(b)(6) generate remain hard to be solved.

Moreover, an aura of uncertainty surrounds the protection that Rule 14a-17 actually provides. Rule 14a-17 provides that by “establishing, maintaining, or operating an electronic shareholder forum” shareholders, registrants, or third parties acting on another’s behalf would not incur federal securities law liability “for any statement or information provided by another person to the electronic shareholder forum.”<sup>72</sup> So, Rule 14a-17 clarifies that the issuer hosting the forum would not be liable for statements made by others in the forum.<sup>73</sup> However, Rule 14a-17 makes clear that federal securities laws continue to apply to those individuals making the statements or providing the information in the forum.<sup>74</sup> Thus, for example, if corporate representatives make statements on the forum, whether they be in written or video format, such statements or information would be subject to the typical Section 10(b) and Rule 10b-5 liability for fraudulent material misstatements or omissions.<sup>75</sup> Furthermore, if management were to disclose information that is not already publicly available, the corporation would need to file such information with the SEC in accordance

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<sup>71</sup> *Id.* at 4453-54.

<sup>72</sup> 17 C.F.R. § 240.14a-17 (2008).

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

<sup>74</sup> *Id.*

<sup>75</sup> See *Basic v. Levinson*, 485 U.S. 224, 230-32 (1988) (summarizing case law interpreting Rule 10b-5 and specifically adopting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), standard of materiality in Section 10(b) and Rule 10b-5 context). Under Section 10(b) and Rule 10b-5, the SEC civilly enforces securities fraud, and the Department of Justice criminally enforces it. Wendy Gerwick Couture, *Prosecuting Securities Fraud Under Section 17(a)(2)*, 50 LOY. U. CHI. L.J. 669, 669 (2019). In addition, there is a private right of action under Section 10(b) and Rule 10b-5. *Id.* Moreover, of note, in recent years, the SEC has increasingly pursued enforcement actions for fraud under Section 17(a)(2) of the Securities Act of 1933 which, unlike Rule 10b-5, requires only a showing of negligence. See *id.* at 669-70 (explaining the SEC’s increasing reliance on Section 17(a)(2)). Section 17(a)(2) prohibits fraud in the offer or sale of securities. See 15 U.S.C.A. § 77q (2011). But the Supreme Court has specifically found that scienter is not required under Sections 17(a)(2) and 17(a)(3) although it is required under Section 17(a)(1). See *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

with Regulation FD, preventing “selective disclosure” of material nonpublic information by reporting companies to securities analysts and shareholders who may trade.<sup>76</sup>

There might be instances, for example, the case of an issuer reposting questions and comments, that could raise doubts about liability exposure.<sup>77</sup> Similarly, questions about the potential liability of the issuer surround cases in which an issuer responds to a comment containing misinformation without expressly addressing the misinformation. More generally, questions exist regarding whether, how, and to what extent the adoption and entanglement theories relating to the duty to correct could apply to the activities carried out on the corporate forum.<sup>78</sup>

As a number of wrinkles still need to be ironed out with respect to the application and interpretation of securities laws and securities law theories, the environment in which issuers could implement corporate forums might be subject to a level of uncertainty that discourages issuers. While a thorough analysis of the securities law implications for issuers could help with mapping the risks for issuers and users of corporate forums, a legislative intervention might be required to facilitate the adoption and diffusion of corporate forums.

#### CONCLUSION

Fisch’s article *GameStop and the Resurgence of the Retail Investor* weighs concerns and opportunities stemming from retail investing in a way that advances the understanding of a phenomenon that is set to produce enduring changes in the financial markets, the corporate sector, and society. Citizen participation in financial markets and the corporate sector bridges the gap between people and corporations in a way that makes capitalism more inclusive. Retail investing can play a key role in that respect, especially when rooted in effective information gathering and engagement.

With our proposal, we shed light on an instrument meant to steer retail investing towards enhanced information gathering and engagement: the corporate forum. Much of the success of the corporate forum will depend on corporations’ desire to nurture a retail investor base as well as on possible legislative interventions that facilitate the implementation diffusion of corporate forums. At the moment, a degree of uncertainty still surrounds liability risks associated with running corporate forums in a manner that fosters a true interaction across investors and between investors and issuers.

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<sup>76</sup> See 17 C.F.R. § 243 (2021).

<sup>77</sup> The Supreme Court has held that even when a person does not “make” a statement, they can still be held liable under Rule 10b-5 for disseminating the statement if they do so with an intent to defraud. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1100-01 (2019).

<sup>78</sup> MARC I. STEINBERG, *SECURITIES REGULATION: LIABILITIES AND REMEDIES* § 2.03[3] (2021) (describing adoption theory and entanglement theory in relation to issuer’s duty to correct statements made by third party).